NORTH CAROLINA COURT OF APPEALS REPORTS

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[4] 1 January 2016.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEROME BREWER, SABRINA BREWER, AND MATTHEW J. BREWER, BY AND THROUGH HIS GUARDIAN AD LITEM, TIMOTHY T. LEACH, PLAINTIFFS
v.
WILLIAM D. HUNTER, M.D., NEUROSCIENCE & SPINE CENTER OF THE CAROLINAS, P.A., AND NEUROSCIENCE & SPINE CENTER OF THE CAROLINAS, L.L.P. DEFENDANTS

No. COA14-7

Filed 2 September 2014

1. Appeal and Error—interlocutory orders and appeals—discovery order—patient medical records—substantial right

Although an order compelling discovery is generally interlocutory and not immediately appealable, defendants assertion of the statutory privilege set out in N.C.G.S. § 8-53 regarding patient medical records affected a substantial right.

2. Discovery—medical records—former patients

The trial court did not abuse its discretion in a medical malpractice case by determining that the disclosure of various medical records of certain former patients of Dr. Hunter was necessary to a proper administration of justice.

Appeal by defendants from order entered 15 August 2013 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 8 May 2014.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and The Eisen Law Firm Co., L.P.A., by Brian N. Eisen, pro hac vice, for plaintiffs-appellees.

Lincoln Derr, PLLC, by Sara R. Lincoln and Scott S. Addison, for defendants-appellants.

DAVIS, Judge.

William D. Hunter, M.D. ("Dr. Hunter"), Neuroscience & Spine Center of the Carolinas, P.A., and Neuroscience & Spine Center of the Carolinas, L.L.P. (collectively "Defendants") appeal from an order granting in part the motion of Jerome Brewer, Sabrina Brewer, Matthew Brewer, and Timothy T. Leach, the guardian *ad litem* of Matthew Brewer, (collectively "Plaintiffs") to compel discovery in this medical malpractice action. On appeal, Defendants contend that the trial court erred in requiring them to produce various medical records regarding certain former patients of Dr. Hunter who are not parties to this lawsuit. After careful review, we conclude that the trial court's order should be affirmed.

Factual Background

In 1998, Jerome Brewer ("Mr. Brewer") underwent thoracic spinal surgery for treatment of spinal stenosis, back pain, and bilateral leg weakness. In 2007, Mr. Brewer was seen by his primary care physician for treatment of back pain and leg weakness, symptoms similar to those that led to his surgery in 1998.

On 28 January 2008, Mr. Brewer was referred to Dr. Hunter, who was employed by Neuroscience & Spine Center of the Carolinas, P.A. and Neuroscience & Spine Center of the Carolinas, L.L.P., after an MRI scan revealed diffuse degenerative disease in Mr. Brewer's lumbar area and severe canal stenosis. On 19 March 2008, Dr. Hunter diagnosed Mr. Brewer as suffering from severe spinal stenosis and recommended a thoracic laminectomy. Mr. Brewer consented to the surgery, which was performed by Dr. Hunter on 10 April 2008.

Upon awakening from surgery, Mr. Brewer discovered that he was unable to move his lower extremities and had no sensation below his thighs. An MRI scan revealed that he had suffered a severe spinal cord infarction during surgery. Subsequent MRI scans revealed that Mr. Brewer continued to suffer from severe myelomalacia. To date, Mr. Brewer remains permanently confined to a wheelchair, continues to undergo physical therapy and rehabilitation, and requires assistance with daily tasks, including managing his bowel and bladder functions.

On 31 August 2012, Plaintiffs filed an amended complaint[1] in Gaston County Superior Court against Defendants, alleging medical negligence, loss of consortium, and negligent infliction of emotional distress. Plaintiffs subsequently served a set of written discovery requests on Defendants which sought, *inter alia*, "all documents . . . showing Dr. Hunter's complications and complication rate for thoracic laminectomies during 2005, 2006, 2007, and 2008 (up to and including April 10, 2008)" and "all documents . . . showing Dr. Hunter's case volume for thoracic laminectomies during 2005, 2006, 2007, and 2008 (up to and including April 10, 2008)." In response, Defendants produced a copy of a letter from Gaston Memorial Hospital identifying 14 thoracic laminectomies performed by Dr. Hunter at the hospital between May of 2005 and October of 2011 (including the operation performed on Mr. Brewer) and stating that those surgeries "were performed with no issues noted[.]"

On 21 September 2012, Dr. Hunter was deposed. During his deposition, Dr. Hunter testified that he had personally created a list of 44 instances, including patient names and dates of surgery, in which he had performed thoracic laminectomies. Plaintiffs subsequently requested the production of this document, and a copy of the document — with the names of the patients redacted — was provided to Plaintiffs' counsel.

On 25 October 2012, Plaintiffs filed a second set of written discovery requests in which they sought, among other things, "the operative notes and discharge summaries for all surgeries performed by Dr. Hunter and as identified on the document created by Dr. Hunter prior to his deposition and attached as Exhibit A to this Request[.]" Plaintiffs attached to this request the redacted document that had been produced by Defendants following Dr. Hunter's deposition. After Defendants served objections to this request, Plaintiffs filed a motion to compel on 18 July 2013.

A hearing on Plaintiffs' motion took place on 29 July 2013. On 15 August 2013, the trial court entered an order granting Plaintiffs' motion in part, which contained the following findings of fact and conclusions of law:

> 1. Plaintiff sought production of 44 individual patient's operative notes and discharge summaries documenting surgical procedures they had with the Defendant.

1. Plaintiffs' original complaint is not contained in the record on appeal.

2. Plaintiff argued that the operative notes and discharge summaries of the 44 individual patients were necessary to assess the credibility of the Defendant with regard to his testimony about the number of surgical procedures he had performed and the number of complications following those procedures he had encountered at the time he responded to questions at his deposition. Plaintiff also argued that the operative notes would demonstrate the operative technique utilized by Defendant.

3. The Court has considered the interests of the parties and the issues at stake in this litigation and carefully weighed these interests against the concern to protect the private health information of non-party patients. A balance between these competing interests is best obtained by compelling production of some of the requested documents, with appropriate redactions that would allow for the protection of the identity of the patients.

4. In the exercise of its discretion, this Court finds good cause exists for the Plaintiffs' Motion to Compel Discovery, and it is ALLOWED IN PART and DENIED IN PART.

IT IS THEREFORE ORDERED, ADJDUGED [sic], and DECREED that:

1. The Defendants shall produce the operative notes and discharge summaries for all procedures occurring from 2005 through October 15, 2011 as identified on Exhibit A to Plaintiffs' Motion to Compel Discovery, including the following dates of service: 5/10/05; 5/17/05; 5/23/05; 7/28/05; 9/8/05; 10/24/05; 3/9/06; 3/13/06; 7/15/06; 8/30/07; 9/17/07; 9/28/07; 1/18/08; 2/15/08; 7/10/08; 11/21/08; 11/24/08; 4/2/09; 10/5/10; 10/8/10; 3/4/11; 3/28/11; 5/13/11; 6/23/11; and 10/15/11.

2. Plaintiff's request for production of operative notes and discharge summaries for procedures occurring prior to 2005 is DENIED and the procedures identified on Exhibit A to Plaintiff's Motion to Compel Discovery prior to May 10, 2005, shall not be produced as they are privileged and not relevant to this matter.

3. Prior to production, the Defendants may redact any protected health information from the operative notes and discharge summaries.

> 4. To the extent that there is information, other than identifying information, contained in the produced records that is highly sensitive, or may otherwise require redaction, Defense counsel may submit the operative note and discharge summary to this Court for in camera inspection. The Court will review and consider any proposed redactions.
>
> 5. The Defendants shall produce these operative notes and discharge summaries within a reasonable time not to exceed 45 days from entry of this order.
>
> 6. Because the records being produced pursuant to this Order are subject to the protections of the Health-Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. 164.500, *et seq.*, N.C. Gen. Stat. § 131E-97, and N.C. Gen. Stat. § 8-53, the production of these records affects a substantial right and there is no just reason to delay appeal.

Defendants filed a timely notice of appeal to this Court.

Analysis

Defendants contend that the trial court erred by granting in part Plaintiffs' motion to compel. We disagree.

I. Jurisdiction

[1] As an initial matter, we must determine whether we have jurisdiction over this appeal. "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable. *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 37 (2011).

In the present case, Defendants argue that the documents at issue are immune from discovery based on the privilege set out in N.C. Gen. Stat. § 8-53, which governs the discoverability of a patient's medical records. Our Supreme Court has held that "when . . . a party asserts a

statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right[.]" *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. Accordingly, we possess jurisdiction over this appeal.

II. Application of N.C. Gen. Stat. § 8-53

[2] N.C. Gen. Stat. § 8-53 states as follows:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. *Any* resident or presiding *judge* in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law *may*, subject to G.S. 8-53.6,[2] *compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.* If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C. Gen. Stat. § 8-53 (2013) (emphasis added).

In the present case, Defendants contend that the production of non-party medical records should be compelled only in exceptional circumstances. However, the essence of their argument is grounded more in policy than in law. It is well established in North Carolina that policy decisions are solely within the province of the General Assembly. *See Richards v. N.C. Tax Review Bd.*, 183 N.C. App. 485, 487, 645 S.E.2d 196, 197 (2007) (holding that the role of policy maker has been entrusted by our Constitution to the General Assembly).

While the General Assembly could have drafted N.C. Gen. Stat. § 8-53 so as to impose greater restrictions on the disclosure of non-party

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2. N.C. Gen. Stat. § 8-53.6 concerns the privilege applicable to a marital counselor, psychologist, or social worker in alimony actions and is, therefore, not relevant to the present case.

medical records than those applicable to the disclosure of the medical records of parties to the litigation before the court, no such distinction has been drawn in this statute. Instead, N.C. Gen. Stat. § 8-53 leaves the discoverability of *all* patient records subject to the discretion of the trial courts of this State based upon whether the court believes the disclosure of records is "necessary to a proper administration of justice." N.C. Gen. Stat. § 8-53.

This Court lacks the authority to judicially create – as Defendants invite us to do – a new standard applicable to the production of medical records where the General Assembly has enacted a statute addressing the issue. *See State v. Sims*, 216 N.C. App. 168, 173, 720 S.E.2d 398, 401 (2011) (holding that where the General Assembly "requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction").

Therefore, the only question before us is whether, on the facts of the present case, the trial court abused its discretion in determining that the disclosure of various records of certain former patients of Dr. Hunter was "necessary to a proper administration of justice." Our prior case law applying N.C. Gen. Stat. § 8-53 makes clear that a trial court's ruling pursuant to this statute is reviewed under an abuse of discretion standard. For example, in *Roadway Exp., Inc. v. Hayes*, 178 N.C. App. 165, 631 S.E.2d 41 (2006), the plaintiff sought discovery concerning the issue of whether the defendant had been taking any prescription medications and had consumed alcohol at the time of a motor vehicle accident. *Id.* at 168, 631 S.E.2d at 44. The trial court ordered the defendant to produce his medical records under seal for an *in camera* review, limiting the scope of production to "only those medical records that mention or reflect the results of any tests performed to determine Defendant's blood alcohol content and the presence of controlled substances in his body." *Id.* at 170, 631 S.E.2d at 45-46. Following the *in camera* review, the trial court ordered that the records be produced to the plaintiff. *Id.* at 167, 631 S.E.2d at 44.

On appeal, we held — based on N.C. Gen. Stat. § 8-53 — that "[t]he physician-patient privilege is not an absolute privilege, and it is in the trial court's discretion to compel the production of evidence that may be protected by the privilege if the evidence is needed for a proper administration of justice." *Id.* at 170, 631 S.E.2d at 45. We further emphasized that "[t]he decision that disclosure is necessary to a proper administration of justice is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully

challenge the ruling." *Id.* at 171, 631 S.E.2d at 46 (citations and quotations omitted).

In *State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992), the State sought to compel the release of medical records concerning the defendant's blood alcohol content following a motor vehicle accident. *Id.* at 591, 411 S.E.2d at 607. Citing N.C. Gen. Stat. § 8-53, our Supreme Court affirmed the trial court's order compelling the disclosure of the requested records, holding that a court's ruling pursuant to this statute may only be overturned on appeal upon a showing of abuse of discretion. *Id.* at 591-92, 411 S.E.2d at 607.[3]

"Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002). In the present case, after a hearing in which it carefully considered the arguments of counsel and reviewed the documents submitted by the parties, the trial court summarized the basis for its holding as follows:

> My conclusion is that the request of records are [sic] relevant from the standpoint of credibility, experience, and technique used. That the records that I'm going to encompass by this order are necessary for the administration of justice.

The court then entered an order reflecting the fact that it had carefully balanced the respective interests implicated by Plaintiffs' motion:

> The Court has considered the interests of the parties and the issues at stake in this litigation and carefully weighed these interests against the concern to protect the private health information of non-party patients. A balance between these competing interests is best obtained by compelling production of some of the requested documents, with appropriate redactions that would allow for the protection of the identity of the patients.

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3. Defendants cite to several cases from other jurisdictions in which courts have refused to require the production of non-party medical records in discovery. However, unlike North Carolina, none of those jurisdictions confer upon their trial courts the discretion to determine the discoverability of such records.

The careful consideration given to this issue by the trial court was evidenced by its decision to (1) require the production of only 25 of the 44 patient records requested; (2) provide for the redaction of information that could reveal the identity of the patients whose records were being produced; and (3) recognize the potential need of the parties to obtain an *in camera* inspection of any portions of the records to be produced containing other personal or sensitive information that could potentially require redaction.

Based on the facts of this case, we cannot say that the trial court's ruling was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Grp. Int'l, Inc.*, 151 N.C. App. at 566, 566 S.E.2d at 161. Therefore, we hold that the trial court did not abuse its discretion in granting in part Plaintiffs' motion to compel.

Conclusion

For the reasons set out above, the trial court's 15 August 2013 order is affirmed.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

CARLTON CLARK, JR., Plaintiff
v.
SUSAN BELMAIN DYER, Defendant

No. COA13-1230

Filed 2 September 2014

1. Divorce—equitable distribution—marital property—direct financial contributions not required

Although defendant wife did not make any direct financial contributions to various property from her own income or her own separate funds during the marriage, plaintiff husband's income during the marriage was marital property, and his direct financial contributions from his income during the marriage were marital contributions.

2. Divorce—equitable distribution—classification—valuation—home

The trial court did not err in an equitable distribution case by its classification and valuation of the Lakeview Drive Property. Plaintiff did not present any argument that the trial court erred in its conclusion that he made a gift of a one-half interest in the home to defendant, and thus, he waived this argument.

3. Divorce—equitable distribution—real property—insufficient findings of fact—case remanded

The Court of Appeals was unable to discern which of the trial court's findings of fact applied to the Duffie Road Property, and thus, the equitable distribution judgment was remanded to the trial court for additional findings of fact and conclusions of law regarding this property.

4. Divorce—equitable distribution—classification—marital property—business bank accounts

The trial court did not err in an equitable distribution case by including plaintiff husband's separate business property, namely the bank accounts, in the marital estate. Plaintiff failed to articulate how the trial court could possibly trace his premarital funds based upon the evidence presented, and the findings of fact which the trial court made were fully supported by the evidence.

5. Divorce—equitable distribution—classification—marital property—reduction in debt value

The trial court did not err in an equitable distribution case by including the separately owned rental property of plaintiff husband in the marital estate. The trial court determined that the reduction in debt paid with marital funds was marital property, not the properties themselves, and the trial court included only this reduction in debt value as a marital asset.

6. Divorce—equitable distribution—credit for debt—credit cards—line of credit—attorney fees

The trial court did not err in an equitable distribution case by failing to give plaintiff husband credit for his debt including credit cards, a line of credit, and defendant wife's attorney fees that he was ordered to pay. Even if the trial court's findings as to the amounts of the debts were erroneous, it did not affect the distribution of property. Further, plaintiff's argument regarding attorney fees was frivolous.

7. Divorce—equitable distribution—valuation—typographical error—miscalculations

Although the Court of Appeals did not find any abuse of discretion in how the trial court allocated the percentages of values for the Lakeview Drive property in an equitable distribution case, the case was remanded for the trial court to correct the typographical error and resulting miscalculations.

8. Divorce—equitable distribution—valuation—business assets and accounts—weight given to evidence

Although plaintiff husband contended in an equitable distribution case that the trial court erred by its valuation of his business assets and accounts, it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.

9. Divorce—equitable distribution—stipulation—credit for post-separation payments

The trial court did not err in an equitable distribution case by allegedly failing to honor the stipulation of the parties and/or correctly calculate the stipulation regarding the credit for post-separation payments by plaintiff on the mortgage on the Lakeview Drive Property. The trial court applied the consent order exactly as it was written.

10. Divorce—equitable distribution—in-kind award—liquid assets

An equitable distribution case was remanded for the trial court to make an additional finding of fact as to how the presumption in favor of an in-kind award was rebutted and a conclusion of law supporting its distributive award. Several bank accounts valued in excess of $60,000.00 in total were liquid assets which could logically serve as a source of payment.

11. Divorce—equitable distribution—financial ability to maintain property not a factor

The trial court did not err in an equitable distribution case by awarding the Lakeview Drive Property to defendant wife even though plaintiff husband contended that she did not have the financial ability to maintain it. Plaintiff cited no law requiring the trial court to consider as a distributional factor what may happen to property in the future or a party's ability to maintain a property.

Appeal by plaintiff from Equitable Distribution Judgment entered 7 February 2013 by Judge John H. Horne, Jr. in District Court, Hoke County. Heard in the Court of Appeals 6 March 2014.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for plaintiff-appellant.

No appellee brief filed.

STROUD, Judge.

Plaintiff appeals equitable distribution judgment. For the following reasons, we remand in part and affirm in part.

I. Background

In this appeal from the trial court's equitable distribution judgment, plaintiff's arguments can be summarized as a claim that the trial court gave defendant the gold mine, while he got the shaft.[1] We disagree and affirm, but for the reasons explained below, we remand for additional findings of fact and conclusions of law as to two issues and correction of an typographical error and miscalculations.

"The parties met in the early spring of 2004" at Chrome's Bar and Grill in Fayetteville, where "plaintiff was a patron and customer" and defendant was working as a bartender. The parties began dating, and defendant became pregnant with the parties' first child in May of 2004. The parties had two children together, born in 2005 and 2006. After the birth of their second child, in 2006, the parties married; they separated on 23 June 2009, and divorced on 14 March 2011.

Plaintiff owned and operated a sole proprietorship known as "Air Tech" prior to, during, and after the marriage, and the parties either separately or together during the marriage owned substantial bank accounts, personal property, and several parcels of real property. On 18 December 2009, plaintiff filed a complaint which included claims for divorce from bed and board, a paternity test, child custody, and equitable distribution. Thereafter, defendant filed an amended answer and counterclaimed for

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1. As stated by Jerry Reed, who wrote, *She Got the Goldmine (I Got the Shaft)*, a country song which addresses some of the legal aspects of divorce: "'Goodbye, turkey. My attorney will be in touch.' So I decided right then and there I was gonna do what's right[.] Give 'er her fair share but, brother, I didn't know her share was gonna be that much. She got the goldmine . . . I got the shaft. . . . They split it right down the middle, And then they give her the better half." Jerry Reed, She Got the Goldmine (I Got the Shaft), on The Man with the Golden Thumb (RCA Records 1982).

divorce from bed and board, post-separation support, permanent alimony, child custody and child support, and equitable distribution.

On 17 November 2010, the trial court entered a Consent Order awarding child support to defendant, interim equitable distribution, and dismissing defendant's counterclaims for post-separation support and alimony. On 7 February 2013, the trial court entered the equitable distribution judgment ("ED Judgment") which plaintiff appealed.[2] The ED Judgment is approximately 30 pages long and contains over 90 findings of fact; thus, for brevity, efficiency, and clarity we discuss below only those findings of fact necessary for an understanding of the arguments before this Court.

II. Standard of Review

> The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

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2. The ED Judgment found as fact that the parties were "divorced on March 14, 2011" and that both children are children of "the parties[.]" As we have already noted, the consent order dismissed defendant's counterclaims for post-separation support and alimony. The interim equitable distribution order also found as fact that "[a]ll issues relating to alimony, child custody, child support, and attorney's fees incurred by the defendant in connection with the issues relating to child custody, visitation, and support have been previously resolved by prior orders of this court." Thus, equitable distribution is the only claim at issue between the parties on appeal.

> The trial court's unchallenged findings of fact are presumed to be supported by competent evidence.

Peltzer v. Peltzer, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359–60 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

III. Observations Concerning This Appeal

This case does not, as did *Hill v. Hill*, "embody *all* of the flaws that could possibly create an abominable appeal of an equitable distribution judgment," but it does embody many of them, and adds on a few more for good measure. ___ N.C. App. ___, ___, 748 S.E.2d 352, 355 (2013) (emphasis added). As in *Hill*, "[t]he defendant filed no brief." *Id.* at ___, 748 S.E.2d at 355. "The order of the trial court combines evidentiary findings of fact, ultimate findings of fact, and conclusions of law" although here there was some "attempt to make them separate portions of the order." *Id.* at ___, 748 S.E.2d at 356. "The brief of appellant is replete with inaccurate references to the record and transcript." *Id.* Mostly, here the brief refers only to the testimony in the transcript which is most useful and convenient to support plaintiff's argument, but fails to specifically reference the detailed exhibits presented at trial by both parties; without a brief from defendant, we have done our best to find the relevant documents. "In many instances there are no references to where the factual assertions are to be found in the record or transcript, in violation of Rule 28(e) of the Rules of Appellate Procedure." *Id.* at ___, 748 S.E.2d at 356.

Throughout plaintiff's brief, he has commingled his arguments and issues, much as he seems to have commingled his separate, marital, and business funds during the marriage, thus rendering it difficult for us to discern exactly what his argument is as to many of the trial court's findings and conclusions. Plaintiff seems to realize this, as he prefaces his arguments by stating that he "recognizes a mere broad brush approach and a single assignment of error to the 7 February 2013 Equitable Distribution Judgment . . . is not appropriate, but with humble respect, Plaintiff does take issue with the entire Judgment and all of the Findings of Fact, Conclusions of Law and the Order." Plaintiff then proceeds to present ten relatively specific issues focusing on particular items of property or debt with a final issue entitled "ADDITIONAL ASSIGNMENTS OF ERROR" in which plaintiff expresses general displeasure with various pretrial rulings of the trial court, several discovery issues which were not preserved for appeal, and the fact that the trial court found much of defendant's evidence more credible than his own. Yet we must address plaintiff's arguments in some logical manner,

within the applicable legal standards of review, so we have reorganized his issues into three categories and will try to address his arguments, which are raised in scattershot fashion, as they relate to each of the trial court's three required tasks in equitable distribution: classification, valuation, and distribution.

And in addition to these flaws, the plaintiff's contempt and disdain for defendant is expressed throughout his brief. Of course, it is clearly expressed throughout the record of this contentious case as well. In fact, defendant filed a Rule 11 motion addressing the disparaging statements about her in several motions which were filed for the purpose of "harass[ing] and injur[ing]" her, and, in addition, have no relevance whatsoever to the equitable distribution case. Plaintiff seems fixated on the circumstances of the inception of his and defendant's relationship back at Chrome's Bar and Grill, but that has no relevance to this case or this appeal. We will not address plaintiff's many general grievances against defendant which litter the record and brief, except to say that an appellate brief is no place for such nonsense.

IV. Classification

[1] Plaintiff argues that the trial court improperly classified several items of property and debts. One of plaintiff's arguments as to classification arises repeatedly throughout his brief, so we will address it first as we can easily dispense with it. Plaintiff places great emphasis upon defendant's pretrial stipulation which he characterizes as a stipulation that "she made no financial contributions of any kind to the Plaintiff or to his separate properties prior to or during the marriage." As plaintiff raises this argument more than once, we will address this stipulation and its relevance in more detail.

Defendant did stipulate to the following:

> 1. Other than her bank account records, the defendant has not maintained any record of direct financial contributions to the household expenses, bills, and debts incurred by the parties during the course of their marriage.
>
> 2. During the course of the marriage of the parties, the defendant did not make any direct financial contribution to the payment of any of the plaintiff's separate debts which he had incurred prior to the marriage of the parties.
>
> 3. During the course of the marriage of the parties, the defendant did not make any direct financial contribution

> toward the payment of the mortgage on the residence in which the parties resided during their marriage.
>
> 4. During the course of the marriage of the parties, the defendant did not make any direct financial contribution toward any items purchased by the plaintiff for his use in his business known as “Air Tech”.

Plaintiff argues that since defendant did not put any funds into the bank accounts used during the marriage she did not make any contribution to the acquisition of or the reduction of the debt on various items of property. Plaintiff fails to appreciate that although defendant did not make any “direct financial contributions” to various property from her own income or her own separate funds during the marriage, plaintiff’s income, including his earnings from Air Tech, during the marriage, *is* marital property, and *his* “direct financial contributions” from his income during the marriage are marital contributions. *See* N.C. Gen. Stat. § 50-20(b)(1) (2009). Thus, to the extent that plaintiff claims that there was no *marital* contribution to the acquisition of or reduction of debt on various items of property during the marriage, his argument is based upon a misapprehension of the law. Plaintiff’s contributions were marital contributions. *See id.* We will now address plaintiff’s arguments as to classification of the various items.

A. Lakeview Drive Property

[2] Plaintiff first contends that “the trial court improperly classified and improperly valued the 355 Lakeview Drive Property.” (Original in all caps.) “Plaintiff takes issue with” at least 25 findings of fact, but for most of them fails to make any argument as to what exactly his “issue” is; thus, we will address only those “issue[s] for which plaintiff makes an argument.

Rather than quoting numerous pages of the judgment, we will summarize the trial court’s findings about the Lakeview Drive Property. Defendant’s parents owned Greenbrier Estates, Inc., which owned a large tract of land that was subdivided into lots. The subdivision was owned by defendant’s parents or their corporation for at least 30 to 35 years, and defendant’s parents, sister, and brother-in-law all lived on the same lake. For years prior to the marriage, defendant and her parents had an understanding that one of the lakeside lots would be hers. Ultimately, on 10 January 2005, prior to the marriage, defendant’s parents conveyed two lots to plaintiff and defendant, as tenants in common. The parties then discussed placing a modular home on the lots and after extensive searching and consideration, they jointly chose a model home

from Siler City and decided to place it upon the Lakeview Drive Property lots. Plaintiff never conveyed any intent that the modular home placed upon the Lakeview lots would be *his* home but always referred to it as *our* home, at least until after the separation. Defendant would never have agreed to place the modular home on the Lakeview Drive Property lots if she had known that plaintiff may later claim that the modular home was his sole and separate property. Plaintiff provided funds to purchase the modular home and to have it erected on the Lakeview Drive Property lots, except for $5,000.00 which defendant contributed towards the purchase of the home. Plaintiff took out a construction loan and a conventional loan to pay for the modular home. During the marriage, defendant did not pay the mortgage on the Lakeview Drive Property and did not make direct financial contributions to its acquisition except for the $5,000.00. Up to this point in the findings of fact, defendant has made no specific challenge to the findings, and thus these facts are binding on appeal. *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.")

Defendant does specifically challenge finding of fact number 38, which is:

> The plaintiff has contended that the residence constitutes his separate property, under the source of funds rule, contending that the money for the residence came from the sale of certain property that he had owned on Water Street in Fayetteville, North Carolina. However, as to the lots upon which the home was constructed, they were clearly a gift to both parties by the defendant's parents prior to the marriage, and the parties incurred no debt in connection with the acquisition of the lots, nor did they pay any consideration for the lots. The deed for the two lots is dated January 10, 2005, and was recorded on January 11, 2005, in Book 652, at Page 376, Hoke County Registry, and the recorded deed indicates that no revenue stamps were purchased in connection with the recording of the deed, confirming that no consideration was paid.

Plaintiff's entire argument as to finding of fact 38 is: "In Finding 38 the trial court identifies the 'source of funds' rule, that Plaintiff expended his own separate funds, but then seems to indicate that the 'sources of funds' rule fails." However, this is a flawed argument because the trial court did not "indicate that the 'sources of funds' rule fails[,]" as plaintiff argues, but rather did not find plaintiff's evidence regarding the source

of the funds to be credible, as is made clear in other findings of fact. As such, plaintiff does not argue that finding of fact 38 is not supported by the evidence, but rather he challenges the trial court's conclusion of law regarding the classification of the Lakeview Drive Property.

Plaintiff's argument regarding finding of fact 39 is similar to his argument regarding finding of fact 38. Finding of fact 39 is that

> [t]hereafter, the parties secured a loan for the construction of the home on the lots, in the amount of $119,900.00, and the deed of trust securing the said loan was recorded on March 4, 2005, in the Office of the Hoke County Register of Deeds, in Book 659, Page 367.

Plaintiff argues only that the evidence does not support a finding that the *parties* secured a loan, as the loan was only in *plaintiff's* name, but again, plaintiff's actual argument is a challenge to the trial court's conclusion of law as to the classification of the Lakeview Drive Property.

In summary, the trial court concluded: The real property, the two lots, owned by the parties as tenants in common and acquired prior to marriage, are not marital; they are the separate jointly owned property of both parties. Plaintiff made a gift of a one-half interest in the structures on the property, including the home, to defendant. Plaintiff does not truly challenge any of the findings of fact upon which the conclusions regarding the Lakeview Drive Property are based, but argues mostly regarding the credibility of the evidence. The unchallenged findings of fact support the trial court's classification of the Lakeview Drive Property.

Plaintiff does make a legal argument as well regarding the Lakeview Drive Property, based upon *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988). Plaintiff argues that the trial court in *McIver* improperly "used a premarital relationship and the fact that they were living together prior to marriage as a basis to classify property as marital." *McIver* bears a superficial factual resemblance to this case, at least to the extent that the husband purchased a lakefront lot and home in which the parties both lived in prior to their marriage, paid for by funds from the sale of property the husband had owned before the marriage, and a home the parties continued to live in after their marriage, until their separation. *McIver*, 92 N.C. App. at 117, 117-18, 374 S.E.2d at 146.

In *McIver*, the trial court found that the husband had purchased, in his own name, the lakefront lot and mobile home in contemplation of marriage, the parties lived there, and the wife, both before and after the

marriage, provided services of upkeep and improvements of the property. *Id.* at 122-23, 374 S.E.2d at 148. Based upon these facts, the trial court classified the lakefront lot and home as entirely marital. *Id.* at 123, 374 S.E.2d at 148-49. This Court reversed:

> It appears from the record, as the husband maintains, that the trial judge improperly relied upon the parties' premarital relationship--in particular, the fact that they lived together--in classifying certain property as marital. In doing so, the judge operated under a misapprehension of the law.
>
> Only married persons are afforded the protections of our equitable distribution statute. That statute is unambiguous: property must be acquired during marriage to be classified as marital property, and only marital property is subject to distribution. We decline to expand the Legislature's clear definition of marital property to include property acquired prior to marriage.
>
> The record shows that the wife's premarital contributions to what later became the marital home consisted of services in the form of housekeeping, upkeep of the property, and helping to construct a seawall. Though we do not decide whether a spouse may have other remedies for services provided before marriage, the potential availability of equitable remedies--such as constructive trust, resulting trust, recovery in *quantum meruit* or quasi-contract--does not transform property acquired before marriage into marital property subject to equitable distribution under Section 50-20.
>
> Accordingly, we conclude that it was error for the trial judge to classify as marital any interest in property acquired before the parties were married but while they lived together.

Id. at 125-26, 374 S.E.2d at 150 (citations omitted).

But what the trial court did in *McIver* is not what the trial court did here. *Compare id.* In this case, it is clear, and plaintiff does not seem to dispute, that the *land* itself is separate property, as it was acquired prior to the marriage by gift, in which each party had an equal, separate interest. There was no indebtedness on the land, and thus no potential marital contribution by payment of a loan on the land, and the trial court

classified the land itself as separate. But the modular home was affixed to the land prior to the marriage, but acquired, by payment of the loans, both prior to and during the marriage, so any separate interests are mixed with a marital interest; thus, the dispute is as to the classification of the home, which was purchased and affixed to the land prior to the marriage. The trial court did not find that defendant's services of pre-marital housekeeping gave her a marital interest in the home, as did the trial court in *McIver*. *Id.* at 125-26, 374 S.E.2d at 148-49. Here, the trial court concluded, "based upon the totality of the circumstances[,]" that "plaintiff intended a gift to the defendant of a ½ interest in the home." These circumstances included, but were not limited to, the fact that they placed the home on jointly owned land which had been given to them by defendant's parents and that they selected the home together and treated and referred to the home as *ours* both prior to and during the marriage. The trial court made many detailed findings about circumstances of acquiring and erecting the home which we will not quote here, and they are not effectively challenged by plaintiff. Thus, the legal issue presented is not a "source of funds" issue; the issue is whether the findings support the trial court's conclusion that plaintiff made a *pre-marital* gift of a one-half interest in the home to defendant.

Plaintiff's brief fails to make any argument regarding the issue of the pre-marital gift of the home, and defendant did not file a brief with this Court. Since plaintiff has not presented any argument that the trial court erred in its conclusion that he made a gift of a one-half interest in the home to defendant, he has waived this argument, and we will not construct this argument for either party. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein.") Plaintiff's challenge to the classification of the Lakeview Drive Property is therefore overruled.

B. Duffie Road Property

[3] Plaintiff next contends that "the trial court erred by failing to include the Duffie Road Property in the marital estate" or to distribute it. (Original in all caps.) The trial court made the following finding regarding the Duffie Road Property:

> 43. In October of 2006, shortly before the marriage of the parties, the plaintiff purchased two lots on Duffy [sic] Road in Hoke County, North Carolina, where he operated a shop in connection with his refrigeration installation and repair business. The deed for this property was

> recorded on October 31, 2006, in the Office of the Register of Deeds of Hoke County, in Book 736, Page 1041, Hoke County Registry. The deed indicates that excise tax in the amount of $94.00 was paid in order to record the deed, indicating that the plaintiff had paid $47,000.00 for this property. Title to this property was placed in the plaintiff and the defendant, as joint tenants with right of survivorship, pursuant to North Carolina General Statute 41-2.

The trial court's findings of fact regarding the Duffie Road Property are intermingled with findings of fact regarding the Lakeview Drive Property, and at times it is not entirely clear as to which property the trial court is referring in the findings of fact. It would appear that the trial court may have simply considered the Duffie Road Property as separate property of the parties, in which each party has a one-half interest, and if so, the trial court's failure to distribute this property would be proper, since the trial court cannot distribute separate property. Most of plaintiff's arguments seek to compare the Duffie Road property to the Lakeview Drive Property, although it is not clear to us why. But it is true that the trial court does not explicitly mention in its conclusions of law or decree the classification, valuation, or disposition of the Duffie Road Property. Because we are unable to discern which of the trial court's findings of fact apply to the Duffie Road Property and how the trial court actually classified this property, we are unable to review the ED Judgment, and we remand to the trial court for additional findings of fact and conclusions of law regarding the Duffie Road Property.

C. Plaintiff's Business

[4] Plaintiff next contends that "the trial court erred by including the plaintiff's separate business property in the marital estate." (Original in all caps.) Plaintiff argues that he "owned his businesses twenty seven years prior to marrying the defendant. The Plaintiff conducted businesses through his [three] bank accounts . . . . Plaintiff also owned equipment, buildings and vehicles as a part of these businesses prior to the marriage." There were also accounts receivable involved which the trial court considered based primarily on plaintiff's own deposition testimony and personal financial statement which "plaintiff prepared or had prepared[,]" and only he, his sister, and his accountant had access to it. Ultimately, the trial court classified and valued plaintiff's businesses not as whole business entities but by classifying, valuing, and distributing their components: the three bank accounts, the items of equipment such as forklifts and trailers, and the accounts receivable.

Because the judgment addresses the business properties as components, most of which are comprised of the bank accounts, plaintiff's arguments here address mainly the bank accounts and centers on the "source of funds" rule and commingling:

> "Comingling of separate property with marital property, occurring during marriage and before date of separation, does not necessarily transmute separate property into marital property; transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into is [sic] form at the date of separation." *Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 30 (2002).

Plaintiff's arguments are nearly impossible to follow, but as best we can tell, they can be summarized this way: he owned his businesses prior to marriage; the bank accounts had certain balances on the date of marriage; the defendant did not personally deposit any money into the bank accounts during the marriage; and thus at least the amounts in the accounts as of the date of marriage should be his separate property. There are two problems with plaintiff's arguments. One is factual and the other legal.

The factual issue is that plaintiff argues before this Court that he himself testified at trial that "his sister cashed his paychecks each week and put the cash in his drawer. . . . His income from his business was not deposited back into his business." The trial court did not find plaintiff's claim as to how he handled his funds to be credible.[3] Instead, the trial court found that "plaintiff did not maintain separate bank accounts for his personal expenditures and business expenditures, but comingled his personal and business funds, as well as his personal and business expenditures." The trial court further found that there were numerous transactions including deposits and withdrawals in all of the accounts during the marriage. The trial court also found that

> [f]unds were transferred among the aforesaid bank accounts, whenever one account needed funds, and there were surplus funds in another account. The court finds from the testimony of Sieglenda Melvin, the plaintiff's sister, in her deposition of January 17, 2011, that the bank

3. For example, the trial court also found, and this finding is not substantively challenged on appeal, that "[t]hough the plaintiff testified he had income in the year 2009 of only $12,028.00, he introduced evidence that for the same year, he had personal expenditures in excess of $106,000.00."

> accounts constituted one 'big bucket' and that the funds were all the plaintiff's funds.

After many findings of fact regarding the bank accounts, the trial court ultimately found as to the bank accounts:

> 68. The plaintiff has not traced the funds in the account at the time of the marriage into their form at the date of separation. North Carolina General Statute 50-20(b)(1) creates the presumption that all property in existence at the time of the separation is marital property, and as to the bank accounts, the plaintiff has failed to rebut that presumption. Therefore, the court classifies the funds in the bank accounts on the date of the separation as marital property.

As we noted above, plaintiff fails to appreciate that defendant need not personally contribute financially to the bank accounts during the marriage to create a marital interest. Plaintiff's own earnings and efforts during the marriage created the marital interest, *see* N.C. Gen. Stat. § 50-20(b)(1), and he failed to present sufficient evidence to trace his separate contributions. Indeed, plaintiff has failed even in his brief on appeal to articulate how the trial court could possibly trace his premarital funds based upon the evidence presented, and the findings of fact which the trial court made are fully supported by the evidence. We conclude that the trial court did not err in classifying "the funds in the bank accounts on the date of separation as marital property." This argument is overruled.

D. Plaintiff's Rental Property

[5] Plaintiff contends that "the trial court erred by including the separately owned rental property of the plaintiff in the marital estate." (Original in all caps.) The plaintiff directs us to three findings of fact regarding three different properties. However, the trial court did *not* include plaintiff's "separately owned rental property" in the marital estate. The trial court actually found that two of the rental properties were plaintiff's separate property and one was defendant's separate property and that during the marriage payments were made to reduce the debt on all the properties by marital contribution. The trial court determined that the "[r]eduction in debt[,]" paid with marital funds, was marital property, not the properties themselves, and the trial court included only this "[r]eduction in debt" value as a marital asset. Accordingly, this argument is overruled.

E. Credit for Debts

[6] Plaintiff contends that "the trial court erred by failing to give plaintiff credit for his debt[,]" (original in all caps.) including credit cards, a line of credit, and defendant's attorney's fees that he was ordered to pay.

1. Credit Card and Line of Credit Debts

"Plaintiff takes issue with Finding 77[,]" which is as follows:

> 77. The plaintiff has claimed that he had the following debts at the time of the separation of the parties:
>
> | | |
> |---|---|
> | Credit card debt | $ 1,469.64 |
> | American Express credit card | $ 89.95 |
> | American Express credit card | $ 388.43 |
> | Credit line | $ 9,311.00 |
>
> However, since the plaintiff used credit cards both in connection with his business, as well as for personal expenses, the court finds that the plaintiff has not met his burden of proof of showing that the said debts are marital debts, and will not consider the said debts in the distribution of the marital property.

Plaintiff first argues that he cannot figure out where the numbers listed for these debts came from, which is presumably an argument that these findings of fact are not supported by the evidence. Yet the trial court also found, and plaintiff does not challenge that "plaintiff has not met his burden of proof of showing that the said debts are marital debts, and will not consider the said debts in the distribution of marital property."

"In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *In re Estate of Mullins*, 182 N.C. App. 667, 670-71, 643 S.E.2d 599, 601 (citation omitted), *disc. rev. denied*, 361 N.C. 693, 652 S.E.2d 262 (2007). Here, even if the trial court's findings as to the amounts of the debts were erroneous, it did not affect the distribution of property, and thus we need not address this issue. *See id.* This argument is overruled.

2. Attorney's Fee Debt

Plaintiff also argues that the trial court should have included in the distribution the $22,637.29 "debt" of attorney's fees which were awarded to defendant by the trial court in a prior ORDER ON ATTORNEY FEES

regarding "child support, post-separation support and alimony[;]" we cannot fathom why plaintiff would argue that an award of attorney's fees incurred by defendant on these claims, which obviously did not exist during the marriage or on the date of separation, could possibly be a marital debt or included in an equitable distribution award.

> A marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties. The party who claims that any debt is marital bears the burden of proof on that issue. The party so claiming must prove the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife.

Becker v. Becker, 127 N.C. App. 409, 414-15, 489 S.E.2d 909, 913 (1997) (citations, quotation marks, and ellipses omitted). This argument is entirely frivolous and overruled.

V. Valuation

Plaintiff argues that the trial court failed to properly value several items of property.

A. Lakeview Drive Property

[7] As discussed above, the Lakeview Drive Property has marital and separate components, which the trial court valued in the ED Judgment. We will start by seeking to determine what the trial court actually did, since plaintiff's brief does not articulate this. We will express the trial court's findings in table form:

Item of Property:	Value:	Finding of Fact No.:
Value of entire Lakeview Drive Property	$200,000.00	50
Lot values (separate property owned 50/50 by each party)	$37,000.00	50
Value of structures including residence and a separate garage	$163,000.00	51
Mortgage balance on the residence on the date of separation	$108,132.25	52

Equity value in structures	$54,867.75	52
Premarital expenditures by plaintiff (plaintiff's separate interest)	$102,397.00 (65% using the correct number)[4]	40
Marital expenditures on residence	$55,128.64 (35% using correct number)[5]	47
Value of gift of ½ interest in structures from plaintiff to defendant	$17,832.02[6]	56

Because the trial court found that plaintiff made a gift to defendant of a one-half interest in the home and garage, the trial court found that "there is an additional jointly owned separate component in the property of $36,267.58, of which each party would own ½, or $18,133.79."[7] We agree that the trial court's math was wrong due to the typographical error of listing $107,397.07 as plaintiff's pre-marital contribution on the home and garage instead of $102,397.07, which then makes the trial court's calculation of the percentages wrong. Yet we do understand how the trial court valued the property, the values are supported by the evidence, and we do not find any abuse of discretion in how the trial court allocated the percentages of values.

Plaintiff's real objection is to the classification of the property, based upon the trial court's finding that plaintiff made a gift to defendant of a one-half interest in the structures on the land, but we have already rejected that argument. We therefore remand for the trial court to correct the typographical error and resulting miscalculations, but otherwise overrule this argument.

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4. The order finds $107,397.07 as plaintiff's pre-marital expenditures on the residence and garage in finding of fact 53, which plaintiff claims, and we agree, is a typographical error, and we have included the correct number from finding of fact 40. The trial court found that 66.1% of the cost of the residence was incurred by plaintiff prior to marriage, but this should be 65% using the correct numbers.

5. The trial court found 33.9%, for the same reasons as stated in footnote 4.

6. The trial court finds the amount to be $18,133.79 based on the typographical error mentioned in footnote 4. Using the correct number of $102,397.00 yields the correct amount here, $17,832.02.

7. Again, using the correct number of $102,397.07 for plaintiff's pre-marital contribution on the home and garage, this should be a "separate component in the property of $35,664.04, of which each party would own ½, or" $17,832.02.

B. Business Value

[8] Plaintiff also contends that "defendant failed to get an appropriate business valuation." (Original in all caps.) Plaintiff's argument mainly faults *defendant* for failing to request a valuation of plaintiff's businesses, specifically AirTech, which he argues he owned twenty years prior to the marriage; Rental Ice Machine; and the rental properties. This argument is quite odd, as one would expect that if defendant were to present evidence of business valuation, she would present a *higher* value than plaintiff. We do not think that plaintiff is arguing that the valuation of his business assets and accounts was too low; clearly, he thinks it was too high. However, plaintiff himself admits "[t]he CPA that testified *on behalf of the Plaintiff* . . . offered the only insight into the value of Plaintiff's separate businesses[.]" (Emphasis added.) Thus, plaintiff is conceding that the trial court relied solely upon evidence presented by *plaintiff* as to the value all of these properties. To the extent that the trial court lacked evidence on these valuations, plaintiff, as the owner and operator of these businesses, would be primarily at fault, as he had all of the information regarding his "separate business property[.]" It appears that because the trial court accepted some of his evidence, but rejected other parts, plaintiff seeks to impugn the trial court for using the evidence he himself presented, arguing that "*knowing the favor Defendant's counsel garnered with the trial judge*, he chose to use pieces of the Plaintiff's separate business property to arrive at [an] increased marital award for an approximate two and [a] half year marriage." (Emphasis added.)

Plaintiff's additional arguments on this issue address the credibility and weight of the evidence, not its sufficiency to support the findings of fact. Plaintiff challenges at least 14 findings of fact as being "against the manifest weight" of the evidence and then proceeds to argue, picking and choosing various findings at random, what his evidence showed and why the trial court should have relied upon it. Plaintiff does not argue that the trial court did not have evidence upon which to make its findings of fact, but rather that it was not his evidence or that the trial court picked which portions to rely upon instead of accepting all of it.

Contrary to plaintiff's arguments, the manifest weight of the evidence is not the correct standard of review; we review the trial court's findings of fact to determine if they are supported by competent evidence. *Peltzer*, ___ N.C. App. at ___, 732 S.E.2d at 359. Furthermore, "[t]he trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Id.* at ___, 732 S.E.2d at 359. Also, "it is within a trial court's discretion to determine the weight and credibility that should be given

to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). We will not reweigh the evidence presented to the trial court, so this argument is overruled.

VI. Distribution

Plaintiff also raises several arguments as to the actual distribution of the marital property.

A. Calculation of the Credit for Post-Separation Payments by Plaintiff on the Mortgage on the Lakeview Drive Property

[9] Plaintiff argues that "the trial court erred by failing to honor the stipulation of the parties and/or correctly calculate the stipulation of the parties[.]" (Original in all caps.) Plaintiff bases this argument upon the provisions of the Consent Order of 17 November 2010, in which the parties resolved the issues of child support, defendant's claims for post-separation support and alimony were dismissed, and interim equitable distribution was made. The relevant provisions of the Consent Order state that:

> 4. The plaintiff shall pay the monthly mortgage payment on the residence formerly occupied by the parties as husband and wife, for nine months, but in any event, no longer than until August 17, 2011, and in addition, he shall pay the ad valorem taxes and insurance on the said residence at 355 Lakeview Drive, Red Springs, North Carolina.
>
> . . . .
>
> 16. The defendant shall pay the pro rata mortgage payment for the month of August, 2011, by paying 13 days thereof, in the event all issues of equitable distribution are not resolved by August, 2011.
>
> 17. The plaintiff shall continue to pay the mortgage, taxes, and insurance on the residence formerly occupied by the parties, until August 17, 2011, but his payments thereon shall be considered as interim equitable distribution, for which he shall be entitled to a credit at the time of the entry of any equitable distribution judgment.
>
> 18. In the event the equitable distribution action is tried and judgment is entered prior to August 17, 2011, the interim equitable distribution payments as provided for herein shall cease and terminate, but in no event shall the

> interim equitable distribution payments required of the plaintiff herein be extended beyond August 17, 2011.

Plaintiff contends that the trial court's finding of fact in the ED Judgment awarding him credit for making mortgage payments was in error because it "short[ed]" him the payments made from the date of separation in June 2009 until December 2010 and that the trial court used the wrong amount for the monthly payments, claiming that he testified that in October 2010 the payment was $1,021.17. Plaintiff also testified that the payment in November of 2011 was $1,018.97 and $1,000.03 in December of 2011. However, plaintiff's argument ignores his own very detailed exhibit number 45, which lists the "Post separation BB & T Costs Paid for by" plaintiff which includes the mortgage payments for each month up until September of 2011. The payments vary over time, but for the months of September 2010 until August 2011 the payments were $987.45, the amount as found by the trial court. This was the amount of each and every payment during the relevant time period, which was from the date of entry of the Consent Order, November of 2010, until August of 2011, the ending date which was very specifically set forth in the November 2010 Consent Order. This adds up to 8 months, beginning in December of 2010 and ending in August 2011, at $987.45 per month, with the prorated payment for August 2011 of $541.62, and a total of $8,441.22, precisely the amount found by the trial court.

Plaintiff argues that the trial court "erred by choosing not to recognize or misinterpreting the agreement of the parties in the 17 November 2010 Consent of the parties" and claims that this nearly $20,000 error is an "unbalanced award [which] gives the appearance [of] further bias against Plaintiff and suggests an unbalanced abuse of discretion." Plaintiff is entirely incorrect. The trial court applied the Consent Order exactly as it was written. The parties seem to have anticipated that their equitable distribution case would be heard by 17 August 2011 and chose to tailor their Consent Order on this assumption, even to the extent of providing for a pro-rata payment for August. Plaintiff then filed a motion for peremptory setting to hear the case on 15 August 2011. Unfortunately, the case was not heard in August 2011, and it was peremptorily set for 19 September 2011, but this peremptory setting was continued on plaintiff's request. A series of motions and countermotions regarding interim equitable distribution ensued, addressing the disputes which arose because the ending date of the Consent Order provisions had passed with no final resolution of equitable distribution, ending in another interim equitable distribution order or about 18 November 2011, in which plaintiff was ordered to pay an interim equitable distribution payment

of $10,000.00 to defendant. The trial finally began on 14 November 2011, "but could not be completed during that session of court[,]" and resumed at the 19 March 2012 session of the trial court, which was the next session at which the trial judge "was assigned to hold civil court in Hoke County."

The Consent Order encompassed many issues which are not subjects of this appeal. The parties reached a detailed agreement regarding the mortgage payments for their own reasons which are not revealed by our record, and neither we nor the trial court can add to or subtract from that agreement. The trial court gave exactly the credit dictated by the Consent Order. This argument is overruled.

B. Failure to Make Findings of Fact and Conclusions of Law Regarding the Presumption of an In-Kind Distribution

[10] Plaintiff contends that "the trial court failed to make any findings of fact and conclusions of law relating to the presumption of an in kind distribution." (Original in all caps.) The trial court ordered the following distribution to defendant:

> a. By transfer to [defendant] of [plaintiff's] ½ undivided interest in the value of the lots upon which the residence and garage are situated, with a value of $18,500.
>
> b. By transfer to [defendant] of [plaintiff's] additional separate interest in the residence of $18,133.79 [or corrected amount $17,832.02].
>
> c. The balance of the distributive award in the amount of $8,192.81 shall be paid by the plaintiff to the defendant within nine months of the date of the entry of this order, or upon the refinance of the residence by the plaintiff as required under paragraph 7, supra, so as to secure the release of the plaintiff from the deed of trust on the said residence.

Plaintiff argues that the trial court did not make any findings of fact or conclusions of law to support making a distributive award not in-kind. While most of the distribution was in-kind, with the exception of $8,192.81 which was needed to balance out the distribution, it is true that the trial court did not specifically address why it ordered this payment.

In *Allen v. Allen*, our Court addressed this situation:

> N.C. Gen. Stat. § 50-20(e) (2003) creates a presumption that an in-kind distribution of marital or divisible property

> is equitable, but permits a distributive award to facilitate, effectuate, or supplement the distribution. The judgment of equitable distribution must contain a finding of fact, supported by evidence in the record, that the presumption in favor of an in-kind distribution has been rebutted. In the instant case, the trial court did not make findings pertaining to the presumption that an in-kind division of the property was equitable. Yet, the record contains evidence that defendant's business was a closely held corporation and not susceptible of division. Such evidence would support a finding that the in-kind presumption was rebutted. We remand for the entry of further findings of fact regarding the basis for the court's distributive award.

168 N.C. App. 368, 372-73, 607 S.E.2d 331, 334 (2005) (citations and quotation marks omitted). Here, instead of a closely held corporation, plaintiff has a sole proprietorship, but the same logic applies. We remand for the trial court to make an additional finding of fact as to how the presumption in favor of an in-kind award was rebutted and a conclusion of law supporting its distributive award.[8]

Plaintiff also argues that "the trial court failed to point to a source of liquid assets from which Plaintiff could pay the distributive award as required by *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003)." We disagree. In *Embler*, the husband argued he was ordered to pay a distributive award without a finding that he had liquid assets. *Id.* at 187, 582 S.E.2d at 629. Here, several bank accounts, valued in excess of $60,000.00 in total, were distributed to plaintiff; these are liquid assets which could logically serve as a source of payment. In addition, the trial court gave plaintiff nine months to make the payment. Accordingly, this argument is overruled.

VII. Awarding Lakeview Drive Property to Defendant

[11] Plaintiff also makes a separate argument in his brief that defendant should not have been awarded the Lakeview Drive Property because she does not have the financial ability to maintain it. But plaintiff cites no law nor are we aware of any requiring the trial court to consider as a distributional factor what may happen to property in the future or a party's ability to maintain a property. Accordingly, plaintiff's arguments as to the Lakeview Drive Property are overruled.

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8. We note that the trial court could have simply allocated $8,192.81 from one of the bank accounts to defendant, thus accomplishing an in-kind distribution in full and eliminating plaintiff's next argument regarding a source for the payment.

VIII. Conclusion

For the foregoing reasons, we remand for additional findings of fact and conclusions of law regarding the Duffie Road Property, for correction of the typographical error and resulting miscalculations regarding the Lakeview Drive Property, and for an additional finding of fact as to how the presumption in favor of an in-kind award was rebutted and a conclusion of law supporting its distributive award; as to all other issues, we affirm.

REMANDED in part and AFFIRMED in part.

Judges CALABRIA and DAVIS concur.

JOHN F. DONNELLY, JR., Petitioner/Appellant
v.
UNIVERSITY OF NORTH CAROLINA, BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, and UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL PUBLIC SAFETY DEPARTMENT, Respondents/Appellees

No. COA14-208

Filed 2 September 2014

1. **Constitutional Law—freedom of speech—harassment of athletes—not protected**

   A fan of University of North Carolina (UNC) sports who was banned from all UNC sports facilities for inappropriate behavior had not engaged in any speech protected by the First Amendment. Petitioner had harassed athletes, athletes' family members, athletic staff, and fans; harassment is not protected speech.

2. **Colleges and Universities—fan banned from athletic facilities—not arbitrary or capricious—university's General Order on trespass—substantially followed**

   The University of North Carolina's (UNC's) decision to ban petitioner from all athletic facilities indefinitely was not arbitrary, capricious, or unsupported by substantial evidence where the decision was based on a series of incidents over a number of years and this was not the first time petitioner had been reprimanded for this behavior. Although four lines on the Notice of Trespass were left blank, those provisions in the UNC's General Order on trespass warnings

were merely matters of form and did not affect a substantial right. UNC substantially complied with the goals of the General Order.

3. Public Officers and Employees—athletic fan banned from facilities for harassment—not retaliation—no abuse of discretion

The lifetime ban of a fan from University of North Carolina athletic facilities for harassing behavior was not an abuse of discretion. The case relied upon by the fan involved retaliation for criticizing government officials, which was not the case here.

Judge HUNTER, Robert N., Jr. concurring in the result in a separate opinion.

Appeal by petitioner from judgment entered on 4 November 2013 by Judge W. David Lee in Iredell County Superior Court. Heard in the Court of Appeals 14 August 2014.

RECH LAW, P.C., by Kate A. Rech for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for respondent-appellee.

STEELMAN, Judge.

A decision by an administrative agency to indefinitely ban petitioner from all University of North Carolina athletic facilities did not violate petitioner's First Amendment rights. The ban was not arbitrary, capricious, or unsupported by substantial evidence, and therefore did not violate N.C. Gen. Stat. § 150B-51. University officials did not misuse their power to retaliate against petitioner.

I. Factual and Procedural Background

John Donnelly, Jr. (petitioner) graduated from the University of North Carolina (UNC) in 1970 and has always been a dedicated fan of the school's sports teams. Petitioner frequently attended UNC athletic events and volunteered as an usher for the 2006 football season. From 2006 until December 2012, in a series of incidents, petitioner displayed inappropriate behavior toward several UNC athletes and staff members of the UNC Athletics Department. Petitioner was reprimanded for his behavior several times prior to UNC imposing upon him a lifetime ban from UNC athletic events. This appeal arises from petitioner's appeal of this ban.

Petitioner made sexually suggestive comments to female UNC Athletics staff members, traveled to UNC women's soccer matches and appeared at the hotel where the players were staying and harassed the players, and alienated fans by openly criticizing players in front of their family members during the game while serving as an usher and representative of UNC Athletics. Petitioner also harassed staff members by repeatedly calling various UNC Athletics offices up to 13 times per day.

The events that led to the lifetime ban arise from an incident that occurred in December 2012 at the Women's Soccer College Cup tournament in San Diego. Petitioner had previously attempted to communicate with several female soccer players both in person and via Facebook. At the Soccer College Cup, petitioner found out which hotel the players were staying, allegedly "because he won an autographed soccer ball and couldn't locate the head coach's signature on the ball." Petitioner claims that he wanted to find the head coach so he could locate his signature on the ball. The parents of the players felt uncomfortable with petitioner's uninvited presence at the hotel, especially given his previous attempts to communicate with several female players. Petitioner was asked to leave, and did so.

As a result of petitioner's persistent harassment of UNC Athletics staff members and athletes, and history of inappropriate behavior at athletic events, on 3 December 2012, UNC issued a Notice of Trespass to petitioner. The Notice prohibited petitioner from entering any area of UNC Athletic Facilities at any time in the future. The Notice was sent to petitioner via certified mail. One week later, George Hare (Hare), Deputy Chief of the UNC Department of Public Safety, called petitioner, explained the Notice of Trespass, and discussed the parameters of the restriction with petitioner. Petitioner was informed of his right to appeal, and he exercised that right.

On 7 March 2013, Hare issued a Final University Decision denying petitioner's appeal of the Notice of Trespass. On 4 April 2013, petitioner filed a Petition for Review of Final Agency Decision, seeking judicial review of the University's decision in the Superior Court of Iredell County. On 4 November 2013, Judge Lee found that, "no substantial rights of the petitioner have been prejudiced and that the final decision of the University should be affirmed."

Petitioner appeals.

II. First Amendment Rights

[1] In his first argument, petitioner contends that the trial court erred in affirming UNC's indefinite ban from all athletic facilities because UNC violated his First Amendment rights. We disagree.

A. Standard of Review

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2013).

"Under a *de novo* review, the superior court 'consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment.'" *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). "When an appellate

court reviews a superior court order regarding an agency decision, 'the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " 356 N.C. at 14, 565 S.E.2d at 18.

B. Analysis

"The first inquiry a court must undertake when a First Amendment claim is asserted is whether the plaintiff has engaged in 'protected speech'." *Goulart v. Meadows*, 345 F.3d 239, 246 (4th Cir. 2003) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 87 L.Ed.2d 567, 576 (1985)). While it is well-recognized that the First Amendment protects more than spoken or written word, the United States Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404, 105 L. Ed. 2d 342 (1989) (quoting *United States v. O'Brien*, 391 U.S. 367, 376, 20 L.Ed.2d 672 (1968)). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* (quoting *Spence v. State of Wash.*, 418 U.S. 405, 410-11, 41 L.Ed.2d 842 (1974)).

The United States Supreme Court has recognized that students wearing black armbands to protest military involvement in Vietnam, sit-ins to protest segregation, and picketing about a wide variety of causes are behaviors that are protected by the First Amendment. *Id.* (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 21 L.Ed.2d 731 (1969); *Brown v. Louisiana*, 383 U.S. 131, 141–42, 15 L.Ed.2d 637 (1966); *United States v. Grace*, 461 U.S. 171, 176, 75 L.Ed.2d 736 (1983)).

The Fourth Circuit held that harassment is not protected speech. *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988) (holding that a West Virginia statute prohibiting use of the telephone to harass others did not violate the First Amendment, as the statute required specific intent to harass, thus indicating that the legislature sought to criminalize conduct rather than speech by protecting citizens from harassment in an even-handed and neutral fashion).

We hold that petitioner has failed to demonstrate that he engaged in any speech protected by the First Amendment. Petitioner harassed athletes, the family members of athletes, athletic staff members, and fans. This behavior is not protected by the First Amendment. Therefore, we do not address petitioner's argument that UNC athletic facilities are a public forum.

This argument is without merit.

III. N.C. Gen. Stat. § 150B-51 Violations

[2] In his second argument, petitioner contends that the trial court erred in affirming UNC's indefinite ban from all athletic facilities because UNC's decision was arbitrary, capricious, and unsupported by substantial evidence, in violation of N.C. Gen. Stat. § 150B-51. We disagree.

A. Standard of Review

As described in Section II A, above, the appropriate standard of review for this argument is the whole record test.

"When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal quotation marks omitted).

B. Analysis

An administrative ruling is deemed arbitrary and capricious when it is "whimsical, willful[,] and [an] unreasonable action without consideration or in disregard of facts or law or without determining principle." *Ward v. Inscoe*, 166 N.C. App. 586, 595, 603 S.E.2d 393, 399 (2004) (quoting *Lenoir Mem. Hosp. v. N.C. Dep't of Human Res.*, 98 N.C. App. 178, 181, 309 S.E.2d 448, 450 (1990)). When a court applies the whole record test, it must determine whether there is substantial evidence to justify the agency's decision. *In re Lustgarten*, 177 N.C. App. 663, 670, 629 S.E.2d 886, 890-91 (2006). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.*

UNC's decision to ban petitioner from all athletic facilities indefinitely was not arbitrary, capricious, nor was it unsupported by substantial evidence. A decision by an administrative agency is arbitrary and

capricious if it clearly lacked fair and careful consideration. *Bio-Med. Applications of N. Carolina, Inc. v. N. Carolina Dep't of Human Res., Div. of Facility Servs., Certificate of Need Section*, 136 N.C. App. 103, 111, 523 S.E.2d 677, 682 (1999).

UNC's decision was based on a series of incidents over a number of years where petitioner engaged in inappropriate behavior toward UNC athletes, the family members of athletes, athletic staff members, and fans. This was not the first time that petitioner was reprimanded for this type of behavior. The Final University Decision summarizes a long series of events which led to the indefinite ban. It is clear that UNC's decision was not an "unreasonable action without consideration or in disregard of facts," nor did the decision lack "relevant evidence a reasonable mind might accept as adequate to support a conclusion."

Petitioner also argues that UNC violated N.C. Gen. Stat. § 150B-51 because UNC officials did not follow the procedure set forth in the Department of Public Safety's General Order on trespass warnings. The General Order states that:

> I. Trespass Warning
>
> A. After determining that a person has no legitimate business or education purpose in a University facility or on University property, a formal "Notice of Trespass," which is valid indefinitely, may be issued. The Notice should be precise enough to alleviate any question as to the specific restrictions being imposed.
>
> B. The information contained in the "Notice of Trespass" should be read to the offender. Any questions from the offender should be answered if possible. Issuance of the notice should be witnessed by another officer. The notice should be signed by the violator or "Refused" should be written by the officer if the violator doesn't cooperate.
>
> II. Right of Appeal
>
> The offender should be informed of his/her right of appeal.

UNC determined petitioner had no legitimate business or educational purpose on university property due to his pattern of inappropriate behavior and issued a Notice of Trespass that clearly stated the restrictions imposed. The information contained in the Notice was discussed with petitioner via telephone and sent via certified mail. Petitioner was also informed of his right to appeal.

Petitioner argues that because four lines on the Notice of Trespass were left blank (date, time, witness name, and witness signature), UNC officials did not follow proper procedure. This Court has stated that:

> In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.

State v. Inman, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005) (quoting *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661–62 (1978)).

Petitioner's argument is based on provisions of the General Order that are a mere matter of form, are not material, and do not affect any substantial right. The procedure set forth in the General Order is based on the assumption that there will be immediate, on-site removal of trespassers. In the instant case, the events leading up to a Notice of Trespass being issued against petitioner occurred off-site, at a soccer tournament in California. UNC made minor, but necessary, changes to its normal procedure to accommodate the nature of this particular incident. Nonetheless, UNC substantially complied with the goals of the General Order. The goals of the General Order are to inform the trespasser of the restrictions imposed upon him and inform him of his right to appeal. Both of these goals were met.

Any procedural error committed by UNC officials was therefore harmless and immaterial.

This argument is without merit.

IV. Retaliation Claim

[3] In his third argument, petitioner contends that UNC's indefinite ban was an abuse of discretion because officials misused their power to retaliate against petitioner. We disagree.

A. Standard of Review

As described in Section II A, above, the appropriate standard of review for this argument is the whole record test.

"When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to

determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal quotation marks omitted).

B. Analysis

Petitioner argues that the case of *Trulock v. Freeh* is applicable to the instant case. *Trulock v. Freeh* is a Fourth Circuit case involving a former Department of Energy official who wrote a magazine article charging the government with incompetence for their handling of alleged security breaches at weapons laboratories. *Trulock v. Freeh*, 275 F.3d 391, 397 (4th Cir. 2001). In that case, the court held that because "The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials," public officials are "prohibited from retaliating against individuals who criticize them." *Id.* at 404.

The issues in the instant case do not parallel the issues in the case petitioner cites for this argument. The instant case does not involve the criticism of governmental officials. Therefore, *Trulock v. Freeh* is not controlling, nor do we find it to be persuasive authority.

This argument is without merit.

AFFIRMED.

Judge GEER concurs.

HUNTER, JR., Robert N., Judge, concurring in the result.

While I concur with the majority's result, I am troubled that the majority only briefly references *United States v. O'Brien*, 391 U.S. 367 (1968) without applying all four prongs of the test announced in that case.

Under the First Amendment and the North Carolina Constitution, speech is given broad protections, save for certain exceptions. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct" are exceptions that do not receive First Amendment protections (internal citations omitted)); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression

because of its message, its ideas, its subject matter, or its content." (citation and quotation marks omitted)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 54 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages."); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383–84 (1992) (holding that exceptions to the First Amendment include, but are not limited to, obscenity, threats, and communications that incite lawless action); *see also* N.C. Const. art. I, § 14.

Conduct, however, may be regulated, as "[i]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Hest Technologies, Inc. v. State ex rel. Perdue*, 366 N.C. 289, 296, 749 S.E.2d 429, 435 (2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 99 (2013) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

The majority opinion cites the *O'Brien* test, which recognized that in some cases there is not a clear distinction between speech and conduct. *O'Brien* concerned a man who intentionally and illegally burned his draft card, but did so as a form of protest against the draft. 391 U.S. at 369–70. The Court explained that "when 'speech' and 'nonspeech' elements are combined in the same *course of conduct*, a sufficiently important governmental interest in regulating the nonspeech element *can* justify incidental limitations on First Amendment freedoms." *Id.* at 376 (emphasis added). The United States Supreme Court then articulated a four-prong test to determine whether government regulation of a course of conduct involving speech is constitutional:

> [1] a government regulation is sufficiently justified if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Here, it is essential to explain why Donnelly's actions should be considered conduct and not speech, thus bringing his actions under the *O'Brien* standard. This case provides a prime example of the gray area between speech and conduct and thus application of *all* four *O'Brien*

factors is appropriate. Although some of Donnelly's individual actions, such as sending an e-mail or making a phone call may be classified as speech, Donnelly's repeated calls, suggestive and inappropriate comments, and other actions combine to become harassing conduct. Taken together, Donnelly's actions constitute a "course of conduct," and *O'Brien* applies.

The power of UNC officials to regulate harassment on campus satisfies the first two prongs of the *O'Brien* test as it is (i) within the power and (ii) in the interest of UNC administrators to provide a safe environment for students. While UNC is preventing Donnelly from engaging in his free speech rights at future UNC athletic events, record evidence shows that (iii) UNC is seeking to protect its students and employees from his harassing and inappropriate behavior instead of intending to quash Donnelly's right to speak freely. Under the fourth and final prong, (iv) the restriction placed on Donnelly is not greater than is essential to promote UNC's legitimate interest. The University previously disciplined Donnelly to a lesser extent and notified him of the inappropriateness of his behavior, but these measures failed to stop Defendant's harassing behavior. For these reasons, the actions of UNC administrators against Donnelly satisfy all four criteria of the *O'Brien* test and Donnelly's behavior is not protected by the First Amendment.

ROSE GLYNNE, M.D., Plaintiff
v.
WILSON MEDICAL CENTER, a North Carolina corporation, Defendant

No. COA14-53

Filed 2 September 2014

1. Statutes of Limitation and Repose—parallel state and federal actions—dismissal of federal action—tolling of state action

The trial court correctly concluded that plaintiff's complaint was subject to dismissal on statute of limitations grounds where plaintiff initially filed a complaint in federal court asserting numerous claims arising under federal and state law, those claims were dismissed, and plaintiff filed this action one week more than thirty days from the date the federal action was dismissed. Although plaintiff argued that the word "tolled" in the federal statue involved the suspension of the statute of limitations, rather than the extension

of the period by a specific number of days, there is binding North Carolina precedent to the contrary.

2. Statutes of Limitation and Repose—tolling—reliance on interpretation of federal rules—not excusable neglect

Reliance on an interpretation of federal tolling provisions accepted in many other jurisdictions but not North Carolina did not constitute excusable neglect. Moreover, the only time periods that may be extended based on the authority in N.C.G.S. § 1A-1, Rule 6(b) are those established by the North Carolina Rules of Civil Procedure, which was not the case here.

3. Statutes of Limitation and Repose—equitable tolling—not a bar

The running of the statute of limitations was not barred on the grounds of equitable tolling or equitable estoppel (treated as interchangeable). Although plaintiff pointed to the statement of defendant's counsel that he would likely depose plaintiff again if she reasserted her claims in state court after a federal dismissal, that statement would not have any tendency to induce plaintiff to refrain from filing her complaint in a timely manner.

Judge GEER concurs in a separate opinion.

Judge Robert N. Hunter, Jr. concurs in the result only in a separate opinion.

Appeal by plaintiff from judgment entered 4 September 2013 by Judge Marvin K. Blount, III, in Wilson County Superior Court. Heard in the Court of Appeals 8 May 2014.

Medicolegal Consultants, LLC, by C. William Hinnant Jr., and McKinney Law Firm, PLLC, by Elizabeth McKinney, for Plaintiff.

Womble Carlyle Sandridge & Rice, LLP, by John E. Pueschel and Theresa M. Sprain, for Defendant.

ERVIN, Judge.

Plaintiff Rose L. Glynne, M.D., appeals from an order dismissing her complaint. On appeal, Plaintiff contends that the trial court erred by granting Defendant Wilson Medical Center's dismissal motion on

the grounds that the time within which she was entitled to file her complaint had been extended by 28 U.S.C. § 1367(d) and that, even if her complaint had not been filed in a timely manner, she was still entitled to equitable relief on the grounds of excusable neglect, equitable tolling, or equitable estoppel. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff practiced medicine in Wilson, having opened her own practice in that community in 2002 after having been employed by another Wilson-based practice group before that time. As a result of the initial success that she experienced after having formed her own practice, Plaintiff employed an associate and purchased an office building. In October 2002, Plaintiff entered into an agreement to lease space in her office building to Defendant, which occupied and used the space from December 2005 until July 2006, when it vacated the premises. Plaintiff claimed that Defendant violated the lease agreement between the parties by failing to pay rent.

In April 2006, Defendant initiated an external quality review concerning Plaintiff based upon allegations that complications had been detected in surgical procedures that she performed in 2004 and 2005. However, the inquiry did not result in any adverse findings in reference to Plaintiff.

On 15 November 2006, Plaintiff attended a meeting of Defendant's medical executive committee at Defendant's request. At that meeting, Plaintiff was informed that problems involving the care that she provided to patients had been reported by several individuals. However, the nature of the problems that had been reported by these individuals was not explained to Plaintiff with any degree of precision. In addition, Defendant expressed concern that there was a high probability that surgical procedures performed by Plaintiff would result in complications. For that reason, Defendant believed that Plaintiff should repeat her residency or obtain a mentor. Although Plaintiff was unable to attend another committee meeting scheduled for the following day due to a medical emergency involving her daughter, she did notify a member of the committee of that fact. The person to whom Plaintiff communicated this information failed to inform the review committee of the necessity for Plaintiff's absence.

On 20 November 2006, Plaintiff's counsel notified Plaintiff that her privileges to admit and treat patients at Defendant's facility would be suspended 21 November 2006. On the following day, Plaintiff learned that Defendant insisted that she satisfy a number of requirements in order to obtain the restoration of her privileges, including taking a leave of absence, obtaining the agreement of a qualified physician to serve as mentor, and having all of her proposed surgical cases reviewed by a board for a period of one year. Plaintiff took leave from practicing medicine from 21 November 2006 until 19 February 2007. During this interval, Plaintiff had to pay $50,000 in additional compensation to her associate in order to ensure that needed call coverage was provided. Although Plaintiff attempted to obtain the assistance of a mentor, Defendant declined to approve the proposed mentoring relationship on the grounds that the proposed mentor no longer practiced obstetrics. After rejecting Plaintiff's proposal, however, Defendant recommended that Plaintiff reach agreement with a different mentor, who had also ceased practicing obstetrics.

On 27 December 2006, Plaintiff received a letter from Defendant identifying the allegedly problematic procedures that had been discussed at the 15 November meeting. On 6 January 2007, Dr. Michael Halpert, Defendant's Chief of Surgery, was appointed to investigate the validity of the allegations that had been made against Plaintiff. On 8 February 2007, Dr. Halpert concluded that there was no evidence of an increased infection rate, other patient-related psychological or medical problems, or other instances of substandard care in the surgical procedures that Plaintiff had performed.

Although Plaintiff was allowed to resume treating patients and performing surgical procedures at Defendant's hospital on 19 February 2007, Defendant insisted that an external source review any questionable cases and that Plaintiff refrain from being on call for more than four consecutive days. As a result of the imposition of this limitation on her ability to be on call, Plaintiff had to continue to make additional payments to her associate in order to ensure the availability of the necessary call coverage.

On 20 December 2006, Plaintiff entered into an agreement with Parklane Venture Capitalists under which she was to sell her medical office building for a price of $1,000,000 while leasing a portion of the space in that building for the use of her medical practice. In the course of investigating the proposed purchase of Plaintiff's office building, however, Parklane learned that Defendant had ceased leasing space

in Plaintiff's building. As a result, Parklane withdrew its offer to purchase Plaintiff's building, costing Plaintiff a substantial amount of money.

Although Plaintiff denied having experienced stress prior to the November 2006 meeting, she did experience emotional turmoil after that time and discussed her feelings with a family therapist and her colleagues. Despite the fact that Plaintiff had regained her privileges at Defendant's hospital in February 2007, her enforced absence from practice coupled with the fact that rumors concerning her alleged patient care issues were circulating in the community resulted in substantial economic harm to her practice. On 15 November 2007, Plaintiff resigned her position as a member of the staff of Defendant's hospital, moved to Rocky Mount, and entered practice there. However, as the result of the financial loss that she sustained because of her temporary loss of privileges at Defendant's hospital and Defendant's refusal to honor the lease agreement, Plaintiff was required to seek personal bankruptcy protection and lost her office building.

B. Procedural History

On 10 December 2008, Plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina in which she asserted numerous claims against Defendant arising under both federal and state law. After Plaintiff voluntarily dismissed her federal claims with prejudice on or about 30 April 2009, the District Court declined to exercise supplemental jurisdiction over Plaintiff's state law claims and involuntarily dismissed the remainder of Plaintiff's complaint without prejudice on 1 March 2011.

On 7 April 2011, Plaintiff filed a complaint in this case in which she asserted claims for negligent infliction of emotional distress, tortious interference with contract, tortious interference with a prospective business relationship, breach of contract, and breach of the lease agreement against Defendant. On 13 May 2011, Defendant filed a motion to dismiss Plaintiff's complaint on the grounds that all of the claims that Plaintiff had asserted against Defendant were barred by the applicable statute of limitations.

On 26 May 2011, Plaintiff filed a motion seeking an extension of time to file a notice of appeal from the order dismissing Plaintiff's federal action or, alternatively, for relief from judgment, in the federal court action. On 4 August 2011, *nunc pro tunc* to 1 March 2011, the District Court entered an order allowing Plaintiff sixty days within which to reassert the dismissed state law claims in the General Court of Justice.

Defendant noted an appeal from the District Court's order to the United States Court of Appeals for the Fourth Circuit on 8 August 2011. On 18 October 2012, the Fourth Circuit vacated the District Court's order. *Glynne v. WilMed HealthCare*, 699 F.3d 380 (2013). On 22 October 2012, Plaintiff filed a motion requesting the District Court to reconsider its refusal to exercise supplemental jurisdiction over Plaintiff's state law claims. The District Court denied Plaintiff's motion on 26 March 2013.

On 19 August 2013, the trial court conducted a hearing concerning the issues raised by Defendant's dismissal motion. On 4 September 2013, the trial court entered an order granting Defendant's dismissal motion and dismissing with prejudice all of the claims that Plaintiff had asserted against Defendant. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"The standard of review of an order granting a [motion filed pursuant to N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) [] is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (citing *Country Club of Johnston County, Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002), *disc. review dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). On appeal from an order granting or denying a motion filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we review the pleadings *de novo* " 'to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' " *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003)). A complaint is properly subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) when " 'one of the following three conditions is satisfied: (1) the complaint . . . reveals that no law supports the plaintiff's claim; (2) the complaint . . . reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428-29 (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). As a result, "[a] statute of limitations can be the basis for dismissal on a [motion made pursuant to N.C. Gen.

Stat. § 1A-1, Rule 12(b)(6)] if the face of the complaint discloses that plaintiff's claim is so barred." *Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986).

B. Expiration of the Limitations Period

[1] In her first challenge to the trial court's judgment, Plaintiff contends that she filed her complaint in a timely manner and that the trial court erred by reaching a contrary conclusion. According to Plaintiff, the provisions of 28 U.S.C. § 1367(d) operated to suspend the running of the statute of limitations during the pendency of her federal action rather than to extend it by thirty days following the dismissal of her federal action so that her complaint was, in fact, timely filed. Plaintiff is not entitled to relief from the trial court's order on the basis of this argument.

1. Relevant Legal Principles

A plaintiff seeking to recover damages or to obtain other relief for negligent infliction of emotional distress and tortious interference with contract or prospective business relations must assert that claim within three years of the date upon which the underlying injury occurred. *See* N.C. Gen. Stat. § 1-52(5). Similarly, claims for breach of contract and breach of a lease agreement must be asserted within three years of the date of the underlying breach. *See* N.C. Gen. Stat. § 1-52(1). According to 28 U.S.C. § 1367(d), "[t]he period of limitations for any [supplemental state law] claim asserted [in a federal action in accordance] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." As a result of the fact that North Carolina does not provide for a longer tolling period than the thirty day interval specified in 28 U.S.C. § 1367(d), *Harter v. Vernon*, 139 N.C. App. 85, 94, 532 S.E.2d 836, 842, *disc. review denied*, 353 N.C. 263, 546 S.E.2d 97 (2000), *cert. denied*, 532 U.S. 1022, 121 S. Ct. 1962, 149 L. Ed. 2d 757 (2001), this Court has interpreted 28 U.S.C. § 1367(d) to provide that, in the event that the statute of limitations applicable to a plaintiff's state law claim expires while a federal action in which that claim has been asserted is pending, the plaintiff has thirty days following the dismissal of the federal action to reassert his or her state law claims in the General Court of Justice. *Harter*, 139 N.C. App. at 91, 532 S.E.2d at 840; *Huang v. Ziko*, 132 N.C. App. 358, 362, 511 S.E.2d 305, 308 (1999).

2. Application of 28 U.S.C. § 1367(d)

As we have already noted, Plaintiff's negligent infliction of emotional distress, tortious interference with contract, tortious interference

with prospective economic relations, breach of contract, and breach of a lease agreement claims are subject to three year statutes of limitations. Since Plaintiff's claims accrued no later than her resignation from Defendant's medical staff on 15 November 2007, she would, ordinarily, have been required to assert those claims against Defendant by no later than 15 November 2010. At that time, the action that she had filed against Defendant in federal court was still pending. According to 28 U.S.C. § 1367(d), the statute of limitations applicable to Plaintiff's state law claims was tolled as long as the federal action remained pending. However, Plaintiff's federal action was involuntarily dismissed without prejudice on 1 March 2011. According to 28 U.S.C. § 1367(d) as interpreted in *Huang*, 132 N.C. App. at 362, 511 S.E.2d at 308 (holding that the state law claims for breach of contract and infliction of emotional distress that the plaintiff had asserted were time-barred given that the plaintiff had failed to reassert those claims in the General Court of Justice within thirty days after the dismissal of the plaintiff's federal action), and *Harter*, 139 N.C. App. at 91, 532 S.E.2d at 840 (holding that, since the statute of limitations applicable to the plaintiff's state law claims had expired while the plaintiff's federal action was pending, the plaintiff's state law claims were time-barred since she reasserted them in the General Court of Justice more than thirty days following the dismissal of her federal action), Plaintiff had 30 days from the date upon which the federal action was dismissed to file her supplemental state law claims in the General Court of Justice. In light of that fact, Plaintiff was entitled to reassert her state law claims in the General Court of Justice on or before 31 March 2011. However, the complaint in this case was not filed until 7 April 2011. As a result, given the absence of a valid District Court order allowing Plaintiff to file her complaint in the General Court of Justice more than thirty days after the dismissal of her federal action,[1] the trial court correctly concluded that Plaintiff's complaint was subject to dismissal on statute of limitations grounds.

In seeking to persuade us to reach a different result, Plaintiff contends that the word "tolling" as used in 28 U.S.C. § 1367(d) should be understood to involve the suspension of the running of the limitations period rather than the extension of that period by a specified number of days. In support of her interpretation of the relevant statutory language, Plaintiff directs our attention to federal decisions and decisions from other states that use the word "tolling" in what she believes to be

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1. The extent to which the District Court would have had the authority to grant such an extension is in dispute between the parties. However, since no such extension was ever granted, we need not resolve that part of the parties' dispute in this opinion.

the correct sense. *See, e.g.*, *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1, 103 S. Ct. 2611, 2613 n.1, 77 L. Ed. 2d 74, 78 n.1 (1983) (stating that "the word 'tolling' [means] that, during the relevant period, the statute of limitations ceases to run"); *Heard v. Sheahan*, 253 F.3d 316, 317 (7th Cir. 2001) (stating that "[t]olling interrupts the statute of limitations after it has begun to run"); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1195 n.8 (10th Cir. 1998) (stating that "the term 'tolling' means to suspend or stop temporarily") (citations and quotation marks omitted); *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 303, 114 Cal. Rptr. 2d 207, 211 (2001) (stating that "[t]o toll the statute of limitations period means to suspend the period"), *review denied*, 2002 Cal. Lexis 1591 (2002). In addition, Plaintiff argues that the extension approach is clearly inconsistent with Congressional intent given that, under this approach, 28 U.S.C. § 1367(d) would only apply in the event that the statute of limitations applicable to the plaintiff's state law claims had expired during the pendency of the federal action in which those claims had been asserted despite the fact that the relevant statutory language provides that the applicable statute of limitations "shall" be tolled during the pendency of the federal action. *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 2662, 105 L. Ed. 2d. 512, 521 (1989) (stating that the use of the word "shall" means that the statute was intended to be "mandatory in cases where the statute applie[s]"); *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481 (6th Cir. 2013) (stating that "the extension approach fails to give any operative effect to [28 U.S.C.] § 1367(d) in a number of cases in which the state statute of limitations does not expire during the course of federal litigation"). Finally, Plaintiff points to the statutory reference to tolling the "period of limitations" and argues that the presence of that expression, rather than a reference to a tolling of the "expiration of the limitations period," suggests the appropriateness of interpreting 28 U.S.C. § 1367(d) so as to suspend the running of the applicable statute of limitations rather than to extend it. As a result, Plaintiff contends that, rather than simply having thirty days after the dismissal of her federal action within which to file her complaint in this case, she had an amount of time consisting of the difference between the three year period of limitations applicable to the claims that she wished to assert against Defendant and the amount of the applicable limitations period that had not expired as of the date upon which she filed her federal action.

The fundamental problem with Plaintiff's argument is that this Court has already considered and rejected it and our decisions to that effect have not been overturned by or demonstrated to be inconsistent with a decision by either the United States Supreme Court or the Supreme Court of North Carolina. According to well-established North Carolina

law, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In other words, even if "a panel of the Court of Appeals . . . disagree[s] with, or even find[s] error in, an opinion by a prior panel . . . [,] the panel is bound by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004). As a result, given that we, like the trial court, are bound by this Court's decisions in *Harter* and *Huang*, we have no hesitation in concluding that the trial court did not err by dismissing Plaintiff's complaint with prejudice on statute of limitations grounds.

C. Equitable Arguments [2]

1. Excusable Neglect

[2] In her second challenge to the trial court's order, Plaintiff contends that she should be allowed to assert her state law claims in this case on excusable neglect grounds despite the fact that they are time-barred. More specifically, Plaintiff contends that, in view of the fact that she relied on an interpretation of 28 U.S.C. § 1367(d) that had been accepted in many other jurisdictions, the fact that she filed her complaint in this case only slightly beyond the period allowed under the "extension" interpretation of 28 U.S.C. § 1367(d), and the fact that there is a "total lack of prejudice to" Defendant, she should be allowed to litigate the state law claims that she has asserted in this case despite the running of the applicable statute of limitations. We do not find Plaintiff's argument persuasive.[3]

The only potentially applicable legal basis for holding that a trial or appellate court has the authority to extend the applicable statute of limitations for "excusable neglect" is N.C. Gen. Stat. § 1A-1, Rule 6(b), which provides that, "[w]hen by these rules . . . an act is required or allowed to be done at or within a specified time . . . [, u]pon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." As

2. In its brief, Defendant contends that Plaintiff failed to properly preserve her equitable challenges to the trial court's order for purposes of appellate review. However, we need not resolve this issue given our determination that none of Plaintiff's equitable arguments have merit.

3. Plaintiff appears to have abandoned this "excusable neglect" argument in her reply brief. However, given that the extent to which she has abandoned this claim is not entirely clear to us, we have elected to address and resolve it on the merits.

the Supreme Court has stated, N.C. Gen. Stat. § 1A-1, Rule 6(b) provides "trial courts [with] broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon finding of 'excusable neglect.' " *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1998). Any argument that Plaintiff may seek to make pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b), necessarily fails, however.

As an initial matter, the only time periods that may be extended based upon the authority available pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b), are those established by the North Carolina Rules of Civil Procedure. *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 108, 493 S.E.2d 797, 801 (1997) (stating that "our courts have consistently held that a trial court's authority to extend the time specified for doing a particular act [pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b)] is limited to the computation of [those] time period[s] prescribed by the Rules of Civil Procedure") (quotations and citations omitted), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998). As should be obvious, the statutes of limitation at issue here do not appear in the North Carolina Rules of Civil Procedure. In addition, the Supreme Court has clearly held that "carelessness or negligence or ignorance of the rules of procedure . . . does not constitute 'excusable neglect.' " *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998) (citing *In re Wright*, 247 F.Supp. 648, 659 (E.D. Mo. 1965)). In light of that principle, we are unable to hold that Plaintiff's lack of familiarity with the interpretation of the tolling provision of 28 U.S.C. § 1367(d) adopted in *Harter* and *Huang* simply cannot be deemed to constitute excusable neglect. As a result, given that the only authority that Plaintiff has cited in support of her contention that trial courts have the authority to overlook the applicable statute of limitations on "excusable neglect" grounds has no application to statutes of limitations and that Plaintiff's failure to recognize and follow the interpretation of 28 U.S.C. § 1367(d) adopted in *Harter* and *Huang* does not constitute "excusable neglect," Plaintiff is not entitled to relief from the trial court's order on the basis of "excusable neglect."

2. Equitable Tolling or Equitable Estoppel

[3] Finally, Plaintiff contends that the running of the applicable statutes of limitation should be deemed to have been tolled on equitable tolling or equitable estoppel[4] grounds. In support of this contention, Plaintiff

4. In her brief, Plaintiff relies on both equitable estoppel and equitable tolling considerations. Although the two terms have different dictionary definitions, *Black's Law*

contends that Defendant should be equitably estopped from asserting that the state law claims that she sought to assert against Defendant in this case were time-barred on the grounds that, prior to the filing of her complaint in this case, Defendant had intimated to Plaintiff that he intended to depose Plaintiff again. Once again, we conclude that Plaintiff's argument lacks merit.[5]

"Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations." *Stainback*, 320 N.C. at 341, 357 S.E.2d at 692. "Equitable estoppel arises when a party has been induced by another's acts to believe that certain facts exist, and that party rightfully relies and acts on that belief to his [or her] detriment." *Ussery v. Branch Banking and Trust Co.*, __ N.C. App. __, __, 743 S.E.2d 650, 654 (2013) (citation and quotation marks omitted). In other words, a defendant "may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App 802, 806, 509 S.E.2d 793, 796 (1998).

According to Plaintiff, Defendant should be equitably estopped from asserting the running of the applicable statute of limitations against her given that Defendant's counsel stated that he "likely would want to depose Appellant (for a fourth time)" in the event that Plaintiff reasserted her claims in the General Court of Justice following the dismissal of her federal court action. At most, however, this statement simply meant that, in the event that Plaintiff reasserted her claims against Defendant in the General Court of Justice, Defendant would seek to depose Plaintiff again. Unlike the statement at issue in *Ussery*, __ N.C. App. at __, 743 S.E.2d at 656, in which the defendant told the plaintiff to "hold off on instituting any action" on the theory that "everything

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Dictionary 579, 590 (8th ed. 2004), this Court and the Supreme Court have used the two terms interchangeably in the statute of limitations context, *See, e.g.*, *Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692-93, (1987) (discussing "[t]he tolling of the statute" because of "equity" and the "equitable doctrine of estoppel"), so we will treat them as interchangeable in the body of this opinion.

5. In addition to the argument discussed in the text, Plaintiff appears to contend that we should simply refuse to enforce the applicable statutes of limitation and the interpretation of 28 U.S.C. § 1367(d) deemed appropriate in *Harter* and *Huang* because it would be inequitable to preclude Plaintiff from asserting the claims at issue in this case because she filed her complaint approximately one week late. However, Plaintiff has cited no authority in support of her implicit assertion that we have the power to act in this manner and we know of none. *See Aikens v. Ingram*, 524 F. App. 873, 879-82 (4th Cir. 2013) (holding that there is no controlling North Carolina authority upholding the use of any sort of equitable tolling of the applicable statute of limitations in the absence of detrimental reliance).

would be worked out," the statement at issue here would not have had any tendency to induce Plaintiff to refrain from filing her complaint in a timely manner. As a result, the trial court did not err by failing to hold that Defendant was equitably estopped from asserting the statute of limitations in opposition to the claims that Plaintiff sought to assert in this case.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the trial court's judgment have merit. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

GEER, Judge concurring.

I concur fully with the majority opinion -- we are bound by *Harter v. Vernon*, 139 N.C. App. 85, 532 S.E.2d 836, *disc. review denied*, 353 N.C. 263, 546 S.E.2d 97 (2000), *cert. denied*, 532 U.S. 1022, 149 L. Ed. 2d 757, 121 S. Ct. 1962 (2001), and *Huang v. Ziko*, 132 N.C. App. 358, 511 S.E.2d 305 (1999). While the result is especially unfortunate given that plaintiff bears no responsibility for the belated filing and given that the complaint barely missed the 30-day deadline, the law has been clearly established in North Carolina for 15 years.

As the California Supreme Court noted a month ago in *City of Los Angeles v. County of Kern*, 59 Cal. 4th 618, 627, 174 Cal. Rptr. 3d 67, 73, 328 P.3d 56, 61 (2014), "[r]easonable jurists can and do differ over the best understanding of [28 U.S.C. § 1367(d)], one whose text lacks an indisputable plain meaning." Because of the profound split in authority that has developed regarding the proper construction of § 1367(d) and the consequences to parties who misinterpret the statute, it is regrettable that neither the United States Supreme Court nor the North Carolina Supreme Court has seen fit to address this issue. Perhaps the *City of Los Angeles* opinion will prompt the United States Supreme Court to take up the issue and, if not, perhaps our Supreme Court will do so, as urged by Judge Hunter's concurring opinion.

HUNTER, JR., Robert N., Judge, concurring.

I concur with the majority in the result. This panel is bound by this Court's decisions *Harter* and *Huang* and therefore must affirm the

trial court's dismissal of Plaintiff's complaint on statute of limitations grounds. However, I write separately because I agree with Plaintiff that our interpretation of 28 U.S.C. § 1367(d) in *Harter* and *Huang* are in conflict with recent persuasive federal authority and authority from other states interpreting the meaning of "tolling," both as a general matter and as used specifically in 28 U.S.C. § 1367(d). For example, since our decisions in *Harter* and *Huang*, the Sixth Circuit Court of Appeals has addressed this issue directly and held that 28 U.S.C. § 1367(d) suspends the running of the statute of limitations period while the federal court is considering the claim and for thirty days after the claim is dismissed. *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481 (6th Cir. 2013) ("We are persuaded that the suspension approach properly gives effect to both § 1367(d) and the state statute of limitations."). Given the importance of this question and our state's conflict with the only federal circuit court that has considered this issue, I would urge the Supreme Court of North Carolina to review this question and resolve the conflict between this persuasive federal precedent and our state's case law.

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
PARKER'S LANDING PROPERTY OWNERS ASSOCIATION, INC., et al., Defendants

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
SHARON M. TAYLOR, Defendant

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
MARION R. CRANK, JR., and wife JENNIFER R. CRANK, Defendants

BETTY P. LEWIS, Plaintiff
v.
ALLEN TOBY HEDGEPETH, et al., Defendant

MAXINE A. EASTON, Plaintiff
v.
ALLEN TOBY HEDGEPETH, et al., Defendant

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
WAYNE DERRELL CRANK, and wife SANDRA R. CRANK, Defendants

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
PARKER'S LANDING PROPERTY OWNERS ASSOCIATION, INC., Defendants

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
GLADYS P. MIDGETTE, Defendant

ALLEN TOBY HEDGEPETH, et al., Plaintiff
v.
JODY E. MIDGETTE, Defendant

No. COA13-914

Filed 2 September 2014

1. Appeal and Error—notice of appeal—denial of motion for summary judgment—construed to encompass only three of nine cases

Since plaintiff Hedgepeth's notice of appeal was directed only to the denial of his motion for summary judgment, the Court of Appeals construed his notice of appeal to encompass cases 10 CVS 275 and 10 CVS 288, even though Hedgepeth was a defendant and not a plaintiff in each of those cases. Hedgepeth's appeal in the remaining cases were dismissed.

2. Appeal and Error—interlocutory orders and appeals—denial of motion for summary judgment—res judicata—collateral estoppel—substantial right

The denial of plaintiff Hedgepeth's motions for summary judgment that were based upon res judicata or collateral estoppel affected a substantial right and were properly before the Court of Appeals. However, any other matters not arising from that ruling were from an interlocutory order and were not reviewed.

3. Collateral Estoppel and Res Judicata—existence and location of easements—res judicata inapplicable with an exception

Although plaintiff Hedgepeth contended that Parker's Landing Property Owners' Association, Inc. was estopped by a federal court order from relitigating the existence and location of the 25-foot and 10-foot easements found by the federal court, with the exception of the 25-foot easement where it crossed the lot owned by POA, res judicata was inapplicable to these claims.

4. Parties—easements—owners of properties required to be added—federal judgment

When the focus of a federal proceeding shifted to the 25-foot and 10-foot easements, the owners of the properties over which these easements ran were required to be added as parties before they could be bound by the federal judgment.

5. Appeal and Error—interlocutory orders and appeals—additional arguments dismissed

Additional arguments that addressed the substance of the case before the trial court were dismissed because they were from an interlocutory order.

Appeal by plaintiff Hedgepeth from order entered 19 December 2012 by Judge Marvin K. Blount, III in Currituck County Superior Court. Heard in the Court of Appeals 22 January 2014.

Vandeventer Black LLP, by Norman W. Shearin and Ashley P. Holmes, for plaintiff-appellant Allen Toby Hedgepeth.

Thompson & Pureza, P.A., by C. Everett Thompson, II, and David R. Pureza, for defendant-appellees Parker's Landing Property Owners Association, Inc., Forrest E. Midgette, Jody E. Midgette, and Sunny's Partnership.

Ward and Smith, P.A., by Eric J. Remington, for defendant-appellee Betty P. Lewis.

Gregory E. Wills, P.C., by Gregory E. Wills, for defendant-appellee Sandra K. Parker.

Brumsey & Brumsey, PLLC, by William Brumsey, IV, for defendant-appellees Sharon M. Taylor, Marion R. Crank, Jr., Jennifer R. Crank, Wayne Derrell Crank, and Sandra R. Crank.

Dan L. Merrell and Glenn R. Weiser, for defendant-appellees Peter F. LoFaso and Kelly M. LoFaso.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for defendant-appellee Maxine A. Easton.

STEELMAN, Judge.

The Parker's Landing Property Owners' Association, Inc. (POA) is bound by the ruling in a prior federal court order under the principle of *res judicata* as to the 25-foot easement that crosses a lot owned by POA. We reverse the ruling of the trial court on this specific issue. As to the other claims against POA, the principles of *res judicata* are not applicable, and we affirm the ruling of the trial court denying the motions of Allen Toby Hedgepeth (Hedgepeth) for summary judgment. The federal court order does not constitute *res judicata* or collateral estoppel with respect to the claims against individual subdivision lot owners, and we affirm the ruling of the trial court denying Hedgepeth's motions for summary judgment. The appeals of issues not based upon *res judicata* or collateral estoppel are dismissed. Any appeals not based upon the denial of Hedgepeth's motions for summary judgment in cases 09 CVS 338, 10 CVS 275, or 10 CVS 288 are also dismissed.

I. Factual and Procedural Background

The lands owned by the parties to the multiple lawsuits at issue in this appeal lie on a peninsula located in Currituck County and bounded on the east by Currituck Sound, and on the west by the North River. The peninsula runs in a generally north-south direction, and is bisected by U.S. Highway 158, which also runs in a generally north-south direction. Hedgepeth, as Trustee under the Allen Toby Hedgepeth Declaration of Trust dated 30 May 2011, owns a tract of land bounded on the east by Currituck Sound, and on the south and west by Parker's Landing

Subdivision, as shown on an amended plat filed in Plat Cabinet E, pages 116 and 117, in the Currituck County Registry. (See Exhibit B attached to this opinion.) This subdivision lies to the west and south of the Hedgepeth property, and to the east of U.S. Highway 158. The final plat states that all streets in the subdivision are private and maintained by POA.[1] The lots as shown on the amended plat run to the edge of a 50-foot road right-of-way.

Hedgepeth purchased the property at a foreclosure sale without procuring a title examination. He sought to develop the property, but was unable to do so without a 50-foot right-of-way leading from his property to U.S. Highway 158. These cases are the second round of litigation brought by Hedgepeth seeking to procure the necessary 50-foot right-of-way to U.S. Highway 158.

The first action was filed in 2007 in the United States District Court for the Eastern District of North Carolina, styled as *Allen Toby Hedgepeth, as Trustee under the Allen Toby Hedgepeth Declaration of Trust, dated 30 May 2001, plaintiff v. Parker's Landing Property Owners' Association, Inc., defendant*, case number 2:07-CV-55-F3. On 5 June 2009, Judge Fox entered an order in that case. That order characterized the case as follows:

> This is a purely state-law-based action in which the plaintiff, Allen Toby Hedgepeth, Trustee under the Allen Toby Hedgepeth Declaration of Trust ("Hedgepeth"), seeks a declaratory judgment that he has a right of ingress and egress to his property by virtue of an easement across the defendant subdivision along a private road belonging to the defendant. Hedgepeth offers several theories under which his claim of an easement may be declared.

The order of the federal court held that Hedgepeth's theories of express easement, easement by necessity, and easement by equitable estoppel were all without merit. The substantive ruling of the federal court was as follows:

> Regardless of the angle from which this case is viewed, or with which party a shifting-burdens inquiry begins, Hedgepeth, who ultimately must prove he is entitled to judgment as a matter of law, unequivocally has demonstrated

1. The final plat was recorded in Plat Cabinet D, pages 99 and 100, of the Currituck County Registry on 22 June 1989, prior to the recordation of the amended plat, which was recorded on 30 August 1993 and is attached to this opinion as Exhibit B.

> that he cannot do so insofar as he seeks declaration of an easement for use of Parker's Landing Drive to subdivide and develop the Hedgepeth tract.
>
> However, the court finds that no genuine issue of material fact exists, the resolution of which could result in Parker's Landing Drive being subject to an easement benefitting the Hedgepeth Tract as depicted on the Smith Heirs Plat, Map Book 2A, Page 119, Currituck Registry. Therefore, Hedgepeth's Motion for Summary Judgment [DE-21] is DENIED.
>
> However, the court concludes that the record demonstrates, and the defendant does not dispute, that an implied easement exists such that he has reasonable access to his property over the 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolia [sic] Smith, Plat Book 2A, Page 119, Currituck County Registry. Therefore, it hereby is DECLARED that the Parker's Landing tract, as shown on the August 30, 1993, Amended Final Plat, *see* DE-21, Exhibit C, is subject to a 10-foot easement and a 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolla Smith, Plat Book 2A, Page 119, Currituck County Registry, the scope of which may not exceed that necessary to the farming or cultivation of the Hedgepeth tract, consistent with the use to which those paths were put when the common title to the two tracts was severed in 1894.

On 14 September 2009, Hedgepeth appealed Judge Fox's decision to the United States Court of Appeals for the Fourth Circuit. On 2 July 2010, the Fourth Circuit issued its opinion in that case, affirming Judge Fox's order. *Hedgepeth v. Parker's Landing Property Owners Ass'n*, 388 Fed.Appx. 242 (4th Cir. 2010) (unpublished).[2] Applying North Carolina law, the Fourth Circuit held that "the Final plat does not clearly show the intention to give an easement." *Id.* at 246 (citations and quotations omitted). Further, the Fourth Circuit held that Hedgepeth could present no evidence to support his argument that POA was precluded by quasi-estoppel from denying the existence of an easement over Parker's

2. This opinion was not selected for publication in the Federal Reporter. We note that while the record contains Hedgepeth's notice of appeal, it fails to include or reference the decision of the Fourth Circuit Court of Appeals in that matter.

Landing Drive. *Id.* at 247. We also agree with the Fourth Circuit that Hedgepeth's "arguments lack some clarity[.]" *Id.* at 245.

Neither of these easements runs along any of the Parker's Landing subdivision streets. However, the 10-foot easement does cross Parker's Landing Drive, the principal street in the subdivision.

On 18 June 2009, Hedgepeth filed the complaint in case 09 CVS 338, Superior Court of Currituck County, against POA and Gladys P. Midgette (Midgette), an individual lot owner in the Parker's Landing Subdivision. On 10 July 2009, Hedgepeth filed an amended complaint naming POA, Midgette, Pamela J. Bell, Forrest E. Midgette and wife Cynthia S. Midgette, Betty P. Lewis, Maxine A. Easton, Carl J. Kreigline and wife Barbara Lento Kreigline, Edward C. Konrad, Jr., and wife Nancy K. Konrad, Dale L. Kreigline and wife Marlena M. Kreigline, Robert W. Donoghue and wife Patricia A. Donoghue, Sandra P. Brinkley, and Sunny's Partnership as defendants. The amended complaint alleged that a portion of Parker's Landing Drive overlaps with the south boundary of the Hedgepeth property, and that the true boundary lines are set forth in a deed recorded in Deed Book 71 at page 449 of the Currituck County Registry. The complaint also referenced the two easements discussed in the federal court order as shown in Map Book 2A, at page 119 of the Currituck County Registry. (See Exhibit A attached to this opinion.) Hedgepeth alleged that Parker's Landing Drive crosses one of the easements (the 10-foot easement) and "burdens and unreasonably interferes with Hedgepeth's said rights of use." The amended complaint sought a declaration from the trial court of the rights of the parties, to quiet title to Hedgepeth's property, and to enjoin defendants from interfering with Hedgepeth's right of access.

On 11 May 2010, Hedgepeth voluntarily dismissed his state law claims against Lewis and Easton, without prejudice. On 9 December 2010, Hedgepeth voluntarily dismissed his claim for boundary overlap, without prejudice. Also on 9 December 2010, Hedgepeth voluntarily dismissed the claims against Midgette, without prejudice.

On 10 May 2011, Hedgepeth filed complaints against Sharon M. Taylor (case 10 CVS 223), and Marian R. Crank, Jr., and wife Jennifer R. Crank (case 10 CVS 225), seeking a declaration of rights to the easements and for an injunction to prohibit defendants from interfering with his access.

On 5 June 2010, Betty Lewis filed a complaint against Hedgepeth (case 10 CVS 275), seeking an injunction prohibiting him from clearing

a roadway across her property, and from trespassing on her property, and for a declaration that any easement had been terminated. On 16 May 2011, Hedgepeth filed an answer, denying the allegations of the complaint, and asserting numerous defenses. No counterclaims were filed.

On 11 June 2010, Maxine Easton filed a complaint against Hedgepeth (case 10 CVS 288), seeking the same relief sought by Lewis in her complaint. On 16 May 2011, Hedgepeth filed an answer and counterclaim to Easton's complaint, asserting that the Easton property overlapped the western boundary of the Hedgepeth property and requesting that the court determine the boundary between the two tracts.

On 23 July 2010, Hedgepeth filed a complaint against Wayne Derrell Crank and wife Sandra R. Crank (case 10 CVS 362), seeking the same relief as in case 10 CVS 225. On 2 February 2011, Hedgepeth filed a second complaint against POA (case 11 CVS 49), seeking the same relief as in the amended complaint in case 09 CVS 338, including a claim seeking resolution of a boundary dispute. On 2 February 2011, Hedgepeth also filed a complaint against Gladys P. Midgette (11 CVS 54), seeking the same relief as in case 11 CVS 49, as to the 10-foot easement, and seeking exclusive rights of access. On 7 February 2011, Hedgepeth filed a complaint against Jody E. Midgette (case 11 CVS 62), seeking the same relief as in case 10 CVS 223, and also seeking a declaration of the location of the southern boundary of the Hedgepeth property.

On 14 June 2011, Hedgepeth filed a motion for leave to amend his complaint and a motion to certify a class, consisting of POA and the individual subdivision lot owners, in case 11 CVS 49. On 17 December 2012, a hearing was held on Hedgepeth's motion to certify a class. On 17 January 2013, the trial court entered an order denying Hedgepeth's motion to certify a class or to declare that POA represented its members. Hedgepeth appealed from the denial of this motion. That appeal is the case of *Hedgepeth v. Parker's Landing* (COA 13-809).

On 18 September 2012, Hedgepeth filed a motion in case 10 CVS 288 pursuant to Rule 19(a) of the North Carolina Rules of Civil Procedure to join Ronald E. Evans and wife Rebecca D. Evans, Sunny's Partnership, POA, Robert W. Donoghue and wife Patricia A. Donoghue, Sandra K. Parker, Betty P. Lewis and Midgette Development Enterprises, Inc., as necessary parties to case 10 CVS 288. On 18 September 2012, Hedgepeth also filed a motion in case 10 CVS 275 pursuant to Rule 19(a) of the North Carolina Rules of Civil Procedure to join the Evanses, Sunny's Partnership, POA, the Donoghues, Sandra K. Parker, Maxine Easton and Midgette Development Enterprises, Inc., as necessary parties.

On 21 September 2012, Hedgepeth filed a motion for summary judgment in cases 09 CVS 338, 10 CVS 275, and 10 CVS 288. On 4 December 2012, Hedgepeth filed an amendment to the complaints in cases 10 CVS 223, 225 and 362, seeking to add Peter F. LoFaso and wife Kelly M. LoFaso as defendants.

On 19 December 2012, Judge Blount entered an order in all nine cases. This order contained the following rulings pertinent to this appeal: the motions to consolidate the cases for trial and other purposes were granted; by virtue of the consolidation of cases, Sandra Parker's motion to dismiss for failure to join necessary parties was rendered moot; Hedgepeth's motions to join necessary parties were denied; Hedgepeth's motions for summary judgment were also denied; defendants' motions to dismiss for failure to join necessary parties in cases 10 CVS 223, 225 and 362 were denied, and Hedgepeth was given thirty days to amend his complaints in those cases to include Peter and Kelly LoFaso.

Hedgepeth appeals.

II. Issues Properly Before This Court on Appeal

[1] As a preliminary matter, we must sort through the quagmire that the parties have thrown before this Court and determine what is properly before us on appeal. The chaos in this case is primarily due to Hedgepeth filing an initial complaint (09 CVS 338), then dismissing certain parties and claims, then having some of the dismissed parties file suit against Hedgepeth (10 CVS 275, 10 CVS 288), and then Hedgepeth refiling a previously dismissed claim against POA in a later suit (11 CVS 49). In addition, Hedgepeth has filed multiple motions to amend his pleadings, to add parties, and to certify a class. Finally, it appears that Hedgepeth's theory of the case has been constantly shifting over the three years that these cases have been before the trial court.

Hedgepeth only filed motions for summary judgment in three cases: *Hedgepeth v. POA*, case 09 CVS 338; *Lewis v. Hedgepeth*, case 10 CVS 275; and *Easton v. Hedgepeth*, case 10 CVS 288. In each of these cases, the summary judgment motion identifies the movant as "the Plaintiff, Allen Toby Hedgepeth as Trustee. . .", even though Hedgepeth is the defendant, and not the plaintiff, in both the *Lewis* and *Easton* cases. Even though a motion for summary judgment was filed in only three of the nine cases before the trial court, the order of the court denied Hedgepeth's motion for summary judgment in those cases, and then added:

> Plaintiff's Motions for Summary Judgment in all other cases listed in the caption of this case also are DENIED

> to the extent they are based on the doctrines of res judicata or collateral estoppel, and any individual or entity that was not a named party in Case No. 2:07-CV-55-F3, which was filed in the United States District Court for the Eastern District of North Carolina, is not bound by the Order entered by the Honorable James C. Fox on June 5, 2009, in that case;

Finally, Hedgepeth's notice of appeal in these cases states that:

> Plaintiff Allen Toby Hedgepeth, as Trustee under the Allen Toby Hedgepeth Declaration of Trust, Dated May 30, 2011, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, hereby gives Notice of Appeal to the North Carolina Court of Appeals from the Order denying Plaintiff's Motion for Summary Judgment signed by the Honorable Marvin K. Blount, III on 17 December 2012, filed on 19 December 2012, and served on 25 January 2013 and attached hereto.

The notice of appeal is directed to the denial of "Plaintiff's Motion for Summary Judgment[,]" even though in two of the three cases in which a motion for summary judgment was filed, Hedgepeth was the defendant, and not the plaintiff.

After culling through the 534 pages of the record in these cases, 248 pages of Rule 9(d) supplement, and the voluminous Rule 9(b)(5) and Rule 11(c) supplements to the record, we are able to find only the three summary judgment motions filed by Hedgepeth in cases 09 CVS 338, 10 CVS 275, and 10 CVS 288. Since Hedgepeth's notice of appeal is directed only to the denial of Hedgepeth's motion for summary judgment, we limit our review to those three cases. In our discretion, we construe Hedgepeth's notice of appeal to encompass cases 10 CVS 275 and 10 CVS 288, even though Hedgepeth was a defendant and not a plaintiff in each of those cases.

As to any appeal by Hedgepeth in the remaining six cases captioned in this appeal, they are dismissed. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) (holding that "a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal").

III. Substantial Right

[2] The denial of summary judgment is not a final judgment, but rather is interlocutory in nature. We do not review interlocutory orders as a matter of course. If, however, the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review[,] we may review the appeal.... The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. Whether a substantial right is affected is determined on a case-by-case basis.

Barfield v. N.C. Dep't of Crime Control & Pub. Safety, 202 N.C. App. 114, 117, 688 S.E.2d 467, 469 (2010) (citations and quotations omitted).

> Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.

Bockweg v. Anderson, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citations omitted).

> Like *res judicata*, collateral estoppel (issue preclusion) is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. Under collateral estoppel, parties are precluded from retrying fully litigated issues that were decided in any prior determination, even where the claims asserted are not the same. The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to

> repetitious and unnecessary lawsuits. Accordingly, we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that defendants' appeal, although interlocutory, is properly before us.

McCallum v. N.C. Coop. Extension Serv., 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (citations and quotations omitted).

Because Hedgepeth's motions for summary judgment were based upon *res judicata* or collateral estoppel, we hold that, on these facts, the denial of these motions affected a substantial right, and that they are properly before us on appeal. Any other matters not arising from that ruling, however, are interlocutory, and will not be reviewed by this Court.

IV. Standard of Review

> "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citation omitted). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14, 474 S.E.2d 127, 128 (1996) (quotation omitted). "The doctrine prevents the relitigation of all matters ... that were or should have been adjudicated in the prior action." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (quotation omitted).
>
> Under the doctrine of collateral estoppel, or issue preclusion, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128. A party asserting collateral estoppel is required to show that "the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral

> estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties." *Id.* at 414, 474 S.E.2d at 128–29.

Williams v. Peabody, ___ N.C. App. ___, ___, 719 S.E.2d 88, 92-93 (2011).

> [A]n issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined. A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical[;] [i]f they are not identical, then the doctrine of collateral estoppel does not apply.

Id. at ___, 719 S.E.2d at 93 (citations and quotations omitted).

> The plea of *res adjudicata* [sic] applies, ... not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

Id. at ___, 719 S.E.2d at 94. (quoting *Edwards v. Edwards*, 118 N.C. App. 464, 472, 456 S.E.2d 126, 131 (1995)).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

V. *Res Judicata* and Collateral Estoppel

Hedgepeth contends that POA, Lewis and Easton are bound by the federal court order under the doctrines of *res judicata* and collateral estoppel as to the 25-foot easement and the 10-foot easement found by the federal court.

We first note that, pursuant to *Williams v. Peabody*, our review for *res judicata* and collateral estoppel is based upon the federal court order, and upon the pleadings and complaint in that action. In his complaint, Hedgepeth asserted that he was entitled to the use of the

subdivision roads in Parker's Landing Subdivision to access his property. Because the federal court order adjudicated more legal theories than were asserted in Hedgepeth's complaint, we look primarily to that order.

The federal court order stated that Hedgepeth's complaint in that court "[sought] judicial declaration of an easement benefitting the Hedgepeth Tract across the Parker's Landing tract via Parker's Landing Drive." As a preliminary matter, we hold that the sole issue actually litigated before the United States District Court for the Eastern District of North Carolina was the existence and location of any easements that crossed the Parker's Landing Subdivision property, providing access to a public road for the Hedgepeth Tract.

A. The Property Owners Association

[3] In his first argument, Hedgepeth contends that POA is estopped by the federal court order to relitigate the existence and location of the 25-foot and 10-foot easements found by the federal court. We agree in part and disagree in part.

It is clear from the federal court order that Hedgepeth was denied the right to use Parker's Landing Drive to access the Hedgepeth tract under a number of different theories. It is also abundantly clear that the federal court held that Hedgepeth had a very limited right to use two easements shown on a plat recorded in Plat Book 2A, page 119 of the Currituck County Registry. The federal court order recited that POA did not dispute these easements before Judge Fox. However, neither of these easements runs along or with the principal subdivision street, Parker's Landing Drive. The 25-foot easement (Doris Lane) runs along the northern boundary of the Parker's Landing Subdivision, to the westernmost corner of the Hedgepeth tract.[3] The 10-foot easement runs in a southerly direction from the southernmost corner of the Hedgepeth tract across the eastern portion of the Parker's Landing Subdivision tract.

Hedgepeth's amended complaint against POA in case 09 CVS 338, filed 18 June 2009, requested

> the Court to declare the rights of the parties under the Plats, Declaration, deeds and the Order and Judgment,

3. It is not clear from the record whether the actual roadway runs over the Parker's Landing Subdivision property or upon the adjoining tract to the north. The Capitolla Smith plat shows it to be entirely on what is now the Parker's Landing Subdivision property. (See Exhibit A attached to this opinion.)

> to quiet title to the Parker Tract and his rights of access in and to the Parker Tract over the Historical Easements, and enjoin the Defendants from interfering with those said rights, and for such other and further relief as the Court may deem appropriate.

Similarly, in his complaint in case 11 CVS 49, filed 2 February 2011, Hedgepeth requested

> the Court to declare the rights of the parties under the Amended Plat, Declaration, and the deeds, to quiet title to the Parker Tract, determine the true boundary between the Parker Tract and the lands of the POA, and enjoin the POA from interfering with those said rights, and for such other and further relief as the Court may deem appropriate.[4]

With respect to POA, in cases 09 CVS 338 and 11 CVS 49, Hedgepeth has asserted the following claims: (1) for a determination of the boundary between the Parker's Landing Subdivision tract and the Hedgepeth tract; (2) to enforce Hedgepeth's right of access in and to the Hedgepeth tract; and (3) to enjoin POA from interfering with his right of access. Neither of these two complaints expressly refer to the existence or the location of the two easements that were ruled upon by the federal court. As a preliminary matter, we hold that only those portions of Hedgepeth's complaint concerning the two easements found by the federal court could possibly be the subject of *res judicata* based upon the federal court order.

Neither the 25-foot easement nor the 10-foot easement runs along a common boundary of the Parker's Landing Subdivision tract and the Hedgepeth tract. Therefore, the easements adjudicated by the federal court cannot be determinative of Hedgepeth's boundary claims in 11 CVS 49.[5] In fact, it is clear from the complaint in 11 CVS 49 that the boundary dispute concerns a portion of Parker's Landing Drive in the eastern portion of the subdivision where it abuts the southern boundary of the Hedgepeth tract. "For *res judicata* to apply, a party must show that . . . the same cause of action is involved[.]" *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14, 474 S.E.2d 127, 128 (1996) (quotation

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4. In these complaints, Hedgepeth refers to the Hedgepeth tract as the "Parker Tract." To avoid confusion, this opinion consistently refers to this tract, containing approximately 21.765 acres, as the Hedgepeth tract.

5. Hedgepeth's boundary claim in 09 CVS 338 had previously been voluntarily dismissed.

omitted). Since the federal court order expressly held that Hedgepeth had no right of access over Parker's Landing Drive, it cannot control the boundary dispute based upon *res judicata* as to Parker's Landing Drive.

Next, as to the second claim by Hedgepeth to enforce his right of access, we again note that the extent of the federal court order was to declare that Hedgepeth had limited rights of access over the 25-foot easement and the 10-foot easement. The amended plat of Parker's Landing Subdivision filed in Plat Cabinet E, pages 116 and 117 (see Exhibit B attached to this opinion), shows that POA was the owner of a lot along the northern boundary of the Parker's Landing Subdivision tract. The 25-foot easement declared in the federal court order does run across the northern boundary of that lot. Because the parties are the same, the issue was the same, and Judge Fox's order constituted a final ruling on the merits, the legal theory of *res judicata* is implicated. Under *res judicata*, as discussed above, Hedgepeth has a 25-foot right of way over the property of POA as shown on the above-referenced plat.

Finally, as to the third claim by Hedgepeth to enjoin POA from interfering with his rights of access, this deals solely with the fact that Parker's Landing Drive crosses the 10-foot easement just below the southern corner of the Hedgepeth tract. Paragraph 35 of Hedgepeth's amended complaint states:

> Parker's Landing Drive crosses one of the Historical Easements. Unfettered access on Parker's Landing Drive across one of the Historical Easements has been granted to every lot owner in Parker's Landing. As a result, Parker's Landing Drive as shown on the Amended Plat crosses, burdens and unreasonably interferes with Hedgepeth's said rights of access.

Hedgepeth's assertion that the lot owners' use of Parker's Landing Drive "burdens and unreasonably interferes" with his access to the 10-foot easement is effectively an assertion that the federal court ruling gives him exclusive rights to the 10-foot easement, and that the lot owners in Parker's Landing cannot use Parker's Landing Drive to cross it. This is an absurd claim. The federal court order did not grant any sort of exclusive rights to Hedgepeth to use the 10-foot easement. In fact, the right to use the easement was sharply restricted as follows:

> . . . the scope of which may not exceed that necessary to the farming or cultivation of the Hedgepeth tract, consistent with the use to which those paths were put when the common title to the two tracts was severed in 1894.

We further note that the owner of the servient tract of land (in this case, POA) may use the land how he pleases, provided that he does not interfere with the dominant tract's use of the easement. See Webster's Real Estate Law in North Carolina, § 15.23 (Patrick K. Hetrick and James B. McLaughlin eds., 6th ed. 2013). Since the ruling of the federal court did not deal with the issue of exclusivity, it does not constitute *res judicata* as to the rights of Hedgepeth to use the 10-foot easement to the exclusion of those having rights to use Parker's Landing Drive.

Thus, with the exception of the 25-foot easement where it crosses the lot owned by POA, *res judicata* is not applicable to the claims brought by Hedgepeth against POA.

This argument is without merit.

B. The Individual Lot Owners

[4] In his remaining arguments, Hedgepeth contends that the various individual lot owners[6] whose property is impacted by the 25-foot easement or the 10-foot easement declared in the federal court order are estopped from relitigating the existence of the historical easements. We disagree.

The federal court action was between only two parties, Hedgepeth and POA. Hedgepeth contends nonetheless that the interests of the individual lot owners were adequately represented by POA before the federal court. As stated above, for the doctrines of *res judicata* and collateral estoppel to be applicable, parties must either have been parties to the original suit, or have been in privity with those parties. *Williams*, ___ N.C. App. at ___, 719 S.E.2d at 92-93.

Hedgepeth contends that the individual lot owners were in privity with POA, arguing that POA represented their interests. Hedgepeth claims that individual lot owners were notified of the litigation, and that they had the opportunity to participate; Hedgepeth further contends that they were not only represented by POA, but that they actively participated in the litigation.

We are not persuaded by Hedgepeth's arguments. We have previously held that:

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6. We note that two parcels that abut the 25-foot right of way from the south are not part of the Parker's Landing Subdivision. See Exhibit B attached to this opinion. The owner of these tracts, Sandra P. Brinkley (referred to by Hedgepeth as Sandra Parker), is one of the defendants named in Hedgepeth's amended complaint in case 09 CVS 338.

> We believe that a dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil, and the record owners of lots in the subdivision, who have user rights in the easement. Those owners of interests in the easement have a material interest in the subject matter of the controversy, and their interest will be directly affected by the court's decision. Furthermore, proof of abandonment by one lot owner, or proof of possession adverse to one lot owner for the prescribed statutory period, does not extinguish an easement dedicated per plat and expressly granted to owners of lots in a subdivision.

Rice v. Randolph, 96 N.C. App. 112, 114, 384 S.E.2d 295, 297 (1989) (citations omitted).

Pursuant to Rule 19(a)(1) of the Federal Rules of Civil Procedure:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

F.R. Civ. P. 19(a)(1). "A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Rice*, 96 N.C. App. at 113, 384 S.E.2d at 297.

It is clear that when real estate claims are adjudicated, in order for the owners of property affected by the easement to be bound by a judicial decision, they must be made parties to the litigation. In the federal court action, none of the individual lot owners were made a party to the

proceeding, presumably because Hedgepeth's objective was to affirm the right to use the 50-foot right of way of Parker's Landing Drive. When the focus of the federal proceeding shifted to the 25-foot and 10-foot easements, the owners of the properties over which these easements run were required to be added as parties before they could be bound by the federal judgment.

This argument is without merit.

VI. Other Arguments

[5] Hedgepeth raises other arguments on appeal. However, those arguments address the substance of the case before the trial court, and are interlocutory. As we have held that the trial court did not err in denying Hedgepeth's motion for summary judgment, these issues are not properly before us on appeal.

VII. Conclusion

We hold that the federal court order is *res judicata* with respect to the portion of the 25-foot easement that crosses the lot owned by POA on the northern boundary of the subdivision property. To this extent, the order of the trial court is reversed, and this matter is remanded for entry of an order granting Hedgepeth's motion for summary judgment. With respect to the other claims of Hedgepeth against POA, the federal court order does not constitute *res judicata*, and we affirm the ruling of the trial court. With respect to Hedgepeth's claims against individual lot owners based upon *res judicata* and collateral estoppel in cases 09 CVS 338, 10 CVS 275, and 10 CVS 288, we affirm the ruling of the trial court denying Hedgepeth's motion for summary judgment. We dismiss Hedgepeth's appeal as to any other issues not based upon *res judicata* or collateral estoppel in cases 09 CVS 338, 10 CVS 275, and 10 CVS 288. Any appeals of Hedgepeth not arising from the denial of his motions for summary judgment in cases 09 CVS 338, 10 CVS 275, or 10 CVS 288 are also dismissed.

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART.

Judges STEPHENS and DAVIS concur.

Exhibit A: Capitolla Smith Heirs Map

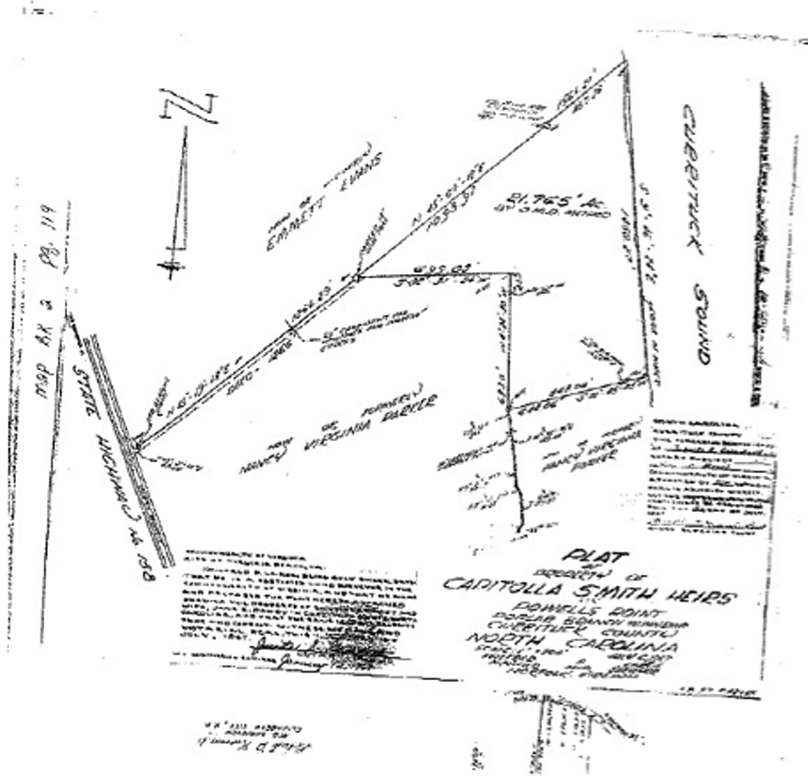
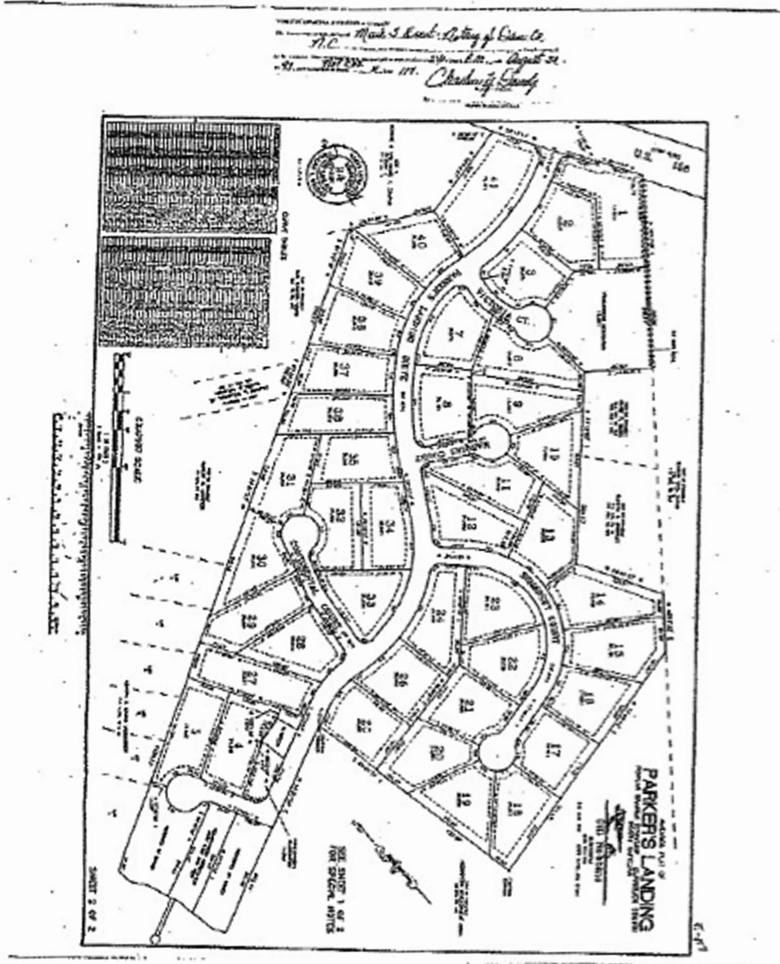


Exhibit B: Amended Plat of Parker's Landing Subdivision



ALLEN TOBY HEDGEPETH AS TRUSTEE UNDER THE ALLEN TOBY HEDGEPETH DECLARATION OF TRUST, DATED MAY 30, 2001, Plaintiff
v.
PARKER'S LANDING PROPERTY OWNERS ASSOCIATION, INC., Defendant

No. COA13-809

Filed 2 September 2014

1. Appeal and Error—interlocutory orders and appeals—denial of class certification—substantial right

Plaintiff's appeal of the trial court's denial of his motion for class certification was properly before the Court of Appeals. Although the order was interlocutory, the denial of class certification affected a substantial right because it determined the action as to the unnamed plaintiffs.

2. Class Actions—class certification—denial not abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion for class certification where the denial of the motion was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

3. Class Actions—class certification—lot owners bound by federal order—holdings incorporated

Plaintiff's argument in a case involving a motion for class certification that individual lot owners were bound by a federal court order issued in a case involving plaintiff was addressed in the companion case of *Hedgepeth v. Parker's Landing* (COA 13-914), and the holdings in that case were incorporated by reference.

Appeal by plaintiff from order entered 17 January 2013 by Judge Marvin K. Blount, III in Currituck County Superior Court. Heard in the Court of Appeals 22 January 2014.

Vandeventer Black LLP, by Norman W. Shearin and Ashley P. Holmes, for plaintiff-appellant.

Thompson & Pureza, P.A., by C. Everett Thompson, II, and David R. Pureza, for defendant-appellee.

Ward and Smith, P.A., by Eric J. Remington, Amicus Curiae, for defendant-appellee Betty P. Lewis.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, Amicus Curiae, for defendant-appellee Maxine A. Easton.

STEELMAN, Judge.

The trial court did not abuse its discretion in denying the motion of Allen Toby Hedgepeth (Hedgepeth) for class certification.

I. Factual and Procedural Background

The facts and procedural background of this case are set forth in the companion case of *Hedgepeth v. Parker's Landing* (COA 13-914).

II. Interlocutory Appeal

[1] "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). "The denial of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000).

In the instant case, we hold that Hedgepeth's appeal of the denial of the motion for class certification is properly before us.

III. Denial of Class Certification

[2] In his first argument, Hedgepeth contends that the trial court erred in denying class certification. We disagree.

A. Standard of Review

"The standard of review for class certification is whether the trial court's decision constitutes an abuse of discretion." *Peverall v. Cty. of Alamance*, 184 N.C. App. 88, 91, 645 S.E.2d 416, 419 (2007). "A trial court may be reversed for abuse of discretion only upon a showing that its

actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

Hedgepeth filed a motion and an amended motion to certify a class of defendants, consisting of the individual lot owners, as represented by the Parker's Landing Property Owners' Association, Inc. (POA). On 17 December 2012, the trial court conducted a hearing on these motions. On 17 January 2013, the trial court denied Hedgepeth's motion to certify a class or, in the alternative, to find that POA represented its members.

In its order denying Hedgepeth's motion, the trial court found that:

> 3. The individual lot owners do not own Parker's Landing Drive, but under the covenants of the subdivision have a right to utilize Parker's Landing Drive.
>
> 4. The Court notes that some lot owners can access their property without utilizing the portion of Parker's Landing Drive claimed by plaintiff, while others could not.
>
> . . .
>
> 6. Based on the evidence before the court, the court cannot find that the named defendant (POA) and the unnamed members each have an interest in either the same issue of law or of fact.
>
> 7. The plaintiff has moved to have the POA serve as the representative of the members and/or the class representative. The POA has informed the court that it does not consent to having it be the defendant class representative or otherwise represent the individual property owners in this case.
>
> 8. The POA is bound by an Order entered on June 5, 2009 by the U.S. District Court for the Eastern District of North Carolina in a case entitled Allen Toby Hedgepeth, as Trustee under the Allen Toby Hedgepeth Declaration of Trust, dated May 30, 2001 v. Parker's Landing Property Owners' Association, Inc. (the "Federal Court Order").
>
> 9. The individual lot owners are not bound by the Federal Court Order and they have the right to assert defenses and raise issues which may no longer be available to the POA.

> 10. The attorney for Betty Lewis, owner of lot #14 and member of the POA, informed the court that Betty Lewis would not consent to having the POA be the class representative for her.
>
> 11. The attorney for Maxine Easton, owner of lot #15 and member of the POA, informed the court that Maxine Easton would not consent to having the POA be the class representative for her.
>
> 12. The court finds that based on the potential conflicts between the POA and the individual lot owners and members of the POA, that the POA would not be an adequate representative of the individual property owners.
>
> 13. Plaintiff alleges that the members of the class would all be property owners in Parker's Landing subdivision. Plaintiff previously has filed actions against at least fourteen (14) individual lot owners. Rather than filing one action and naming all interested parties in that action, plaintiff chose to file separate actions against the POA and each of these lot owners. Plaintiff was able to obtain service on all of the individuals named in previous actions. The court has consolidated all of the pending lawsuits for trial.

Based upon its findings, the trial court concluded that:

> 1. The court concludes that the POA cannot fairly and adequately represent the interest of the all [sic] members of the potential class.
>
> 2. The court concludes that a conflict of interest exists between the POA and the members of the class who are not named parties so that the interest of the unnamed class members cannot be adequately and fairly protected.
>
> 3. The court concludes that the plaintiff has failed to demonstrate substantial difficulty or inconvenience in joining all the members of the requested class. Thus, the plaintiff has failed to show that it would be impracticable to join all the members of the class.
>
> 4. The Court concludes that the plaintiff has failed to meet his burden to certify a class action.

Upon review of the record, we hold that the trial court's denial of Hedgepeth's motion was not "manifestly unsupported by reason" or

"so arbitrary that it could not have been the result of a reasoned decision." We hold that the trial court did not abuse its discretion in denying Hedgepeth's motion to certify a class.

This argument is without merit.

IV. Federal Court Order

[3] In his second argument, Hedgepeth contends that the individual lot owners are bound by the federal court order. As we have addressed this issue in the companion case of *Hedgepeth v. Parker's Landing* (COA 13-914), we need not address this argument here, and incorporate by reference our holdings in that case.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

IN THE MATTER OF JAMES SPENCER

No. COA14-143

Filed 2 September 2014

1. **Appeal and Error—appeal not moot—involuntary commitment—basis for future commitment—collateral legal consequences**

   Respondent's appeal from the trial court's order involuntarily committing him to inpatient mental health treatment for a period not to exceed sixty days was not moot. Even though the sixty-day commitment period had expired, the possibility that respondent's commitment might form a basis for a future commitment, along with other obvious collateral legal consequences, rendered the appeal not moot.

2. **Mental Illness—involuntary commitment—examination by second physician—no written findings—no prejudice**

   The trial court did not err by involuntarily committing respondent to inpatient mental health treatment for a period not to exceed sixty days even though the record did not include written findings that he had been examined by a second physician within twenty-four hours of being admitted to the hospital, in violation of N.C.G.S. § 122C-266. Respondent was not prejudiced by the absence of

a written record from the doctor who testified that he had examined respondent the day after respondent had been admitted to the hospital.

3. Notice—involuntary commitment hearing—inadequate—no prejudice

The trial court did not err by involuntarily committing respondent to inpatient mental health treatment for a period not to exceed sixty days even though notice of the commitment hearing was inadequate under N.C.G.S. § 122C-264. Respondent failed to establish that he was prejudiced by the inadequate notice.

Appeal by respondent from order entered 25 July 2013 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Josephine Tetteh, for the State.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe and Robert A. Leandro, for petitioner-appellee Holly Hill Hospital.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Mary Cook, for respondent.

McCULLOUGH, Judge.

Respondent James Spencer appeals from an order of the trial court, involuntarily committing him to inpatient treatment for a period not to exceed sixty (60) days. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 20 July 2013, Dr. Sharyn Comeau of Wake Med Hospital filed an affidavit and petition for involuntary commitment, providing that respondent James Spencer was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." The affidavit stated that respondent

> has ongoing psychosis and hyper religiosity concerning the mark of the beast and people in authority being satanic in some way. He continues to make decisions that

> compromise his medical care, currently his sodium [is] compromised to the point of needing medical intervention. He has multiple past psychiatric hospitalizations and he has a sister who his his [sic] guardian t in part [sic] of his medically compromising his health due to his lack of judgment and insight. He cannot be safely released into the community at this time.

On the same day, Dr. Comeau also completed an "Examination and Recommendation to Determine Necessity for Involuntary Commitment." Dr. Comeau opined that respondent was mentally ill and dangerous to himself, and recommended inpatient commitment for ten (10) days. On 22 July 2013, respondent was admitted to Holly Hill Hospital.

A hearing was held at the 25 July 2013 session of Wake County District Court. Dr. Muhammed Saeed, a psychiatrist at Holly Hill Hospital, testified that he had examined respondent on 23 July 2013. Dr. Saeed described respondent as "very psychotic, very paranoid, very agitated, not caring for self." Dr. Saeed stated that respondent had multiple medical problems, but that the "most concerning is hyponatremia" which if it is not treated, could be life threatening. Dr. Saeed opined that respondent was mentally ill and suffering from schizophrenia. Respondent displayed extreme paranoid ideation, somatic delusions, and grandiose delusions. Dr. Saeed testified that respondent was unable to care for himself as demonstrated by his inability to restrict his fluid intake and his refusal to take his medication the two previous days. Dr. Saeed testified that he believed respondent was in need of further inpatient treatment at Holly Hill Hospital and recommended a commitment of sixty (60) days.

Respondent testified at the hearing. Respondent agreed that he suffered from schizophrenia but did not think he needed inpatient treatment and should have been discharged from Holly Hill Hospital.

On 25 July 2013, the trial court entered an involuntary commitment order. The trial court found by clear, cogent and convincing evidence that

> THE RESPONDENT CONTESTS COMMITMENT. The respondent acknowledges and recognizes that he suffers from a mental illness, that being schizophrenia. Symptoms include psychotic behavior (somatic delusions and grandiose delusions) and extreme paranoid behavior as well as agitation. However, the respondent does not appreciate the degree of his paranoia, and this has resulted in

> situations wherein he has threatened physical aggression in response to medical treatment.
>
> The respondent suffers from hyponatremia. Low sodium levels can be a life threatening situation. The respondent disagrees with his health care provider's assessment of his sodium levels. The respondent has been told to intake no more than 1 liter of fluid, which is about one quart (or 32 ounces). While the respondent is trying to . . . monitor his fluid intake, he believes that he can consume 56 ounces of fluid (7 eight-ounce cups).
>
> Since his June 21, 2013 initial admission to Holly Hill, the respondent's compliance with medication has been up and down. Most recently, for the past two days he has refused all medication, including medication to treat his mental illness and his hyponatremia. Without medical treatment, the respondent will suffer from ongoing psychotic decompensation. The respondent is not able to appropriately cope with stress, is not following recommendations, and won't cooperate with doctor's advice.
>
> The respondent has poor insight into his paranoia and physical health condition. The respondent's refusal to take his medication or follow his health care provider's instructions regarding fluid intake demonstrate an inability to satisfy his need for medical care. The respondent is unable to take care of himself without a structured environment. He is not currently stable from a mental or physical health perspective. There is a reasonable probability of the respondent's suffering serious physical debilitation within the near future unless adequate treatment is given.

Based on the foregoing reasons, the trial court concluded that respondent was mentally ill and dangerous to himself. Respondent was committed to an inpatient facility for a period not to exceed sixty (60) days.

On 22 August 2013, respondent filed notice of appeal from the 25 July 2013 order.

II. Discussion

On appeal, respondent argues that (A) his involuntary commitment was contrary to law because he was not evaluated by a second physician within 24 hours of admission to the Holly Hill Hospital in violation of

N.C. Gen. Stat. § 122C-266 and that (B) the trial court erred by involuntarily committing respondent where he was not given notice of the commitment proceeding in violation of N.C. Gen. Stat. § 122C-264.

[1] Before addressing the merits of respondent's appeal, we first address the preliminary matter of whether his appeal is moot. Although the sixty (60) day commitment period provided in the 25 July 2013 order has expired, our Supreme Court has held that "[t]he possibility that respondent's commitment in this case might likewise form a basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot." *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977). Therefore, we hold that respondent's appeal is not moot and address the merits of his appeal.

A. Examination by a Physician

[2] Respondent argues that the record does not demonstrate that he was examined by a second physician within twenty-four hours of being admitted to Holly Hill Hospital, in violation of N.C. Gen. Stat. § 122C-266. Respondent admits that while Dr. Saeed testified that he examined respondent on 23 July 2013, there was no written record of the examination demonstrating Dr. Saeed's findings. As such, respondent contends that the 25 July 2013 order should be vacated.

"It is well established that when a trial court acts contrary to a statutory mandate and a [party] is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the party's] failure to object at trial." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citation and quotation marks omitted).

N.C. Gen. Stat. § 122C-266 provides that

> (a) Except as provided in subsections (b) and (e), within 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a physician. This physician shall not be the same physician who completed the certificate or examination under the provisions of G.S. 122C-262[1] or G.S. 122C-263[2]. The examination shall include but is not limited to the assessment specified in G.S. 122C-263(c).

1. N.C. Gen. Stat. § 122C-262 is entitled "Special emergency procedure for individuals needing immediate hospitalization."

2. N.C. Gen. Stat. § 122C-263 is entitled "Duties of law-enforcement officer; first examination by physician or eligible psychologist."

> . . . .
>
> (c) The findings of the physician and the facts on which they are based shall be in writing, in all cases. A copy of the findings shall be sent to the clerk of superior court by reliable and expeditious means.

N.C. Gen. Stat. § 122C-266(a) and (c) (2013).

Our Court has previously held that "[t]he purpose of the second examination [pursuant to N.C. Gen. Stat. § 122C-266] is to protect the rights of a respondent who has been taken to a medical facility immediately prior thereto to insure that he was properly committed." *In re Lowery*, 110 N.C. App. 67, 70, 428 S.E.2d 861, 863 (1993).

Here, respondent concedes that Dr. Saeed's testimony illustrates that he conducted an examination of respondent on 23 July 2013, the day after he was admitted to Holly Hill Hospital. Dr. Saeed's testimony indicated that he believed respondent to be mentally ill with a diagnosis of schizophrenia. Dr. Saeed also stated throughout his testimony that respondent was a danger to himself because he refused to take necessary medication, was unable to care for himself, and was unable to limit his fluids in order to keep his sodium level normal. On appeal, respondent does not contest the substance of Dr. Saeed's testimony, nor does he argue that he was improperly committed based on any insufficiency of Dr. Saeed's examination. Reviewing the record, we are unable to find that respondent was prejudiced by the absence of a written record of Dr. Saeed's findings. Based on the foregoing, we reject respondent's argument that the involuntary commitment order should be vacated.

B. Notice of Hearing

[3] Next, respondent argues that the trial court erred by failing to provide respondent with notice of the 25 July 2013 commitment hearing in violation of N.C. Gen. Stat. § 122C-264.

N.C. Gen. Stat. § 122C-264(c) provides that

> [n]otice to the respondent, . . . shall be given as provided in G.S. 1A-1, Rule 4(j) at least 72 hours before the hearing. Notice to other individuals shall be sent at least 72 hours before the hearing by first-class mail postage prepaid to the individual's last known address. G.S. 1A-1, Rule 6 shall not apply.

N.C. Gen. Stat. § 122C-264(c) (2013).

In the present case, the trial court stated at the end of the 25 July 2013 hearing that "I've noted that concern that his power of attorney was not given the notice that [respondent] thinks they're entitled to." Nonetheless, the transcript of the hearing reveals that both respondent and his attorney were present at the hearing. Respondent was able to testify on his own behalf. Most importantly, respondent has not argued or demonstrated that the failure to receive notice of the hearing resulted in his inability to adequately prepare for the hearing. Because respondent has failed to establish that he was prejudiced by the failure to receive notice of the 25 July 2013 hearing, his argument is overruled.

III. Conclusion

Where respondent has failed to demonstrate any prejudice by the lack of a written record of his second examination by a physician and by any failure to give respondent notice of the 25 July 2013 hearing, we affirm the order of the trial court.

Affirmed.

Judges STEELMAN and ERVIN concur.

RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, Petitioner
v.
130 OF CHATHAM, LLC, Respondent

No. COA14-134

Filed 2 September 2014

Jurisdiction—subject matter—eminent domain—property spanning two counties—motion to amend pleadings

The trial court erred in a private condemnation proceeding by dismissing petitioner's petition to condemn easements for a power line across respondent's property and the trial court abused its discretion by denying petitioner's motion to amend its pleadings. Although the tract of land at issue spanned two counties, the trial court had jurisdiction to hear the petition concerning the land located in the county in which the trial court was located and the trial court should have allowed petitioner's motion to amend its pleadings to remove the portion of the property from its pleadings that was not located in that county.

Appeal by petitioner from order entered 30 October 2013 by Judge Hugh B. Lewis in Rutherford County Superior Court. Heard in the Court of Appeals 14 August 2014.

Parker Poe Adams & Bernstein, LLP, by W. Edward Poe, Jr., Thomas N. Griffin, III, and Benjamin Sullivan; and Law Offices of Elizabeth T. Miller, by Elizabeth T. Miller, for Petitioner-appellant.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and William Clarke; Sigmon, Clark, Mackie, Hanvey & Ferrell, PA, by Forrest Ferrell and Amber Reinhardt; and Kilpatrick, Townsend & Stockton, LLP, by Steven J. Levitas, for Respondent-appellee.

HUNTER, JR., Robert N., Judge.

Petitioner Rutherford Electric Membership Corporation ("Rutherford Electric") appeals from an order dismissing their petition to condemn easements for a power line across Respondent 130 of Chatham LLC's ("Chatham") tract of land ("Box Creek Wilderness") that spans across Rutherford and McDowell Counties After careful review, we reverse the trial court's order.

I. Facts & Procedural History

Rutherford Electric filed a special proceeding petition with the Rutherford County Superior Court on 24 January 2013 and filed an amended petition on 15 February 2013. Both petitions were filed pursuant to Chapter 40A of the General Statutes, which allow for a private company to petition for exercise of eminent domain "for the public use of benefit." N.C. Gen. Stat. §§ 40A-3(a), 40A-20 (2013). Chatham answered the amended petition on 1 April 2013, which included a motion to dismiss under N.C. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, stating that "[a] portion of the property subject of the Amended Petition lies in McDowell County, and the Clerk of Court for Rutherford County has no jurisdiction over property in McDowell County." The petition concerned a single tract of land that lay in both Rutherford and McDowell counties. The petition's stated purpose was to condemn easements so that Rutherford Electric may construct power lines and extend its service to additional customers. Rutherford Electric also filed a separate petition to condemn easements for a second tract of land also owned by Chatham that is entirely in McDowell County ("Copperleaf").

The Rutherford County Clerk of Court appointed three citizens of Rutherford County as commissioners to appraise and determine the

value of just compensation for the tract at issue pursuant to N.C. Gen. Stat. § 40A-25 (2013). A hearing date of 28 May 2013 was also set in the order appointing the commissioners. The hearing took place on 28 May 2013 and the three commissioners returned a value of $71,686.00 for the easement on the tract of land at issue via a written report on 24 June 2013. Both parties appealed for a *de novo* jury trial on the amount of just compensation.

A trial on the merits was set for August 2013. Rutherford Electric also filed a separate petition for the Copperleaf tract in McDowell County on 5 June 2013 to condemn certain land under Chapter 40A of the General Statutes. Chatham responded to the petition on 24 June 2013. The parties consented to an order to consolidate the cases for trial which was filed on 20 September 2013. The order set a trial date of 30 September 2013.

On 24 September 2013, Chatham filed a Motion to Dismiss the present matter for lack of subject matter jurisdiction. Judge Lewis heard arguments on the motion to dismiss on 30 September 2013. Judge Lewis then adjourned court and stated that he would rule on Chatham's motion to dismiss the next morning.

Judge Lewis then granted Chatham's motion to dismiss and explained the rationale for his decision. Rutherford Electric made a motion under Rule 59(e) for leave to amend its petition to include only the land in Rutherford County and to alter the petition it filed in McDowell County concerning the Copperleaf tract to include the McDowell County portions of the Box Creek Wilderness. The trial court denied the motion and declined to hear the other case concerning the Copperleaf tract. The trial court filed written orders granting Chatham's motion to dismiss and motion to amend on 30 October 2013. The trial court's order did not indicate whether Rutherford Electric's claim was dismissed with or without prejudice. Rutherford Electric filed timely written notice of appeal from the orders on 15 November 2013.

II. Jurisdiction & Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2013) (stating a right of appeal lies with this Court from the final judgment of a superior court).

"A motion to dismiss for lack of subject matter jurisdiction is reviewed *de novo* pursuant to Rule 12 of the North Carolina Rules of Civil Procedure." *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 809 (2011); *see also Burgess v. Burgess*,

205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010). Further, when an argument presents an issue of statutory interpretation, full review is appropriate, and the trial court's conclusions of law are reviewed *de novo*. *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (citations omitted). "If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms." *Whitman v. Kiger*, 139 N.C. App. 44, 46, 533 S.E.2d 807, 808 (2000), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001) (citation and quotation marks omitted).

"Under *de novo* review, we examine the case with new eyes." *Templeton Properties LP v. Town of Boone*, ___ N.C. App. ___, ___, 759 S.E.2d 311, 317 (2014). "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted).

The second issue on appeal is whether the trial court improperly denied a request for leave to amend Rutherford Electric's complaint under N.C. R. Civ. P. 59, and is reviewed under an abuse of discretion standard. *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 785–86, 437 S.E.2d 383, 385 (1993) ("Leave to amend should be granted when 'justice so requires,' or by written consent of the adverse party . . . . The granting or denial of a motion to amend is within the sound discretion of the trial judge, whose decision is reviewed under an abuse of discretion standard." (internal citation omitted)). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006); *Bartlett Milling Co., L.P. v. Walnut Grove Auction and Realty Co., Inc.*, 192 N.C. App. 74, 89, 665 S.E.2d 478, 490 (2008) (holding that refusal to grant a motion to amend "without any justifying reason and without a showing of prejudice to the defendant is considered an abuse of discretion." (citation omitted)).

III. Analysis

Rutherford Electric asks this Court to reverse the trial court based on a reading of N.C. Gen. Stat. § 40A-20 and other sections within Chapter 40A allowing for a condemnation action involving property in multiple counties. Chatham points primarily to N.C. Gen. Stat. § 40A-25 within Chapter 40A, which allows an answer to the petition for condemnation

and allows the county clerk to appoint three commissioners to value the property who "shall be [residents] of the county wherein the property being condemned lies . . . ." *Id.* These three commissioners are required to take an oath to "fairly and impartially appraise the property in the petition." N.C. Gen. Stat. § 40A-26 (2013).

While there is apparent conflict between statutes in Chapter 40A on whether a multi-county private condemnation action may be filed, we reverse the trial court because the trial court very clearly *did* have subject matter jurisdiction over at least the portions of the Box Creek Wilderness that were in Rutherford County and did not grant Rutherford Electric's motion to amend its pleading. *See* N.C. Gen. Stat. §§ 40A-20, 40A-21, 40A-25, 40A-28, 40A-67 (2013). This Court leaves to the General Assembly whether or not Chapter 40A contemplates a multi-county private condemnation action via the procedure that Rutherford Electric attempted here and would urge the General Assembly to clarify the procedure to avoid future issues of this type.[1]

A. Subject Matter Jurisdiction

The trial court's proper action in this matter, rather than dismissing the *entire* claim under Chapter 40A for want of subject matter jurisdiction would be to encourage or allow Rutherford Electric to amend its claim under Rule 15 or Rule 59 of the Rules of Civil Procedure or to dismiss only the portion of the claim for which it thought jurisdiction was lacking. While courts shall "not take jurisdiction" when it is not granted, likewise courts "must take jurisdiction" when there is an express grant. *Cohens v. State of Virginia*, 6 Wheat. 264, 19 U.S. 264, 404 (1821); *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009) ("[W]hen jurisdiction is conferred, a court may not decline to exercise it.").

Section 40A-20 provides a procedure for a private condemnor to file a petition for condemnation with the county clerk of court where "the real estate described in the petition is situated." N.C. Gen. Stat. § 40A-20. The procedure outlined in Chapter 40A is a special proceeding, a variation of a routine civil action, where the county clerk of court is given the authority to appoint three commissioners who value the property after taking evidence. N.C. Gen. Stat. § 40A-26. After the commissioners complete their inquiry, they ascertain the compensation the condemnor

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1. An example where the General Assembly has provided clear procedural instructions for a multi-county tract is in the payment of excise taxes charged on parcels that span multiple counties. *See* N.C. Gen. Stat. § 105-228.30(a) (2013). Another example where the General Assembly provided jurisdiction to a clerk of court for a single parcel spanning multiple counties is also found in N.C. Gen. Stat. § 28A-17-1 (2013).

must make to the property owners and report their award to the county clerk of court. *Id.* Service of orders, notices, and any other papers are the same as those made in other special proceedings found in the General Statutes. N.C. Gen. Stat. § 40A-24 (2013).

A party may appeal the clerk's order to the superior court under N.C. Gen. Stat. § 40A-29 (2013). *De novo* appellate jurisdiction is then granted to the superior court from the clerk's order and such jurisdiction provides for a jury trial to resolve questions of fact such as the value of the property. N.C. Gen. Stat. § 40A-29; *see also High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) ("Since 1868 the clerk of the court has had no power except that which is given him by statute. Where judicial power or jurisdiction has been conferred upon him, his court is one of limited jurisdiction, both as to subject matter and the territory in which it may be exercised." (citation omitted)).

There is no violation of due process when a plaintiff follows the statutory procedure allowed for in a special proceeding nor is there want of subject matter jurisdiction for either the clerk of court or the trial court. *See* N.C. Gen. Stat. § 40A-20. In tandem, Sections 40A-20 and 40A-29 very clearly provide the clerk of court and the trial court with jurisdiction over at least the Rutherford County portion of the Box Creek Wilderness property.

B. Motion to Amend

Rutherford Electric sought to amend its petition under Rule 59 after the trial court granted Chatham's motion to dismiss. In so doing, Rutherford Electric stated that they moved for amendment because "the interest of our members also requires a speedy adjudication by this Court . . . ." We hold that this satisfied N.C. R. Civ. P. 59(a)(9), which allows for amending judgments when a reason was previously recognized as a ground for a new trial. These reasons include when "the ends of justice will be met." *Sizemore v. Raxter*, 58 N.C. App. 236, 236, 293 S.E.2d 294, 294 (1982). The motion to amend is also considered with a general understanding that "[l]iberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits and not avoided on the basis of mere technicalities." *Phillips v. Phillips*, 46 N.C. App. 558, 561, 265 S.E.2d 441, 443 (1980) (citation omitted). Further, "[t]he philosophy of Rule 15 should apply not only to pleadings but also to motions where there is no material prejudice to the opposing party." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E.2d 806, 809 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

In response to Rutherford Electric's motion, Judge Lewis stated at the hearing:

> The issue is in all three matters [sic] the fact that you are dealing in the arenas of due process and by consequence subject matter jurisdiction.
>
> The request is basically to preempt due process that is outlined in Chapter 40A, which through all of the eleven pages of text that I was reading is premised on the North Carolina Constitution relating to property-like rights, and that is to be strictly adhered to.
>
> There is not an ability to agree, consent, to circumvent that process. You need to follow the statutes in the timeline as designated in the statutes period on all properties. The one property that you're asking for me to take a look at outside of Rutherford County has not even had any hearings or proceedings or orders signed by the Clerk in the other county.
>
> The timeline of how things occur and move to Superior Court are designated in the statutes. They need to be followed in order to protect the citizens, the owners of that property, period.
>
> *As to the amendment issue, that is also denied because you need to make sure that all the T's are crossed and all the I's are dotted in all proceedings*, because the issue of subject matter jurisdiction can be brought up at all times, it can not be waived. For this to be clean and brought to a final end for both tables so that it doesn't come back because there haven't been some – because someone raises subject matter jurisdiction at a later time, even though they do not voice it now, is imperative. That's what justice requires. That is what necessary is.
>
> I'm denying both of the condemnor's request [sic] at this point in time. The one order will stand. An additional order denying those requests will also need to be drafted by your table as well.

Thereafter, the trial court filed an order which stated that Rutherford Electric made an oral motion pursuant to N.C. R. Civ. P. 59(e) seeking leave to amend under N.C. R. Civ. P. 15(a). The trial court stated that the "oral motion was made subsequent to the Court having found

that [Rutherford Electric] had no authority to condemn the property as described in this condemnation action and entering a final dismissal of this action pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure." The trial court then concluded its order by stating "[a]fter hearing arguments of counsel, the Court in its discretion DENIES the Petitioner's oral motion."

The foregoing constitutes an abuse of discretion. The trial court had jurisdiction to hear at least a portion of the case. Three private citizens from Rutherford County were chosen to provide a valuation of certain property in Rutherford County. While there was also property in McDowell County which may or may not have been properly included in the action, Rutherford Electric sought leave to amend to correct their misunderstanding of the statute. Rather than grant leave to amend their pleading, the trial court instead denied their motion. In doing so, the trial court misapprehended its ability to hear the present matter, and also provided no rationale for denying the motion under N.C. R. Civ. P. 59(e).

"A trial court abuses its discretion only where no reason for the ruling is apparent from the record." *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, ___ N.C. App. ___, ___, 750 S.E.2d 555, 561 (2013) (citation omitted). "A motion to amend may be denied for '(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.' " *Strickland v. Lawrence*, 176 N.C. App. 656, 666–67, 627 S.E.2d 301, 308 (2006) (quoting *Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003)).

Here, the trial court did not address *any* of these categories and simply denied the motion after misapprehending the law. This constitutes an abuse of discretion, and accordingly, the trial court is reversed. We remand to the trial court with instructions to allow Rutherford Electric's motion to amend its action to remove the McDowell County portion of the petition from its Box Creek Wilderness claim and thereafter proceed with the trial on the Rutherford County portions of the Box Creek Wilderness tract in Rutherford County Superior Court.

IV. Conclusion

For the reasons stated above, the decision of the trial court is

REVERSED AND REMANDED.

Judges STEELMAN and GEER concur.

LULA SANDERS, CYNTHIA EURE, ANGELINE MCINERNY, JOSEPH C. MOBLEY, on behalf of themselves and others similarly situated, Plaintiffs

v.

STATE PERSONNEL COMMISSION, a body politic; OFFICE OF STATE PERSONNEL, a body politic; LINDA COLEMAN, State Personnel Director (in her official capacity); TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate; MICHAEL WILLIAMSON, Director of the Retirement System Division and Deputy Treasurer of the State of North Carolina (in his official capacity); JANET COWELL, Treasurer of The State of North Carolina and Chairman of The Board of Trustees of the Retirement System (in her official capacity); TEMPORARY SOLUTIONS, a subdivision of the Office of State Personnel, and STATE OF NORTH CAROLINA, Defendants

No. COA13-654

Filed 2 September 2014

1. Appeal and Error—interlocutory orders and appeals—attorney fees—sovereign immunity—substantial right

Defendants' appeal of the attorney fees award was granted only to the extent that their challenge was based on sovereign immunity since it affected a substantial right. However, defendants' appeal of attorney fees based on some other defense or upon the merits was dismissed.

2. Contracts—breach of contract—summary judgment—no promises or inducements

The trial court did not err by granting defendants' motion for summary judgment with respect to plaintiffs' breach of contract claim. Plaintiffs failed to produce any evidence to create a genuine issue of material fact with respect to whether defendants had made any promises or inducements to plaintiffs to cause them to continue their employment beyond twelve months, other than to continue paying their normal wages, which were, in fact, paid as agreed.

3. Class Actions—denial of motion for class certification—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiffs' motion for class certification given the circumstances presented and procedural posture of this case.

4. Appeal and Error—interlocutory orders and appeals—attorney fees—sovereign immunity—substantial right—cross-appeal—remaining issues not addressed

With respect to issues raised in defendants' cross-appeal, the Court of Appeals affirmed the portion of the trial court's order

imposing the attorney fees award "as provided by law" based on the State's contention concerning its defense of sovereign immunity. However, the merits of the State's remaining contentions on this issue were not reached since they were not predicated upon a substantial right of the State.

Judge HUNTER, JR., Robert N. dissenting.

Appeal by Plaintiffs from order entered 18 December 2012 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 12 December 2013.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, James H. Kelly, Jr., Susan H. Boyles, Richard D. Dietz, and Gregg E. McDougal, and North Carolina Justice Center, by Jack Holtzman, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance and Special Deputy Attorney General Charles Gibson Whitehead, for Defendants.

State Employees Association of North Carolina, by Thomas A. Harris, amicus curiae.

DILLON, Judge.

This case was commenced in 2005 and has been on appeal before this Court twice previously. *See Sanders v. State Personnel Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10 ("*Sanders I*"), *disc. review denied*, 361 N.C. 696, 652 S.E.2d 653 (2007); and *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 677 S.E.2d 182 (2009) ("*Sanders II*"), *disc. review denied*, 363 N.C. 806, 691 S.E.2d 19 (2010).

In the present appeal, Plaintiffs Lula Sanders, *et al.* ("Plaintiffs") challenge the trial court's order denying their motion for partial summary judgment and granting summary judgment in favor of Defendants State Personnel Commission, *et al.* ("Defendants"). Defendants, on the other hand, have filed a cross-appeal, challenging the trial court's award of costs, including attorneys' fees, in Plaintiffs' favor. For the following reasons, we affirm the trial court's order denying Plaintiffs' motion for partial summary judgment and granting Defendants' motion for summary judgment, and we affirm in part and dismiss in part the issues raised in Defendants' cross-appeal.

I. Factual & Procedural Background

Pursuant to its authority under the State Personnel Act, N.C. Gen. Stat. § 126-4 (2013), the State Personnel Commission (the "Commission") has promulgated regulations establishing various types of appointments through which an individual may gain employment with the State of North Carolina. *See* 25 N.C.A.C. 1C.0400, *et seq.* For example, some individuals are hired as permanent employees with the State through a permanent appointment, *see* 25 N.C.A.C. 1C.0402, and others are hired as temporary employees through a temporary appointment, *see* 25 N.C.A.C. 1C.0405.

There are two differences between temporary employees and permanent employees which are relevant to this case. First, while under the regulations the period of employment for a permanent employee is indefinite, the regulations stipulate that a person may not be employed as a temporary employee for a period "exceed[ing] 12 consecutive months" (hereinafter, the "Twelve-Month Rule"). 25 N.C.A.C. 1C.0405(a). The second difference is that temporary employees are not eligible to receive certain benefits available to permanent employees, such as leave time, state service credit, health benefits, retirement credit, severance pay, or priority reemployment consideration. 25 N.C.A.C. 1C.0405(b).

Each Plaintiff was employed by the State of North Carolina as a temporary employee for a period exceeding twelve consecutive months, in violation of the Twelve-Month Rule. Plaintiffs commenced this action, alleging that because they had been employed as temporary employees for more than twelve consecutive months – in violation of the Twelve-Month Rule – they were entitled to the "rights, compensation, benefits, and status" of permanent employees. Plaintiffs alleged claims for (1) violations of the North Carolina Administrative Code; (2) violations of the North Carolina Constitution; and (3) breach of contract. Based on these claims, Plaintiffs prayed for relief in the form of monetary damages and costs, including attorneys' fees, in addition to declaratory relief. Plaintiffs also sought class certification for inclusion of all similarly-situated individuals, i.e., those who had been employed by the State as temporary employees for more than twelve consecutive months.

Defendants responded by moving to dismiss Plaintiffs' claims for lack of personal jurisdiction pursuant to N.C. R. Civ. P. 12(b)(2) on grounds of Defendants' sovereign immunity, and pursuant to N.C. R. Civ. P. 12(b)(6) for failure to state a claim for which relief could be granted. In *Sanders I*, we affirmed the trial court's Rule 12(b)(2) dismissal of Plaintiffs' claim based on violations of the North Carolina Administrative

Code. 183 N.C. App. at 24, 644 S.E.2d at 16. In *Sanders II*, we affirmed the trial court's Rule 12(b)(6) dismissal of Plaintiffs' constitutional claims; however, we reversed the trial court's dismissal of Plaintiffs' breach of contract claim and remanded the matter "for a declaratory judgment, to declare plaintiffs' status and rights pursuant to the Uniform Declaratory Judgment Act." 197 N.C. App. at 323, 677 S.E.2d at 189. In analyzing Plaintiffs' breach of contract claim, we determined that the Twelve-Month Rule and the other "relevant regulations of the [Commission]" are part of Plaintiffs' employment contracts with Defendants, *id.* at 320-21, 677 S.E.2d at 187, noting as follows:

> There is an agreement between the parties whose term is known and agreed. What is unknown is what are the legal relationships and status of the parties when the contract continues in effect after the expiration of the agreed upon terms.

Id. Accordingly, we instructed the trial court on remand to determine the legal relationship between the parties, including the precise terms of Plaintiffs' employment with Defendants as of the "twelve month and one day mark and beyond." *Id.* at 323, 677 S.E.2d at 188.

On remand from *Sanders II*, the parties engaged in extensive discovery regarding Plaintiffs' breach of contract claim, after which Plaintiffs filed motions seeking partial summary judgment on this claim; a declaratory judgment construing their rights under the contract pursuant to N.C. Gen. Stat. § 1-253; and class action certification. Defendants likewise moved for summary judgment with respect to Plaintiffs' breach of contract claim.

Following a hearing on these matters, the trial court entered an order on 18 December 2012 granting relief to both Plaintiffs and Defendants. Specifically, the trial court declared that Plaintiffs' status as temporary employees did not convert to that of permanent employees after twelve months and that they were entitled only to the wages for which they had bargained and already received for the period that they had worked as temporary employees beyond the permissible twelve-month period. Accordingly, the trial court granted Defendants' motion for summary judgment on Plaintiffs' breach of contract claim and denied Plaintiffs' motions for partial summary judgment and for class certification.

The trial court, however, also granted Plaintiffs certain relief; namely, the court enjoined Defendants from future violations of the Twelve-Month Rule; it directed the State Personnel Director and the Office of State Personnel to present to the trial court "a

comprehensive plan [hereinafter, the "Comprehensive Plan"] to assure full compliance with the mandates of North Carolina General Statutes 126-3(b)(8) and (9)[;]" and it taxed Defendants "with the costs of this action, including attorney fees as provided by law [hereinafter, "Attorneys' Fees Award"]."

In the present appeal, Plaintiffs seek review of the trial court's order granting Defendants' motion for summary judgment and denying their motions for partial summary judgment and for class certification. In Defendants' cross-appeal, Defendants seek review of the trial court's Attorneys' Fees Award.

II. Jurisdiction

[1] The threshold issue presented is whether and to what extent this Court has jurisdiction over the parties' appeals. "Generally, an interlocutory order is not immediately appealable." *Builders Mut. Ins. Co. v. Meeting Street Builders, LLC*, __ N.C. App. __, __, 736 S.E.2d 197, 199 (2012). An order is interlocutory where it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). A party may immediately appeal from an interlocutory order, however, where the issue has been certified by the trial court for immediate appellate review pursuant to N.C. R. Civ. P. 54(b) ***or*** where the interlocutory order "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal citations omitted).

In the present case, the trial court order resolves the entire controversy except with respect to two matters. First, although the trial court has entered the Attorneys' Fees Award, the court has not yet determined the amount of the Award. Second, further action is required with respect to the Comprehensive Plan, which the trial court has ordered certain Defendants to prepare and present to the court for review.

Our Supreme Court has held that "[a]n order that completely decides the merits of an action [] constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues *such as attorney's fees and costs.*" *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (emphasis added). Therefore, while our Supreme Court considers the Attorneys' Fees Award a "collateral issue," it is unclear whether the presentation and review of the Comprehensive Plan also constitutes a "collateral

issue." Notwithstanding, the trial court has certified the issues raised in Plaintiffs' appeal for immediate appellate review. Accordingly, we have jurisdiction to address the issues raised in Plaintiffs' appeal.

Regarding Defendants' cross-appeal, Defendants are not challenging the trial court's injunction prohibiting future violations of the Twelve-Month Rule or the directive to present the Comprehensive Plan to the court. Accordingly, we do not address the propriety of those portions of the order. Rather, Defendants only challenge the "collateral issue" of the "Attorneys' Fees Award." In that the trial court left open for future determination the *amount* Defendants would be taxed, Defendants' appeal of this collateral issue is interlocutory.[1] Since the trial court did not certify the Attorneys' Fees Award issue for immediate appellate review, Defendants may challenge the Attorneys' Fees Award in this appeal only to the extent that the Award affects a substantial right.

Defendants make a number of arguments in their brief challenging the Attorneys' Fees Award; however, their only argument based on a substantial right is their contention that the award is "in derogation of [Defendants'] sovereign immunity." *See McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (holding that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to immediate appellate review"), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 443 (2007). Accordingly, we review Defendants' appeal of the Attorneys' Fees Award only to the extent that their challenge is based on sovereign immunity; however, we dismiss Defendants' appeal to the extent that Defendants' challenge is based on some other defense or upon the merits.

III. Analysis

We address the issues raised in Plaintiffs' appeal and the issue raised in Defendants' appeal, in turn, below.

A. Plaintiffs' Appeal

Plaintiffs essentially make two arguments on appeal: (1) the trial court erred in granting Defendants' motion for summary judgment with respect to Plaintiffs' breach of contract claim; and (2) the trial court erred in denying Plaintiffs' motion for class certification. For the following reasons, we affirm the trial court's rulings on these issues.

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1. Under *Duncan*, an unresolved collateral issue does not render a judgment or order deciding the main issues interlocutory. However, an appeal of the collateral issue of attorney fees, itself, is interlocutory if the trial court has not set the amount to be awarded.

1. Summary Judgment

[2] In their complaint, Plaintiffs alleged that Defendants had breached their employment agreements by failing to provide Plaintiffs, after twelve months of service, with the benefits generally provided to permanent employees. Plaintiffs contend that the trial court's order granting Defendants' summary judgment motion on Plaintiffs' breach of contract claim conflicts with our holding in *Sanders II*. Specifically, Plaintiffs argue that our prior holding in that case establishes *as a matter of law* that Defendants are liable to Plaintiffs for breach of contract, based on Defendants' admitted violation of the Twelve-Month Rule, and all that remained was for a jury to decide the issue of damages.

Plaintiffs, however, misconstrue our holding in *Sanders II*. We did not hold in that case that the failure to adhere to the Twelve-Month Rule established Defendants' liability for breach of contract as a matter of law. We held only that the allegations in Plaintiffs' complaint were sufficient to survive Defendants' Rule 12(b)(6) motion to dismiss. *Sanders II*, 197 N.C. App. at 321, 677 S.E.2d at 187 (stating that "[b]ecause there is a breach of the rules under which the contract was formed, [P]laintiffs' complaint sufficiently alleged a breach of contract claim and should have survived [D]efendants' motion to dismiss"). The issue of whether Defendants were liable for breach of contract was not ripe for consideration at the time we decided *Sanders II*, as the issue then presented dealt only with the sufficiency of the allegations set forth in Plaintiffs' complaint.

In *Sanders II*, we instructed the trial court on remand to determine "the legal relationships and status of the parties" — including the terms of any agreements — "at the twelve month and one day mark and beyond." *Id.* at 323, 677 S.E.2d at 188. We stated as follows:

> [I]t is clear that [P]laintiffs accepted some sort of arrangement with [D]efendants by accepting continued work and compensation, without a permanent appointment and without benefits. Whether that arrangement was discussed with [P]laintiffs individually or collectively and what [P]laintiffs understood about their status are relevant inquiries requiring further factual development.

Id. at 323, 677 S.E.2d at 189. On remand, the parties conducted extensive discovery, after which the trial court conducted a hearing and granted summary judgment in favor of Defendants on Plaintiffs' breach of contract claim.

We believe that the trial court correctly concluded that Defendants did not breach their employment contracts with Plaintiffs. Plaintiffs failed to produce any evidence to create a genuine issue of material fact with respect to whether Defendants had made any promises or inducements to Plaintiffs to cause them to continue their employment beyond twelve months, other than to continue paying their normal wages, which were, in fact, paid as agreed. There was no evidence presented to suggest that Defendants had represented to Plaintiffs that their employment status would convert to that of a permanent employee after twelve months of service. Furthermore, there is nothing in the Commission rules or the relevant law that contractually obligated Defendants to treat Plaintiffs as permanent employees after twelve months of service. Indeed, we held just the opposite in *Sanders II*, stating that if the trial court were to determine on remand that Plaintiffs' employment had automatically converted to permanent status, the trial court would be "enact[ing] an employment scheme in direct contravention of the state constitution and other sections of the regulatory scheme." *Id.* at 322, 677 S.E.2d at 188; *see also Cauthen v. N.C. Dept. of Human Resources*, 112 N.C. App. 238, 242, 435 S.E.2d 81, 84 (1993) (refusing to allow an employee with a permanent appointment to achieve tenure by tacking onto her current appointment period her previous periods of temporary employment, stating that in doing so we would effectively be creating "a quasi-tenure system in temporary employment which neither the General Assembly nor the State Personnel Commission intended").

Plaintiffs, however, argue that Defendants' "breach" of the Twelve-Month Rule is sufficient to sustain their breach of contract claim, even if such breach entitles Plaintiffs only to nominal damages. We are unpersuaded. As this Court recognized in *Sanders II*, administrative regulations pertinent to a particular contractual arrangement between the State and its employees may properly be incorporated into, and govern, a State employment contract. 197 N.C. App. at 320-21, 677 S.E.2d at 187. The State, certainly, has an obligation to the public to conduct its affairs in accordance with its own regulations. We do not believe, however, that every instance in which a regulation incorporated into a State employment contract is ignored provides the employee with a breach of contract claim against the State.

Here, Defendants ignored the Twelve Month Rule by permitting each Plaintiff to remain employed after twelve months. Likewise, each Plaintiff ignored the Twelve Month Rule by continuing to report to work beyond twelve months of employment. We do not condone Defendants' conduct in neglecting to comport with its own administrative regulations.

However, we do not believe the trial court erred in granting Defendants' motion for summary judgment on Plaintiffs' breach of contract claim, where Defendants' conduct involved allowing Plaintiffs to continue working under their respective contracts when they were no longer eligible to continue performing under them — where the uncontradicted evidence showed that Plaintiffs were compensated as agreed and where there is no law requiring Defendants to confer any other benefit or status upon Plaintiffs after twelve months of service.

2. Class Certification

[3] Plaintiffs further contend that the trial court erred in denying their motion for class certification. Our Supreme Court has held that "[t]he trial court has broad discretion in determining whether a case should proceed as a class action." *Faulkenbury v. Teachers' and State Employees' Ret. Sys. Of N.C.*, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997). Upon review, we discern no abuse of discretion – given the circumstances presented and procedural posture of this case – in the trial court's decision to deny class certification.

B. Defendants' Appeal

[4] Defendants appeal from the trial court's Attorneys' Fees Award. As previously stated, since this appeal is interlocutory, we are compelled only to consider Defendants' contention that the Attorneys' Fees Award is in derogation of its sovereign immunity, which we have held affects a substantial right.

Plaintiffs argue that the Attorneys' Fees Award is appropriate because the State has waived sovereign immunity in this context under N.C. Gen. Stat. § 6-19.1, a provision which authorizes the court to award attorneys' fees to a prevailing party "who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law[.]" N.C. Gen. Stat. § 6-19.1(a). Alternatively, Plaintiffs argue that the Attorneys' Fees Award is appropriate under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-263 (2013) (permitting recovery of attorneys' fees where "such award of costs [is] equitable and just"), because the Award is based upon Plaintiffs' breach of contract claims, which has already survived Defendants' sovereign immunity challenge.

The trial court's order does not specify a statutory basis for the Attorneys' Fees Award. Rather, the order merely taxes Defendants "with the costs of this action, including attorney fees as provided by law." Because the order directs only that Defendants bear Plaintiffs' attorneys' fees "as provided by law," and because the State has, in certain instances

— e.g., under N.C. Gen. Stat. § 6-19.1 — waived sovereign immunity with respect to claims for attorneys' fees, we cannot at this point conclude that the trial court committed reversible error based on the State's sovereign immunity defense. We, accordingly, affirm the portion of the trial court's order imposing the Attorneys' Fees Award "as provided by law" based on the State's contention concerning its defense of sovereign immunity, but we do not reach the merits of the State's remaining contentions on this issue, as they are not predicated upon, and do not implicate, a substantial right of the State. We note that our holding in this respect should not be construed as precluding the State from raising sovereign immunity as a defense should the trial court enter a subsequent order awarding attorneys' fees on a particular, articulated basis.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order granting Defendants' motion for summary judgment and denying Plaintiffs' motions for partial summary judgment and for class certification.

With respect to the issues raised in Defendants' cross-appeal, we affirm the Award, in part, based on Defendants' sovereign immunity argument; and we dismiss, in part, the Defendants' arguments concerning the Award not based on sovereign immunity.

AFFIRMED IN PART; DISMISSED IN PART.

Judge STROUD concurs.

HUNTER, JR., Robert N., Judge, dissenting.

I dissent from the majority's opinion concerning Plaintiffs' appeal and Defendants' appeal. In my view, Plaintiffs are entitled to partial summary judgment on the issue of liability for breach of contract. I would also hold that the trial court abused its discretion in denying Plaintiffs' motion for class certification. Finally, I would dismiss Defendants' appeal concerning attorneys' fees as interlocutory notwithstanding Defendants' claim of sovereign immunity. My views with respect to each appeal are addressed separately, in turn.

A. Plaintiffs' Appeal

1. Summary Judgment on Plaintiffs' Breach of Contract Claim

Despite the existence of a temporary employment contract between the parties, the incorporation of the Twelve-Month Rule as a condition

of that contract, and the admitted violation of the Twelve-Month Rule by Defendants, the trial court below, and the majority here, conclude that no breach of contract has occurred and that Defendants are entitled to summary judgment as a matter of law. I respectfully dissent.

"[The] standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

In *Sanders II*, this Court said that the Twelve-Month Rule "has the effect of law and is incorporated into the employment contract when employees are placed into a temporary assignment." *Sanders II*, 197 N.C. App. at 321, 677 S.E.2d at 187. Admissions by Defendants and discovery conducted below establish conclusively that Plaintiffs and thousands of additional state employees were placed in temporary appointments for more than twelve consecutive months with no change in employment status in violation of the Twelve-Month Rule. By doing so, Defendants breached an implied term of the temporary employment contract. *See id.* at 320, 677 S.E.2d at 187 (stating that "[i]n a breach of contract action, a complainant must show that there is (1) existence of a valid contract, and (2) breach of the terms of that contract." (internal quotation marks and citation omitted)). Notwithstanding the evident nature of this conclusion, the majority concludes that no breach of contract occurred and affirms summary judgment in favor of Defendants.

Although not addressed by the majority, the trial court concluded that there could have been no breach of contract because "the acts of any hiring official in violating the [Twelve-Month Rule] . . . were clearly *ultra vires* and would not bind the State." Thus, the trial court went so far as to conclude that there was no valid contractual relationship between the parties after Plaintiffs had provided twelve months of service, resting its analysis on a defense to the contract's validity.[1] However, the trial court's *ultra vire*s argument must fail.

The temporary employment contracts were not *ultra vires* when they were entered into by the parties. Indeed, to hold otherwise would

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1. Notably, the record in this case is devoid of any contention from Defendants that the actions of their hiring officials constituted *ultra vires* activity. Defendants' answer and motion to dismiss, motion for summary judgment, hearing arguments, and brief before this Court make no mention of the *ultra vires* doctrine or its application to this case. Instead, the doctrine first appears in the trial court's order.

be to deny Defendants the ability to initially hire anyone for a temporary appointment with the State. Rather, the contract became *ultra vires*, if at all, because of Defendants breach of the Twelve-Month Rule. In an analogous context, we have stated that, as a general matter,

> a municipality cannot be made liable for breach of an express contract for services when the official making the contract has exceeded his or her authority by entering into such a contract. And the city will not ordinarily be estopped to assert the invalidity of a contract made by an officer of limited authority when that authority has been exceeded.
>
> *However, such a contract may become binding and enforceable upon the corporation through the doctrine of estoppel* based upon the acts or conduct of officers of the corporation having authority to enter into the contract originally, as by receiving the benefits of the contract, or other grounds of equitable estoppel. *A municipality cannot escape liability on a contract within its power to make, on the ground that the officers executing it in its behalf were not technically authorized in that regard, where they were proper officers to enter into such contracts.*

Pritchard v. Elizabeth City, 81 N.C. App. 543, 553–54, 344 S.E.2d 821, 827 (1986) (internal citations omitted). Thus, there is a critical distinction between the complete absence of authority to enter into a contract and the later improper exercise of existing contractual authority. Here, Defendants had authority to enter into temporary employment contracts with Plaintiffs, but misused that authority in violating the Twelve-Month Rule.[2] Consistent with *Pritchard*, I would hold that the defense of *ultra vires* is unavailable to Defendants.

Even so, the majority concludes that even if the contractual relationship between the parties is valid, there has been no breach because Plaintiffs failed to produce any evidence that "Defendants had made

2. In *Sanders II*, we stated that "if the court below finds defendants automatically converted plaintiffs' positions from temporary to permanent on their own accord without appropriate classification and budgetary approval, they would have enacted an employment scheme in direct contravention of the state constitution and other sections of the regulatory scheme." *Sanders II*, 197 N.C. App. at 322, 677 S.E.2d at 188. Thus, the conclusion that Defendants misused their contractual authority in violating the Twelve-Month Rule has already been reached by this Court and this panel is bound by that decision. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

any promises or inducements to Plaintiffs to cause them to continue their employment beyond twelve months, other than to continue paying their normal wages," or "that Defendants had represented to Plaintiffs that their employment status would convert to that of a permanent employee after twelve months of service." *Ante*, at ___. The majority also notes that "there is nothing in the Commission rules or the relevant law that contractually obligated Defendants to treat Plaintiffs as permanent employees after twelve months of service." *Ante*, at ___. At this point, I believe the majority mistakes the remedial question (*i.e.*, the valuation of Plaintiffs damages based on Plaintiffs' expected compensation) with the underlying liability question (*i.e.*, whether a breach of the Twelve-Month Rule occurred). I agree that, at least with respect to the named Plaintiffs, there was never an expectation of permanent employee benefits after Plaintiffs continued in their temporary appointments beyond the twelve month mark. Indeed, the trial court found as fact, unchallenged before this Court, that:

> There is no allegation that the benefits sought by Plaintiffs were bargained for, or granted, when Plaintiffs began their employment. In fact, prior to employment in their "temporary appointment" all of the Plaintiffs signed a statement acknowledging the provisions of 25 N.C.A.C. 1C.0405(b). Each of the Plaintiffs indicated in their depositions a desire for continued employment with the State beyond the twelve (12) month mark. Further, there are no allegations of promises or inducements made to Plaintiffs to cause them to continue their employment other than the payment of wages; and no allegations of representations, conduct, or acts of their employers indicating the employment would become permanent.

However, I believe these facts speak to value of Plaintiffs' expectation interest, not Defendants' underlying liability for breach of contract. In my view, Plaintiffs are entitled to an award of nominal damages in recognition of the technical injury resulting from Defendants breach of the Twelve-Month Rule.[3] *See Cole v. Sorie*, 41 N.C. App. 485, 490, 255 S.E.2d 271, 274 (1979) (standing for the proposition that, "in a suit for damages

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3. The majority suggests that both parties are in breach of the employment contract, stating, "[h]ere, Defendants ignored the Twelve Month Rule by permitting each Plaintiff to remain employed after twelve months. Likewise, each Plaintiff ignored the Twelve Month Rule by continuing to report to work beyond twelve months of employment." *Ante*, at ___. However, the Twelve-Month Rule is a constraint on the State, not the employees. I would therefore hold that only Defendants are in breach.

for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." (internal quotation marks, citation, and brackets omitted)). Accordingly, I would grant partial summary judgment on the issue of liability for breach of contract in favor of Plaintiffs and remand for a determination of damages.

2. Plaintiffs' Motion for Class Certification

With respect to the issue of class certification, I also dissent from the majority's opinion because I would hold that the trial court's decision to deny Plaintiffs' motion for class certification is an abuse of discretion.

Rule 23 of the North Carolina Rules of Civil Procedure states, in pertinent part, that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. R. Civ. P. 23(a). Our Supreme Court has recently explained the law with respect to class certification under Rule 23 as follows:

> First, parties seeking to employ the class action procedure pursuant to our Rule 23 must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites:
>
> > (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.
>
> When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to

> other available methods for the adjudication of the controversy. . . . The touchstone for appellate review of a Rule 23 order . . . is to honor the broad discretion allowed the trial court in all matters pertaining to class certification. Accordingly, we review the trial court's order denying class certification for abuse of discretion. The test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Beroth Oil Co. v. N.C. Dep't of Transp., ___ N.C. ___, ___, 757 S.E.2d 466, 470–71 (2014) (internal quotation marks, citations, brackets, and footnote omitted) (second alteration in original).

Here, Plaintiffs' motion for class certification defined the putative class as all persons

> who have been or currently are employed by the State of North Carolina who are subject to the twelve-month limitation set forth in 25 N.C.A.C. 1C.0405(a); and been placed in temporary appointment for more than twelve consecutive months in violation of 25 N.C.A.C. 1C.0405(a) during the period of April 1, 2002 through the present; and have not received benefits including paid holidays, vacation leave, sick leave, health benefits, and when applicable, retirement benefits and longevity pay; excluding employees who work less than 20 hours per week and all employees of the sixteen institutions of the University of North Carolina system.

The trial court's order denying class certification concluded with respect to Plaintiffs' motion as follows:

> The claims of the Plaintiffs and the putative class members have an interest in the same issue of law and fact; that class counsel and the Plaintiff will adequately represent the interests of all class members with no conflict of interest; that they have a genuine interest in the outcome of the action; and that class members are sufficiently numerous that joining them would be impractical. *However*, *these factors do not outweigh the predominant issues affecting individual putative class members which are not capable of application of a general mathematical calculation*, *but would require extensive individual inquiry concerning*

> *class members' unique employment circumstances (i.e., discussions concerning employment status, requests or promises of benefits, higher pay in lieu of benefits, requests for permanent employment, etc.)*[.]

(Emphasis added). Thus, the trial court grounded its decision to deny class certification on the predominance requirement, concluding in effect that no "class" exists under Rule 23. *See Beroth*, ___ N.C. at ___, 757 S.E.2d at 470 ("A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members."). Accordingly, the question presented to this Court by Plaintiffs' appeal is whether the trial court abused its discretion in determining that no class existed based on the predominance inquiry. *See id.* at ___, 757 S.E.2d at 470 n.2 ("Therefore, we review the trial court's determination of whether plaintiffs established the actual existence of a class for abuse of discretion.").

In my view, the trial court abused its discretion in denying class certification because it conflated the remedial question concerning the calculation of damages with the underlying issue of liability for breach of contract. Specifically, the trial court's determination that "extensive individual inquiry concerning class members' unique employment circumstances" would be necessary, including "discussions concerning employment status, requests or promises of benefits, higher pay in lieu of benefits, requests for permanent employment, etc.[,]" is a concern for the expectation value of Plaintiffs' damages—whether and what each putative class member expected to receive as compensation after the expiration of their twelve-month term. This is wholly separate from the underlying question of contract liability, a question common to all putative class members based on the narrowly defined class articulated by Plaintiffs, the incorporation of the Twelve-Month Rule into each employee's contract, and the admissions by Defendant that the Twelve-Month Rule was violated.

In *Beroth*, our Supreme Court stated that differences in the amount of damages owed to putative class members should not preclude class certification as long as the damages inquiry is not determinative of the underlying merits claim. *Id.* at ___, 757 S.E.2d at 475. This generally comports with federal precedent interpreting Fed. R. Civ. P. 23. *See generally* 2 William B. Rubenstein, *Newberg on Class Actions* § 4:54, at 205–10 (5th ed. 2012) (collecting cases and stating that "Courts in every circuit have . . . uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations.").

Here, the trial court acknowledged that "[t]he claims of the Plaintiffs and the putative class members have an interest in the same issue of law and fact[,]" yet denied class certification because of the possibility of individual damage calculations. Given the aforementioned precedent on this issue, I believe the trial court's action to be an abuse of discretion. I would certify the proposed class and grant partial summary judgment to Plaintiffs on the issue of liability for breach of contract.

B. Defendants' Appeal

With respect to Defendants' appeal of the trial court's award of attorneys' fees to Plaintiffs, I agree with the majority that Defendants' appeal is interlocutory because the actual amount of attorneys' fees owed by Defendants has yet to be decided. *Triad Women's Ctr., P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660–61 (2010) ("We, therefore, specifically hold that an appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded. For this Court to have jurisdiction over an appeal brought prior to that point, the appellant would have to show that waiting for the final determination on the attorneys' fees issue would affect a substantial right."). Furthermore, I also agree that sovereign immunity is a substantial right for purposes of appellate review under N.C. Gen. Stat. § 1-277(a) (2013). *Kawai Am. Corp. v. Univ. of North Carolina at Chapel Hill*, 152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) ("This Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." (quotation marks and citation omitted)). However, I do not agree that Defendants are entitled to sovereign immunity in this case and would therefore dismiss Defendants' appeal in its entirety. Because the majority goes beyond a pure jurisdictional analysis and specifically affirms a portion of the trial court's order concerning attorneys' fees, I respectfully dissent.[4]

The trial court's order states that "Defendants are taxed with the costs of this action, including attorney fees *as provided by law.*"

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4. The majority opinion states that "we review Defendants' appeal of the Attorneys' Fees Award only to the extent that their challenge is based on sovereign immunity; however, we dismiss Defendants' appeal to the extent that Defendants' challenge is based on some other defense or upon the merits." *Ante*, at ___. While the majority opinion does not go so far as to decide whether the trial court's award was proper under either N.C. Gen. Stat. § 6-19.1 or § 1-263, it does decide, and explicitly affirms "the portion of the trial court's order imposing the Attorneys' Fees Award 'as provided by law' based on the State's contention concerning its defense of sovereign immunity[.]" *Ante*, at ___.

(Emphasis added). As the majority opinion notes, the trial court's order does not specify the statutory authority for its action. Nevertheless, the parties concede that attorneys' fees can only be awarded in this case, if at all, pursuant to either N.C. Gen. Stat. § 6-19.1 or § 1-263. Thus, Defendants enjoy the right of sovereign immunity in this case only to the extent that such a claim can shield them from paying out attorney fees under these two statutes. If the doctrine of sovereign immunity does not shield Defendants from paying out attorney fees under the statutes, the trial court's order cannot "deprive" Defendants of a substantial right nor "work injury" if Defendants are forced to attend another hearing as to the amount owed. *See Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (stating that to meet the substantial right test for appealing interlocutory orders, "the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.").

N.C. Gen. Stat. § 6-19.1, entitled "Attorney's fees to parties appealing or defending against agency decision," provides that if certain prerequisites are met, "the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, . . . to be taxed as court costs against the appropriate agency[.]" N.C. Gen. Stat. § 6-19.1(a) (2013). Thus, by its express terms, N.C. Gen. Stat. § 6-19.1 allows a party who prevails on an underlying merits claim to recover attorneys' fees from the State. This is an implicit waiver of any claim that the State has sovereign immunity from paying attorney fees awarded under the statute. *See Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003) ("It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere *unless it has consented by statute to be sued* or has otherwise waived its immunity from suit." (emphasis added)). Accordingly, the defense of sovereign immunity is not available to Defendants under N.C. Gen. Stat. § 6-19.1 and this Court should therefore foreclose any further inquiry under the statute.

N.C. Gen. Stat. § 1-263, entitled "Costs," provides that "[i]n any proceeding under [the Uniform Declaratory Judgment Act] the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263. As is evident from the text, the statute does not expressly or impliedly waive the sovereign immunity of the State, and this Court has held that the Uniform Declaratory Judgment Act does not act as a general waiver of the State's sovereign immunity in declaratory judgment actions. *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546–47, 660 S.E.2d 662, 664 (2008). Nevertheless, it is well-established that the

State's sovereign immunity is waived in "causes of action on contract," *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976), and this Court has recently interpreted that language to include "declaratory relief actions seeking to ascertain the rights and obligations owed under an alleged contract." *Atl. Coast Conference v. Univ. of Maryland*, ___ N.C. App. ___, ___, 751 S.E.2d 612, 621 (2013).

Here, the Plaintiffs' declaratory judgment motion sought a declaration from the trial court concerning the parties' temporary employment contracts and the admitted violation of the Twelve-Month Rule. Plaintiffs' motion, and the trial court's subsequent order, were responsive to this Court's disposition in *Sanders II* when we remanded Plaintiffs' breach of contract claim with instructions for the trial court to "assess the terms of [P]laintiffs' contracts with [D]efendants at the twelve month and one day mark and beyond" and "to declare [P]laintiffs' status and rights" under the temporary employment contracts. *Sanders II*, 197 N.C. App. at 323, 677 S.E.2d at 188–89. Thus, the declaratory relief at issue here concerns the "rights and obligations owed under an alleged contract." By consequence, and consistent with this Court's opinion in *Atl. Coast Conference*, Defendants cannot assert sovereign immunity to shield themselves from an obligation to pay costs under N.C. Gen. Stat. § 1-263. The defense of sovereign immunity is therefore not available to Defendants under either of the statutes potentially implicated by Defendants' appeal.

Accordingly, because the defense of sovereign immunity is not available to Defendants under N.C. Gen. Stat. § 6-19.1 or § 1-263, I would hold that Defendants have failed to meet the substantial right test and that we lack jurisdiction to hear Defendants' appeal at this time. Although the majority does not engage in a full merits analysis concerning whether the award was proper under N.C. Gen. Stat. § 6-19.1 or § 1-263, the majority errs in affirming a portion of the order. I would dismiss Defendants' cross-appeal in its entirety as interlocutory.

JOHN SHEARL, Petitioner
v.
TOWN OF HIGHLANDS, Respondent

No. COA14-113

Filed 2 September 2014

Zoning—burden of proof—zoning violation—purchase of property

The superior court erred in a zoning case by placing the burden on petitioner of proving that petitioner's zoning violation dated back to his purchase of the property. Because the burden was inappropriately placed on petitioner, the superior court's order was vacated and the matter was remanded for a new hearing.

Appeal by petitioner from order entered 5 September 2013 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 22 May 2014.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Coward, Hicks, & Siler, P.A., by Bonnie J. Claxton, for respondent-appellee.

HUNTER, JR., Robert N., Judge.

John Shearl ("Petitioner") appeals from an order of the Macon County Superior Court affirming a zoning decision by the Town of Highlands Zoning Board of Adjustment ("the BOA"). The BOA's decision concluded that Petitioner was making commercial use of property located in a residential zone in violation of the local zoning ordinance. On appeal to this Court, Petitioner contends that the Superior Court erred by concluding that the evidence established the existence of a zoning violation when the notice of violation was issued. In the alternative, Petitioner contends that the Superior Court erred by determining that he had the burden of proving that his nonconforming use was grandfathered in under the terms of the zoning ordinance given that the Town of Highlands ("Respondent") has lost an official zoning map crucial to his defense. Given the unique factual circumstances presented here, we hold that Respondent bears the burden of proving that Petitioner's zoning violation dates back to Petitioner's purchase of the property. Because the burden was inappropriately placed on Petitioner, we vacate

the superior court's order and remand this matter for a new hearing consistent with this opinion.

I. Factual & Procedural History

Petitioner owns property directly off Highway 28 in Highlands, on which he operates a business entitled, "J&J Lawn and Landscape." On 19 August 2009, Respondent issued a zoning violation notice to Petitioner, which stated that he was making commercial use of property zoned for residential use. Petitioner promptly appealed to the BOA, which heard Petitioner's case at two separate hearings on 14 October 2009 and 4 November 2009. Evidence presented at the hearings tended to show the following.

Petitioner purchased the subject property in November of 1993. Prior to Petitioner's purchase, in 1983, Respondent split-zoned the property for commercial and residential use. The front portion of the property, which measured 230 feet from the centerline of Highway 28, was zoned for business or commercial use. The rear of the property, *i.e.*, 230 feet and beyond, was zoned for residential use. An official zoning map, current through 1988, was admitted at the BOA hearings and reflects the 230-foot line demarcating the two zones.

In 1990, Respondent made comprehensive changes to the town's zoning ordinance for the purpose of reducing strip commercial development. As a result, zoning categories changed and a new zoning map was adopted. Respondent contended that at this time, the demarcation line between the commercial and residential zone on the subject property was moved from 230 feet to 150 feet from the centerline of Highway 28. However, the official map adopted in connection with the 1990 zoning changes was not admitted into evidence and, by Respondent's own admission, the map and all copies have been lost. The only evidence in the record supporting the existence of the 150-foot line as of the date of Petitioner's purchase of the property is a subdivision plat map drawn up and recorded in connection with Petitioner's land transaction. The plat map shows the demarcation line between the two zones at 150 feet from the centerline of Highway 28.

With respect to the location of the line when the notice of violation was issued on 19 August 2009, the BOA minutes refer to two additional maps that were admitted into evidence. The first map, a 1996 zoning map described as being "current," appears in the list of exhibits but has been omitted from the record on appeal. Testimony from Respondent's Zoning Administrator, recounted in the BOA hearing minutes, indicated that the 1996 map showed a 150-foot demarcation line. The second map

referred to is a Geographic Information System ("GIS") printout entitled "Current Zoning Map," which has been attached at the end of the BOA hearing minutes. The map tends to indicate that the property is split-zoned but reveals little more. There are no references to zoning categories on the map and there is no measurement scale.

Further evidence presented at the BOA hearings revealed that since Petitioner's purchase of the subject property in November 1993, Petitioner has operated his business using two structures. The first structure is a shop building near Highway 28 that falls in the commercial zone under either a 230-foot or a 150-foot demarcation line. The second structure is a storage building towards the rear of the property that falls in the commercial zone under a 230-foot demarcation line, but in the residential zone under a 150-foot demarcation line. Thus, the location of the demarcation line, whether at 230 feet or at 150 feet from the centerline of Highway 28, was of paramount importance to the validity of Petitioner's appeal before the BOA.

Upon hearing the foregoing evidence, the BOA emphasized that the burden to establish a nonconforming use was with Petitioner and unanimously voted to deny Petitioner's appeal. On 11 November 2009, the BOA issued a written decision upholding the zoning violation.

Thereafter, Petitioner filed a petition for the issuance of a writ of certiorari to the Macon County Superior Court pursuant to N.C. Gen. Stat. §§ 160A-388(e2), -393 (2013) on 24 November 2009. The petition was dismissed without prejudice. On 5 October 2012, Petitioner re-filed the petition, which was granted. Upon review of the administrative record, the Superior Court affirmed the BOA's ruling on 5 September 2013, concluding that the BOA's decision was "supported by substantial and competent evidence." The Superior Court also concluded that "the Board did not err in failing to require the Town to prove the actions of the Town Board in 1990" and concluded that "Petitioner's use of his property was not 'grandfathered[.]' " Petitioner filed a timely notice of appeal to this Court on 2 October 2013.

II. Jurisdiction & Standard of Review

Petitioner's appeal from a final order of the Superior Court lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013).

In reviewing a decision from a local board of adjustment, a superior court should:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are

> followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Lamar Outdoor Adver., Inc. v. City of Hendersonville Zoning Bd. of Adjustment, 155 N.C. App. 516, 517–18, 573 S.E.2d 637, 640 (2002) (quotation marks and citation omitted). "This court, on review of the superior court's order must determine whether the trial court correctly applied the proper standard of review." *Id.* at 518, 573 S.E.2d at 640. Accordingly,

> [t]his court applies the whole record test when reviewing the sufficiency of the evidence to support the findings of fact and, in turn, conclusions of law based thereon. To do so, we must determine whether the Board's findings are supported by substantial evidence contained in the whole record. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record de novo, as though the issue had not yet been determined.

Id. (internal quotation marks and citations omitted).

Here, the proper application of the burden of proof at the BOA hearing is a question of law that this Court reviews *de novo*. The BOA's decision concerning the location of the zoning line on the subject property is reviewed to see if it is supported by substantial evidence in view of the whole record.

III. Analysis

Petitioner's appeal presents two questions for this Court's review: (1) whether the BOA's determination concerning the existence of a zoning violation on 19 August 2009 was supported by substantial evidence in view of the whole record, and (2) if so, whether Petitioner's commercial activity on the rear portion of the property constituted a legal nonconforming use.

As to the first question, the burden of proving the existence of an operation in violation of the local zoning ordinance is on Respondent. *City of Winston-Salem v. Hoots Concrete Co., Inc.*, 47 N.C. App. 405,

414, 267 S.E.2d 569, 575 (1980). Thus, it was Respondent's responsibility to present evidence that Petitioner's commercial use of his storage building was in violation of Respondent's zoning ordinance when the notice of violation was issued on 19 August 2009.

Respondent contends that the 1993 Plat Map, the 1996 Zoning Map, and the GIS printout entitled "Current Zoning Map" constitutes competent, material, and substantial evidence that the current zoning line on Petitioner's property runs 150 feet parallel from the centerline of Highway 28. As previously noted, testimony concerning the 1996 Zoning Map tended to support the location of the zoning line at 150 feet, but the 1996 Zoning Map is not in the record on appeal.

Ordinarily, "[i]t is the duty of the appellant to ensure that the record is complete." *First Gaston Bank of N.C. v. City of Hickory*, 203 N.C. App. 195, 198, 691 S.E.2d 715, 718 (2010); *see also* N.C. R. App. P. 9 (discussing the procedural rules concerning the record on appeal). However, in granting the petition for a writ of certiorari, the Superior Court ordered Respondent to prepare and certify to the court the record of the BOA proceedings. *See* N.C. Gen. Stat. § 160A-393(f) ("The writ shall direct the respondent city . . . to prepare and certify to the court the record of proceedings below within a specified date."). Both parties concede that the record on appeal to this Court is incomplete and does not have all the exhibits considered by the BOA, including the 1996 Zoning Map.

Given the incomplete record available to this Court, we cannot properly determine if the BOA's decision to find Petitioner in violation of the current zoning ordinance was supported by competent, material, and substantial evidence in view of the whole record. However, as explained in detail below, we do not need to answer this question in order to resolve the issues raised by Petitioner's appeal. Because the burden of proof was inappropriately placed on Petitioner to establish the location of the zoning line when he began his nonconforming use, the Superior Court's order must be vacated. On remand, Respondent should reintroduce evidence that Petitioner's commercial use of his storage building was in violation of the zoning ordinance on 19 August 2009, the BOA should make a new determination with respect to this issue, and both parties should ensure that all evidence presented at the hearing is properly included in the record.

Petitioner contended before the BOA that his commercial use of the storage building toward the rear of his property constituted a legal nonconforming use under Section 110 of Respondent's zoning ordinance. Section 110(A) of the ordinance, entitled, "Non-conforming uses,"

provides that "[t]he lawful use of any building or premises at the time of the enactment of this Ordinance, or immediately preceding any applicable amendment thereto, may be continued even though the use does not conform with the provision of this Ordinance . . . ." Consistent with this provision, Petitioner contended that at the time that he purchased the subject property in 1993, the zoning line demarcating the commercial and residential zones ran 230 feet parallel from the centerline of Highway 28, making his use of the storage building legal. Thus, Petitioner contended that even if the zoning line was subsequently changed, his ongoing commercial use of the storage building is valid under Section 110(A).

Ordinarily, once a town meets its burden to establish the existence of a current zoning violation, the burden of proof shifts to the landowner to establish the existence of a legal nonconforming use or other affirmative defense. *See City of Winston-Salem*, 47 N.C. App. at 414, 267 S.E.2d at 575 ("The defendant, of course, has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case. As to such defenses, he is the actor and has the laboring oar. The city had the burden of proving the existence of an operation in violation of its zoning ordinance. It was defendant's burden to prove the city had already made a determination that the operation was permissible and did not violate the zoning ordinance." (internal quotation marks and citation omitted)). Here, however, Respondent has seriously handicapped Petitioner's ability to prove the location of the zoning line in 1993 because Respondent has lost the Official Zoning Map adopted with the 1990 zoning ordinance.

Section 103 of Respondent's zoning ordinance states that "[t]he Zoning Map and all explanatory matter thereon accompanies and is hereby made a part of this Ordinance and, together with a copy of this Ordinance, shall be permanently kept on file in the office of the Town Clerk." Thus, Respondent violated its own ordinance by failing to keep official zoning maps available for public inspection. *See* N.C. Gen. Stat. § 160A-77 (2013) (stating that the governing board of a town "may provide that [ordinances establishing or amending the boundaries of zoning districts] shall be codified by appropriate entries upon official map books to be retained permanently in the office of the city clerk or some other city office generally accessible to the public."); *see also* N.C. Gen. Stat. § 160A-78 (2013) (stating that "each city shall file a true copy of each ordinance adopted on or after January 1, 1972, in an ordinance book separate and apart from the council's minute book. The ordinance book shall be appropriately indexed and maintained for public inspection in the office of the city clerk."). These record

keeping requirements represent a recognition by Respondent and by the General Assembly that the public must be placed on constructive notice of past and present amendments to zoning ordinances in order to safeguard property and procedural due process rights.

We believe that where, as here, a town fails to comply with its obligations under local ordinances and state law by failing to keep official zoning maps on record for public inspection, the appropriate remedy is to place the burden back on the town to establish the location and classification of zoning districts when the landowner began his or her nonconforming use. Because the BOA placed the burden on Petitioner to establish the location of the zoning line when he began his nonconforming use in 1993, the Superior Court's order affirming that allocation of proof must be vacated and the matter remanded for a new hearing. At the new hearing, Respondent must: (1) present evidence establishing the existence of a current zoning violation, and (2) present evidence that the 1990 zoning ordinance moved the zoning line on the subject property from 230 feet to 150 feet from the centerline of Highway 28. Petitioner must be allowed to offer additional evidence in rebuttal.

Furthermore, with respect to the type of evidence that may be presented on remand, we note that N.C. Gen. Stat. § 160A-79, entitled, "Pleading and proving city ordinances," provides that "[c]opies of any part of an official map book" maintained in accordance with the statute "shall be admitted in evidence in all actions or proceedings before courts or administrative bodies and shall have the same force and effect as would an original ordinance[.]" N.C. Gen. Stat. § 160A-79(b)(2) (2013). While we do not hold that the plain meaning of this statute forecloses other methods of proof, we do agree that the official 1990 map or a copy thereof is the best evidence of the line's location when Petitioner began his nonconforming use.

The 1988 Zoning Map admitted into evidence below shows the zoning line at 230 feet. The only evidence in the current record tending to support Respondent's argument that the line moved to 150 feet in 1990 is the subdivision plat map approved and recorded in connection with Petitioner's land transaction. This plat map is not an official zoning map duly enacted with the 1990 zoning ordinance. Nor is it a copy. While we believe that the plat map has some evidentiary value concerning the location of the line, it must be weighed against the evidentiary value of the 230-foot line depicted on the official 1988 Zoning Map. A factual determination concerning the location of the line that is not supported by competent, material, and substantial evidence in view of the whole record will not be sustained on appeal. Respondent must produce such

evidence on remand establishing that the line was at 150 feet when Petitioner began his commercial use of the storage building. Otherwise, it must be presumed that Petitioner has a legal nonconforming use given the absence of any evidence tending to show that Petitioner's building is within the earlier 230-foot demarcation line.

IV. Conclusion

For the foregoing reasons, the Superior Court's order is vacated and this matter is remanded to the Superior Court with instructions to order further proceedings before the BOA consistent with this opinion.

VACATED AND REMANDED.

Judges ERVIN and DAVIS concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
SUPREME JUSTICE ALLAH, Defendant

No. COA14-126

Filed 2 September 2014

Search and Seizure—motion to suppress drugs—private residence—consent—search warrant

The trial court did not err in a drugs case by denying defendant's motion to suppress the search of his private residence attached to an ABC licensed storefront. The Alcohol Law Enforcement agents first obtained consent to search the living quarters, not including the recording studio, and then obtained a search warrant to search the recording studio.

Appeal by defendant from order and judgment entered 8 August 2012 by Judge W. Douglas Parsons in New Hanover Superior Court. Heard in the Court of Appeals 14 August 2014.

Roy Cooper, Attorney General, by R. Marcus Lodge, Special Deputy Attorney General, for the State.

Anne Bleyman, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Supreme Justice Allah ("Mr. Allah")[1] appeals from the denial of his motion to suppress, arguing that a warrant was needed for the search of his private residence though it is attached to an ABC licensed storefront. Mr. Allah also challenges the trial court's conclusions of law and findings of fact. For the following reasons, we affirm the trial court's order.

I. Facts & Procedural History

On 31 January 2011, a New Hanover County Grand Jury indicted Mr. Allah on charges of (i) possession of marijuana; (ii) possession with intent to manufacture, sell, and distribute marijuana; (iii) keeping and maintaining a place for the purpose of keeping and selling controlled substances; and (iv) possession of drug paraphernalia. On 12 July 2012, Mr. Allah made a motion to suppress all evidence resulting from illegal searches. The following month, on 7 August 2012, Mr. Allah's case came on for trial in New Hanover County before Judge W. Douglas Parsons. The trial judge denied the motion to suppress evidence. The transcript of the hearing tended to show the following facts.

Kenneth Simma ("Agent Simma") is a special agent with North Carolina Alcohol Law Enforcement ("ALE"). Agent Simma testified that on 23 October 2010 at approximately 9:00 p.m., he and another ALE agent, Agent Price, went to a convenience store called The Caribbean Lion to conduct an inspection. When Agents Simma and Price arrived, two or three patrons were "hanging around" the main area of The Caribbean Lion, which consisted of a lobby, merchandise area, and a pool table. The patrons left the convenience store shortly after the ALE agents entered. Agent Simma testified that a juvenile male was working at the cash register. Once the agents identified themselves to the juvenile male, he turned around and yelled, "Mom, the police are here."

Shortly thereafter, Dianna Shabazz-Allah ("Mrs. Allah"), the permittee, introduced herself to Agent Simma and allowed Agents Simma and Price to enter the cash register area. Mrs. Allah was the person primarily responsible for running the store at the time of the inspection. Agent Simma testified that he smelled marijuana upon entering the convenience store, but recalled the smell growing stronger once behind the cash register. Agent Simma explained to Mrs. Allah that he and Agent

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1. This Court will refer to Defendant, Supreme Justice Allah, as Mr. Allah for purposes of this opinion because Defendant was referred to as Mr. Allah throughout the trial transcripts. This Court notes that Defendant's full name is now Supreme Justice Shabazz-Allah.

Price were there to conduct an inspection, and asked Mrs. Allah to turn over any marijuana. Mrs. Allah said the smell came from customers in the store.

At that point, the two agents went with Mrs. Allah into a kitchen area behind the cash register. The room contained large kitchen equipment, shelves on both sides, and a piece of plywood in one corner. According to Agent Simma, the odor of marijuana was stronger near the plywood. Agent Simma testified that the "piece of plywood opened up, and a little, four-year-old girl came out." Mrs. Allah explained she needed to go into the room behind the plywood because she had other children in there, and consented to the ALE agents going into the room with her.

In the room behind the sheet of plywood, there were beds, a portable shower and toilet, and a television. In the room, another young male was watching television. The smell of marijuana continued to grow stronger. From there, Agent Simma asked Mrs. Allah for permission to enter another room, her bedroom, to which she consented. Mr. and Mrs. Allah's bedroom contained a couch and liquor bottles sitting on a bar.

The agents discussed the smell of marijuana with Mrs. Allah, asking her to hand over any marijuana on the premises. Mrs. Allah showed Agents Simma and Price an ashtray filled with marijuana ashes. At that point, Agent Simma also noticed a small bag of marijuana sitting in Mrs. Allah's open purse. Mrs. Allah handed the officers the small bag of marijuana.

For safety purposes, Agent Simma went to the front of the convenience store and asked the juvenile male to lock the doors because all the adults were in the back rooms. Agent Simma then asked him about any potential weapons in the building. At first, the boy said there were no weapons, but then remembered that his father always carried a taser, though the boy did not know the location of his father or the taser at that time.

Once Agent Simma returned to the living area behind the store, he leaned up against a bookshelf. As he did so, "the bookshelf opened up and Mr. Allah came out." According to Mrs. Allah, Mr. Allah was returning from his full-time job as a certified nursing assistant. Once Mr. Allah exited the hidden doorway, Agent Simma asked if he had permission to search Mr. Allah for safety purposes, to which Mr. Allah raised his hands. Agent Simma found cash, a set of keys, and a small bag of marijuana.

Mr. Allah described the room hidden behind the bookshelf as his "recording studio." Agent Simma requested permission to search the

recording studio, but Mr. Allah expressed concerns about a search "messing up his recording equipment." At that point, Agent Simma contacted the Wilmington Police Department for assistance in securing the location. Once officers from the Wilmington Police Department arrived, Mr. Allah said that "he had a little bit of marijuana, he used it for religious purposes"[2] and then proceeded to hand Agent Simma two small bags of marijuana. Although Mr. Allah offered this evidence voluntarily, he still did not consent to a search of the recording studio.

Since Mr. Allah again refused to consent to a search of the recording studio, Agent Simma explained to Mr. and Mrs. Allah "that they were not under arrest, but that for safety purposes, because of the partitions or walls or whatever you want to call them opening up and finding more hidden areas, that for safety purposes, that they were going to be detained." After Agent Simma detained Mr. and Mrs. Allah, he obtained a search warrant from the magistrate's office. Agent Simma then read the warrant aloud to Mr. Allah and gave him a copy of the warrant before conducting a search of the recording studio. In the recording studio, Agent Simma found a large bag of marijuana, marijuana seeds, two guns, rolling papers, and a digital scale. Agent Simma arrested Mr. Allah and read him his Miranda rights. After Mr. Allah signed a statement describing his rights, Agent Simma asked Mr. Allah if he was a convicted felon, to which Mr. Allah replied "yes." Agent Price decided not to charge Mrs. Allah because she agreed to surrender her ABC permits and thus surrender her right to sell alcoholic beverages.

Mr. Allah was indicted on 31 January 2011. On 12 July 2012, Mr. Allah filed a motion to suppress evidence obtained as the result of an illegal search, which was denied on 10 August 2012 via written order. In the trial court's written order, the trial court made the following findings of fact:

> 4. Under N.C.G.S. Section 18B-502, North Carolina Alcohol Law Enforcement (hereinafter ALE) officers or agents have the authority to investigate the operations of each licensed premises and to make inspections of each such premises which hold an Alcoholic Beverage Control (hereinafter ABC) permit.

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2. Mr. Allah explained that he purchased approximately four ounces of marijuana every month to use for religious purposes. Mr. Allah is a Rastafarian. As part of his beliefs, he "inhales marijuana as part of his spiritual growth, maintenance, and he also has grown his hair for quite a long time as part of that."

5. Such inspections of ABC permitted premises include viewing the entire premises pursuant to the statute.

6. That the ALE agents in this case made entry to the ABC permitted premises at 801 Dawson Street in the City of Wilmington, North Carolina to conduct such an inspection of the entire premises pursuant to statute.

7. That upon entry into these premises on October 23, 2010 at about 9:00 P.M., the ALE agents detected the odor of marijuana.

8. After detecting the odor of marijuana, the agents began to conduct their inspection of the ABC permitted premises.

9. As the agents went from place to place, such as in the side door, behind the cash register area enclosed by plexiglass, etc., the odor of marijuana became stronger.

10. That the agents asked for consent to go into other areas of the premises from the permit holder, the defendant's wife Dianna Allah and such consent was granted.

11. That as the agents went further towards the interior of the permitted premises which also contained the living quarters of the defendant, the odor of marijuana became stronger.

12. The agents discovered, in plain view in the purse of Mrs. Allah, a bag of marijuana.

13. Defendant came out of a hidden sliding door and Agent Simma asked him if he could pat him down for officer safety, and defendant consented to such patdown verbally and also indicated his consent by raising his hands.

14. Agent Simma felt in defendant's pants pocket an object which appeared to him based upon his training and experience to be a controlled substance in a plastic bag.

15. Agent Simma then went into defendant's pocket and removed US currency and a plastic bag containing marijuana.

16. Defendant and his wife, the ABC permit holder, consented to the entry of the agents into each part of the

> permitted premises until Agent Simma asked him for consent to search his recording studio located inside the permitted premises.
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> 17. Defendant then revoked his consent at which time Agent Simma froze the scene and detained defendant while he applied for a search warrant for the entire ABC permitted premises.
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> 18. Agent Simma applied for and received a search warrant for said premises at approximately 12:35 A.M. on October 24, 2010, and returned to the premises and executed said search warrant at about 1:12 A.M. on October 24, 2010.
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> 19. Upon executing said search warrant, agents found more than one and one-half ounces of marijuana as well as two firearms, a Mossberg shotgun and a .22 caliber rifle at the premises authorized to be searched pursuant to said search warrant.
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> 20. Upon finding these items of contraband, Defendant was placed under arrest and advised of his rights under *Miranda v. Arizona* by use of a written rights form.
>
> 21. Defendant waived his rights and agreed to speak to Agent Simma, and advised Agent Simma that he was in fact a convicted felon and that the marijuana found was his and that it was for personal use only for religious purposes.

The trial court then made the following conclusions of law:

> 2. That the entry by the ALE agents into the ABC permitted premises at 801 Dawson Street in the City of Wilmington, North Carolina on October 23, 2010 was lawful and proper.
>
> 3. That the entry by the ALE agents into each and every separate room or partition at the premises was by consent.
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> 4. That the agents continued to conduct their inspection of the above-referenced ABC permitted premises pursuant to statutory authority and with the consent of the permit holder, Dianna Allah.
>
> 5. That the odor of marijuana detected by the ALE agents from their entry into the permitted premises and detected

throughout the inspection of such ABC permitted premises gave the agents probable cause to conduct a warrantless search based upon exigent circumstances.

6. Based upon the facts as found herein and based upon the totality of the circumstances existing at the ABC permitted premises at 801 Dawson Street in the City of Wilmington, the ALE Agents had exigent circumstances present entitling them to conduct a warrantless search of the entire premises.

7. That despite such probable cause and exigent circumstances, Agent Simma applied for and properly received a search warrant to conduct a complete search of said premises.

8. That said warrant was issued based upon probable cause, and was legally and properly issued and was a valid search warrant.

9. That the ALE agents had authority to enter into and inspect the entire ABC permitted premises pursuant to statutory and regulatory authority of the State of North Carolina.

10. That the arrest of the Defendant was based upon probable cause and was appropriate and with just cause.

11. That the Defendant was properly given his rights under *Miranda v. Arizona*.

12. That the statement given by Defendant thereafter was freely, voluntarily and understandingly given and that Defendant understood and voluntarily waived his rights and gave such statement of his own free will and without duress by anyone.

The trial court concluded that the ALE officers inspected the premises pursuant to statutory authority, pursuant to probable cause and exigent circumstances, and pursuant to a valid search warrant. Following the denial of Mr. Allah's motion, he entered an *Alford* plea on 8 August 2012 to felony possession of marijuana, maintaining a place for keeping and selling controlled substances, possession of drug paraphernalia, and possession of a firearm by a felon.

Mr. Allah filed a notice of appeal on 12 November 2012.[3] Judge Parsons ruled the notice of appeal null and void on 13 November 2012 and stated that Mr. Allah did not appeal orally in open court. Mr. Allah then petitioned this court to grant certiorari, which we granted on 24 June 2013.

II. Jurisdiction and Standard of Review

This appeal lies of right pursuant to N.C. Gen. Stat. § 7A-27 from a final judgment of the New Hanover Superior Court. Mr. Allah argues on appeal that the ALE agents did not have the authority to search the private dwelling areas at issue.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

A trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994). "At a suppression hearing, conflicts in the evidence are to be resolved by the trial court." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003).

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779 (2014). "[D]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

Both parties agree the inspection of the retail area constituted a valid search pursuant to N.C. Gen. Stat. § 18B-502(a) (2013). Mr. Allah

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3. Mr. Allah's notice of appeal was dated 18 August 2012, but was not filed with the trial court until 12 November 2012.

argues that the ALE officers had no authority to search the living quarters or recording studio. For the following reasons, we disagree.

A. The Retail Area

This Court has recognized that ABC permittees waive their Fourth Amendment rights "to the limited extent of inspection by officers incident to enforcement of State ABC regulations." *State v. Sapatch*, 108 N.C. App. 321, 322–23, 423 S.E.2d 510, 512 (1992). The relevant ABC statute reads:

> To procure evidence of violations of the ABC law, alcohol law-enforcement agents, employees of the Commission, local ABC officers, and officers of local law-enforcement agencies that have contracted to provide ABC enforcement under G.S. 18B-501(f) shall have authority to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee.

N.C. Gen. Stat. § 18B-502(a) (emphasis added).

Both parties contend the main issue is whether the living area and recording studio connected to the ABC licensed premises are considered part of the "entire premises." However, this Court does not need to reach that issue if the searches of the living area and recording studio were lawful searches notwithstanding the interpretation of N.C. Gen. Stat. § 18B-502(a).

B. Living Area

Generally searches of a private residence are only reasonable if supported by a valid warrant. *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978). One exception to this general rule is consent. "Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997).

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). "As a general rule, the owner of the property or the person who is apparently entitled to give or withhold consent to search premises may give consent, and a

person who has common authority over the premises may also give valid consent to search the premises." *State v. Early*, 194 N.C. App. 594, 602, 670 S.E.2d 594, 601 (2009).

Here, Mrs. Allah plainly had valid authority over the premises as Mr. Allah's wife and the holder of the ABC permit. Mrs. Allah testified that she "felt like [she] needed to cooperate" with the authorities and Mr. Allah argues on appeal that Mrs. Allah's feeling rendered the consent involuntary. However, competent evidence exists via both Agent Simma's testimony and Mrs. Allah's testimony tending to show that Mrs. Allah provided her consent to enter all portions of the premises in dispute, with the exception of the recording studio area.

C. Recording Studio

Defendant cites *Terry v. Ohio*, 392 U.S. 1 (1968) to argue that law enforcement officers "must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . ." *Id.* at 20. Here, once Mr. Allah denied consent to search the recording studio behind the bookcase, Agent Simma took the proper action and obtained a search warrant. At the moment the consensual search ended, officers froze the search and only continued once they obtained a search warrant. As Agent Simma obtained a search warrant immediately after Mr. Allah objected to their search of the recording studio, Mr. Allah's argument that the search of the recording studio was constitutionally invalid is without merit.

As the ALE agents first obtained consent to search the living quarters not including the recording studio and then obtained a search warrant to search the recording studio, we hold the trial court did not err in denying Mr. Allah's motion to suppress.

IV. Conclusion

For the foregoing reasons, the trial court's order is

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
THOMAS ARMSTRONG

No. COA14-162

Filed 2 September 2014

Search and Seizure—motion to suppress evidence—automobile—odor of marijuana—probable cause

The trial court erred by granting defendant's motion to suppress evidence seized after a warrantless search of an automobile, and the case was remanded to the trial court. The officers had probable cause to search the automobile based upon the odor of marijuana emanating from the vehicle, after defendant was restrained in handcuffs and secured in the officers' patrol vehicle, that justified the search of every part of the vehicle and its contents.

Appeal by the State from order entered 4 December 2013 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellee.

CALABRIA, Judge.

The State appeals, pursuant to N.C. Gen. Stat. § 15A-979 and § 15A-1445(b), an order granting Thomas Armstrong's ("defendant") motion to suppress evidence seized by virtue of a search without a search warrant. We reverse and remand.

About 1:45 a.m. on 13 February 2012, Officers Jonathan Scher ("Officer Scher") and Bryce Carr ("Officer Carr") (collectively "the officers") of the Gastonia Police Department observed a black Chevrolet Impala ("the Impala") execute a three-point turn in the middle of an intersection, strike a parked vehicle, and continue traveling on the left side of the road. The officers activated their blue lights to initiate a traffic stop. Before the driver stopped the Impala, the officers observed a brown beer bottle thrown from the driver's side window.

The officers approached the Impala. Defendant, the driver, and his passenger complied with the officers' order to exit the Impala. When the officers checked the vacant Impala, they detected an odor of alcohol and marijuana emanating from inside the Impala and discovered a partially consumed bottle of beer was located in the center console. Officer Carr also detected an odor of alcohol on defendant's breath, and observed defendant's eyes, which he described as "red, glassy bloodshot eyes."

Defendant was arrested for hit and run and possession of an open container of an alcoholic beverage. Both defendant and his passenger were restrained in handcuffs and secured in the back of the officers' patrol vehicle. Officer Carr then retrieved the beer bottle that had been thrown from the Impala while Officer Scher searched the vehicle. Officer Scher found the beer bottle in the center console and a grocery bag with three unopened beers on the floorboard of the passenger area. He also found a "plastic baggie containing several white rocks" in the glove compartment of the Impala.

Defendant was subsequently charged with felony possession of cocaine, hit and run with failure to stop when property damage occurred, reckless driving to endanger, driving while license revoked, possession of an open container of an alcoholic beverage in the passenger area of a vehicle while consuming alcohol, and drinking beer while driving. On 7 November 2013, defendant filed a pretrial motion to suppress all the evidence that was obtained as the fruit of an illegal search of defendant's vehicle. After a hearing, the trial court entered an order on 4 December 2013 granting defendant's motion to suppress. The State appeals.

The State argues the trial court erred by granting defendant's motion to suppress. Specifically, the State contends the search of defendant's vehicle was based upon probable cause, therefore the trial court mistakenly concluded that the extensive search went beyond a valid and lawful search incident to arrest, and "is distinguishable from other cases where the vehicles are stopped lawfully but no one is placed under arrest such that the vehicle is not secured, and also from cases in which law enforcement actually observed the occupants of the vehicle engaging in drug transactions and subsequently secured the vehicle." We agree with the State.

The standard of review regarding a trial court's decision with respect to a motion to suppress "is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "[T]he trial court's findings of fact are conclusive on

appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation omitted). Findings not challenged on appeal are deemed supported by competent evidence and are binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "Conclusions of law are reviewed de novo[.]" *Id.*

Since the State does not challenge the trial court's findings, they are binding on appeal. *Id.* Rather, the State contends that the trial court erred in its conclusion of law that the officers' extensive search of the Impala went beyond a valid and lawful search incident to arrest because a search warrant was required to execute a lawful search of the interior portion of the Impala without violating defendant's Fourth Amendment rights. Therefore, the issue for our determination is whether the officers had probable cause to justify the warrantless search.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. Amend. IV. Generally, a warrant is required for every search and seizure, with particular exceptions. *State v. Trull*, 153 N.C. App. 630, 638-39, 571 S.E.2d 592, 598 (2002). Two specific exceptions include a search incident to a lawful arrest and the "automobile exception." The United States Supreme Court has held that law enforcement may search a vehicle incident to a suspect's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Arizona v. Gant*, 556 U.S. 332, 343, 173 L. Ed. 2d 485, 496 (2009) (citation and internal quotations omitted). "[W]hen investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle." *State v. Mbacke*, 365 N.C. 403, 409-10, 721 S.E.2d 218, 222 (2012).

"It is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area may take place." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (citing *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 583-84 (1982)); *see also State v. Isleib*, 319 N.C. 634, 638-39, 356 S.E.2d 573, 576-77 (1987) (discussing the automobile exception to the warrant requirement). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *State v. Mitchell*, ___ N.C. App. ___, ___, 735 S.E.2d 438, 441 (2012), *appeal dismissed, disc. review denied*,

___ N.C. ___, 740 S.E.2d 466 (2013). "Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Downing*, 169 N.C. App. at 795, 613 S.E.2d at 39 (citations and internal quotations omitted) (alterations in original). "[T]he mere odor of marijuana or presence of clearly identified paraphernalia constitutes probable cause to search a vehicle." *Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 442; *see State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) (odor of marijuana "gave the officer probable cause to search . . . for the contraband drug."); *see also State v. Corpening*, 200 N.C. App. 311, 315, 683 S.E.2d 457, 460 (2009) ("The 'plain smell' of marijuana by the officer provided sufficient probable cause to support a search and defendant's subsequent arrest.").

In the instant case, the trial court found that defendant and his passenger were restrained with handcuffs and secured inside the officers' patrol vehicle before the officers searched the Impala, and that the officers did not see any contraband in plain view before the search. The trial court was correct in concluding that since defendant was restrained in handcuffs and secured in the officers' patrol vehicle before Officer Scher began searching the Impala, *Gant* did not permit a search of the Impala because defendant was neither unsecured nor within reaching distance of the passenger compartment of the vehicle at the time of the search.

However, *Gant* also recognized that there are other exceptions to the warrant requirement that would permit a vehicle search, including the automobile exception. *Gant*, 556 U.S. at 346-47, 173 L. Ed. 2d at 498 ("If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross* . . . authorizes a search of any area of the vehicle in which the evidence might be found."). The officers testified, and the trial court found, that the officers detected the odor of both alcohol and burning marijuana emanating from within the passenger compartment of the Impala. At the hearing, Officer Carr testified that he could "smell a strong odor of marijuana coming from inside the vehicle." Officer Scher testified that after detecting the odor of alcohol and marijuana in the Impala and placing defendant and his passenger in the back of the patrol vehicle, he "proceeded to conduct a probable cause search of the [Impala]." Since the officers had probable cause to search the Impala based upon the odor of marijuana, the officers could lawfully search every part of the Impala where marijuana might reasonably be found, including the glove compartment. *Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 441.

The trial court misinterpreted *Gant* as requiring the officers to obtain a search warrant in order to execute a lawful search of the interior portion of the vehicle. However, the officers had probable cause to search the Impala based upon the odor of marijuana emanating from the vehicle, after defendant was restrained in handcuffs and secured in the officers' patrol vehicle, that justified the search of every part of the vehicle and its contents. *See Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 441. Therefore, the trial court was mistaken because it failed to take into account the officers' probable cause to search for contraband. We reverse the trial court's order granting defendant's motion to suppress and remand to the trial court.

Reversed and remanded.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
PATRICE ANTOINETTE BERNARD, Defendant

No. COA13-1470

Filed 2 September 2014

1. Appeal and Error—transcript not provided—interests of justice

Defendant's arguments on appeal were considered in the interests of justice where the State contended that she had waived her issues by not providing a transcript, but the trial court had ordered the State to provide transcripts to defendant's attorney at AOC expense. The lack of complete transcripts on appeal was the responsibility of the State.

2. Search and Seizure—overlapping civil and criminal actions—probable cause for warrant—suppression of items necessary to civil action

In a prosecution for computer crimes including unauthorized access against a terminated university employee with an ongoing civil action against the university, there was probable cause for the issuance of a search warrant where defendant objected that the warrant was based on hearsay, that the officer was biased against her, and that items necessary to her ongoing civil litigation were

seized. Probable cause may be founded on hearsay, regardless of the officer's attitude, there was information to support the issuance of the warrant, and items necessary to the ongoing civil litigation were suppressed.

3. Jurisdiction—university police—off campus home—search warrant—sending false email

University police had jurisdiction to execute a search warrant at defendant's off-campus private home where defendant was charged with sending a false email to a campus computer. Under N.C.G.S. § 14-453.2, any offense committed by the use of electronic communication is deemed to have been committed where the communication was originally sent or received, in this case on the campus since the email was sent through the university servers on the campus. Moreover, the university and city police had an agreement for police cooperation and mutual aid.

4. Constitutional Law—Fourth Amendment rights—overlapping civil and criminal case

Defendant's Fourth Amendment rights were not violated where she was engaged in in an ongoing employment action with A&T University after her termination; a university officer obtained warrants, searched her home, person, and vehicle in a criminal action arising from a false email; and the officer deliberately chose to seize documents subject to the attorney client privilege. The trial court properly suppressed privileged evidence.

Appeal by defendant from consolidated order entered 4 April 2013, order denying motion to suppress entered 27 June 2013, and judgments entered 12 July 2013 by Judge David L. Hall in Superior Court, Guilford County. Heard in the Court of Appeals 24 April 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Hicks McDonald Noecker LLP, by Raymond D. Large III, for defendant-appellant.

STROUD, Judge.

Defendant appeals her convictions for accessing a government computer without authority, accessing computers, and identity theft, arguing that her motions to suppress evidence seized by the North Carolina

Agricultural and Technical State University police from a search of her home should have been allowed. For the following reasons, we find no error.

I. Background

This case has an odd and somewhat disturbing background. It began with a civil case and ended up as a criminal prosecution of defendant, who was the plaintiff in the civil case. In this criminal case, as a practical matter, North Carolina Agricultural and Technical State University ("A&T") used a criminal search warrant to obtain discovery from defendant for possible use in its defense of the civil case she had filed against A&T. Until 11 July 2008, defendant was an employee of A&T, but her employment was terminated. On 28 July 2009, in the civil action, the trial court entered an order addressing defendant's "Petition for Judicial Review of the Decision" before an administrative law judge which determined that A&T had failed to inform her of her right to contest her termination. The order found that "Petitioner [defendant] received a letter from Respondent [A&T] dated June 11, 2008 advising that her employment would be terminated July 11, 2008" and concluded that

> [t]he letter to Petitioner [defendant] dated June 11, 2008 fails to inform her of her right to contest her termination based on RIF; the procedure for contesting her termination, or the time limit for filing her objection to the termination. Accordingly, the notice was insufficient to start the time limit for filing her petition[.]

Accordingly, the trial court reversed the final decision of the administrative law judge, which had dismissed defendant's contested case, and remanded the case for further proceedings.

About a month and a half after the civil case was remanded, on or about 8 September 2009, "Detective M. Tillery, of North Carolina Agricultural and Technical State University Department of Police & Public Safety" applied for a search warrant for Road Runner Hold Company LLC ("Road Runner") based upon the following facts:

> On September 3, 2009 I, Detective M. Tillery, responded to 1020 Wendover Avenue, Greensboro, NC, which is property of NC A&T State University. The complainant, Mrs. Linda McAbee, Vice Chancellor of Human Resources at NC A&T SU, stated that someone accessed her NC A&T SU email account without her permission. The complainant stated that the unknown and unauthorized user(s) created

an email which intended to deceive Administrators of the university.

The complaint stated that the information contained in the email addressed an issue which NC A&T State University and [defendant] Mrs. Patrice A. Bernard (Petitioner) is/was in litigation in Guilford County, North Carolina. The complainant also stated that the unauthorized email was sent on August 30, 2009 at 18:49EST.

This affiant discovered through court documents that the petitioner filed a grievance in April 2008 in response to a termination letter dated April 22, 2008. According to court documents, the petitioner [defendant] received a Reduction In Force (RIF) letter indicating that her position would be eliminated for funding reasons. The petitioner filed an appeal. University Administrators have been communicating with Mrs. McAbee to resolve this issue through legal means. Mrs. McAbee stated that someone accessed her email, constructed a bogus communication, and emailed the document to University Administrators in an effort to rehire or compensate the former employee, [defendant] Mrs. Patrice Bernard.

Mrs. Lisa Lewis-Warren, Department of Information Technology with NC A&T SU stated that her department conducted forensic analysis on Mrs. McAbee's desktop computer and the campus Network System. Mrs. Warren stated that her department discovered that the unauthorized communication was not sent from Mrs. McAbee's desktop computer. Mrs. Warren stated that the NC A&T SU IT Department analysis indicated that an unauthorized person accessed Mrs. McAbee's university email account and other current employees email accounts of NC A&T SU, several times for several minutes from IP Address 65.190.107.64, between August 28, 2009 through September 2, 2009.

This affiant knows that many individuals and businesses obtain their access to the Internet through businesses known as Internet Service Providers ("ISPs"). ISPs provide their customers with access to the Internet using telephone or other telecommunications lines; provide Internet email accounts that allow users to communicate

with other Internet users by sending and receiving electronic messages through the ISPs' servers; remotely store electronic files on their customers' behalf; and may provide other services unique to each particular ISP.

Through this affiant['s] training and experience, when an ISP or other providers uses dynamic IP addresses, the ISP randomly assigns one of the available IP addresses in the range of IP addresses controlled by the ISP each time a user dials into the ISP to connect to the Internet. The customer's computer retains that IP address for the duration of that session, and the IP address cannot be assigned to another user during that period.

. . . .

Through this affiant['s] training and experience, a static IP address is an IP address that is assigned permanently to a given user or computer on a network. A customer of an ISP that assigns static IP addresses will have the same IP address every time.

Through this affiant['s] training and experience, ISPs maintain records pertaining to the individuals or companies that have [a] subscriber account with it. Those records could include identifying and billing information account access information in the form of log files, email transaction information, posting information, account application information, and other information both in computer data format and in written record format. ISPs reserve and/or maintain computer disk storage space on their computer system for the use of the Internet service subscriber for both temporary and long-term storage of electronic communications with other parties and other types of electronic data and files. E-mail that has not been open is stored temporarily by an ISP incident to the transmission of the e-mail to the intended recipient, usually within an area known as the home directory.

Through my training and experience this affiant knows that when an individual uses a computer to obtain unauthorized access to a victim computer over the internet, the individual's computer will generally serve both as an instrumentality for committing the crime, and also as a storage device for evidence of the crime. The computer

> is an instrumentality of the crime because it is used as a means of committing the criminal offense.

Based on these facts Detective Tillery requested a search warrant to seize anything within the possession of Road Runner regarding IP Address 65.190.107.64 between the dates of August 28, 2009 and September 2, 2009. The magistrate issued the search warrant. On or about 15 September 2009, Detective Tillery applied for an amended search warrant based on the same facts and requesting the same information to be seized; again, the magistrate issued the search warrant. On or about 15 September 2009, Time Warner Cable's Subpoena Compliance Team, wrote to Detective Tillery and informed him that the IP Address at issue was assigned to defendant Patrice Bernard.

On or about 16 September 2009, Detective Tillery again applied for a search warrant but this time for defendant's home, vehicle, and her person. Detective Tillery's factual basis for the search warrant was the same as the Road Runner search warrants except he added that "[t]he ISP, Road Runner Hold Co LLC RRMA, identified IP Address 65.190.107.64 connection as being assigned to [defendant] Patrice Bernard located at 2722 Chadbury Drive Greensboro, North Carolina. This is the petitioner who is/was in litigation against NC A&T State University in Guilford County, North Carolina." The magistrate issued the search warrant. On or about 23 September 2009, Detective Tillery again applied for a search warrant based on the same facts as in the other search warrants, this time specifically requesting to search a computer seized during the search of defendant's home. The magistrate issued the search warrant. All of the search warrants except for the one regarding defendant's computer were returned by Detective Tillery.

On or about 30 September 2009, the magistrate issued a warrant for defendant's arrest for accessing a government computer; this warrant was returned by Detective Tillery. On or about 12 July 2010, the magistrate issued two other arrest warrants for felony accessing computers and identity theft; these warrants were returned by A&T officers. On 20 September 2010, defendant was indicted for accessing a government computer without authorization, felony accessing computers, and identity theft.

On 22 February 2013, defendant filed a motion to suppress "evidence obtained as a result of any supposed forensic examination" of her computer because the information on her seized computer was manipulated. On 4 March 2013, defendant filed a supplement to her motion requesting suppression and/or exclusion of everything seized in the search of her

home due to "the State's tainted chain of custody[,]" particularly evidence regarding the civil action against A&T, and requesting the charges against her be dismissed. On 27 March 2012, defendant filed another motion again requesting exclusion and suppression of the evidence seized from her home and for dismissal of her criminal case.

On 4 April 2013, the trial court entered a consolidated order regarding all three of defendant's aforementioned motions. The trial court found the following facts which are not challenged:

> 1. That on September 3rd, 2009 Detective M. Tillery responded to the Office of the Vice Chancellor of Human Resources at North Carolina A & T State University regarding a report from Vice Chancellor Linda Mcabee who reported that someone had accessed her email and sent unauthorized e-mail transmissions from state owned computers;
>
> 2. That Vice Chancellor Linda Mcabee advised Detective Tillery that the defendant was involved in pending civil litigation with North Carolina A & T State University;
>
> 3. That Detective Tillery then independently examined court documents and learned of the nature and ongoing status of the litigation;
>
> 4. That also on or about September 3rd Lisa Lewis Warren, of the Department of Information Technology at North Carolina A & T State University, performed a forensic analysis of Vice Chancellor Linda Mcabee's computer and other computers on the campus network system;
>
> 5. That Lisa Lewis Warren discovered e-mails not sent from the campus network system computers but that had originated from IP address 65.190.107.64;
>
> 6. That on September 8th, 2009 Detective Tillery obtained a search warrant for the records of Road Runner Holding Company, LLC and did send that search warrant to Road Runner;
>
> 7. That on September 15th, 2009 Detective Tillery obtained another search warrant for Road Runner and served that search warrant on Road Runner.

8. That Detective Tillery made a return on the second search warrant dated September 16th, 2009;

9. That Road Runner provided Detective Tillery with information that the subject IP address, 65.190.107.64, was assigned to the defendant;

10. That based upon representations made by Vice Chancellor Linda Mcabee and the subscriber information provided by Road Runner, Detective Tillery applied for and received a search warrant for the search of the defendant's home located at 2722 Chadbury Drive in Greensboro, North Carolina, on September 16th, 2009;

11. That Detective Tillery executed a search warrant on the defendant's home on September 16th, 2009;

12. That Detective Tillery was assisted during the execution of the search warrant upon the defendant's home by, without limitations, Detective J. S. Flinchum of the Greensboro Police Department, as well as Officer Kimberly Willis of the North Carolina A & T State University Campus Police;

13. That a number of computers and computer-related hardware were located and seized from defendant's home, as reflected on Detective Tillery's Inventory of Seized Property dated September 16, 2009;

14. That Detective Tillery also located a number of paper documents pertaining to the lawsuit between North Carolina A & T State University and the defendant;

15. That these paper documents included correspondence between her attorney, David W. McDonald, and the defendant, relating to her litigation with North Carolina A & T State University;

16. That although Detective Tillery was aware of the pending lawsuit, he nonetheless reviewed these paper documents in an effort to locate evidence pertaining to his criminal investigation;

17. That after reviewing these paper documents, recognizing they pertain to pending civil litigation, Detective Tillery nonetheless seized these documents;

> 18. That at all times relevant to Detective Tillery reviewing and seizing these documents, Detective Tillery was acting within the scope and course of his employment with North Carolina A & T State University;
>
> 19. That Detective Tillery processed all seized property, including all computers and the above described paper documents, at North Carolina A & T State University Campus Police Headquarters;
>
> 20. That after processing all property seized from the defendant's home Detective Tillery stored all seized property in the North Carolina A & T State University Campus Police Evidence Management System;
>
> 21. That Detective Tillery checked out the computer hardware seized from the defendant's home from North Carolina A & T State University Campus Police Evidence Management System and delivered same to Detective Flinchum for purposes of a computer forensic examination on September 23rd, 2009;
>
> 22. That Detective Flinchum performed his forensic examination and returned the computer hardware to Detective Tillery, who again entered the computer hardware into the North Carolina A & T State University Campus Police Evidence Management System;
>
> 23. That Detective Flinchum found no evidence that the computer hardware seized from defendant's home had been accessed, powered-on or manipulated in any way from the time the hardware was seized until Detective Flinchum began his forensic examination on September 23rd, 2009[.]

The trial court denied defendant's motions to suppress with the exception of exclusion of "any and all correspondence of any kind, whether electronic or in paper form, between the defendant" and her attorney in the civil case.

On or about 30 May 2013, defendant filed another motion to suppress evidence alleging A&T campus police were "acting outside the scope of their jurisdiction as prescribed by law" when they searched defendant's private residence. On 27 June 2013, the trial court denied defendant's last motion to suppress finding:

1. That on September 16, 2009, representatives of North Carolina A & T State University Campus Police obtained a search warrant for the search of the defendant's premises, located at 2722 Chadbury Drive, located in Greensboro, North Carolina;

2. That representatives of the North Carolina A & T State University Campus Police, along with a representative from the Greensboro Police Department, executed the above-referenced search warrant on September 16, 2009;

3. That pursuant to the above-referenced search, representatives of the North Carolina A & T State University Campus Police and a detective with the Greensboro Police Department seized various computers and computer-related devices from the home of the defendant, Ms. Patrice Bernard;

4. That Ms. Bernard's property was not located on real property owned by North Carolina A & T State University;

5. That the property which was the subject of the September 16, 2009, search was occupied by defendant Patrice Bernard, and located approximately six miles from the real property owned by North Carolina A & T State University;

6. That in providing probable cause for issuance of the search warrant, Detective Tillery with the North Carolina A & T State University Campus Police articulated probable cause for a violation of North Carolina General Statute Section 14-454(b), which is commonly referred to as "Accessing a Computer Without Authorization";

7. That the physical acts necessary to commit the crime of Accessing a Computer Without Authorization in this instance would necessarily be committed not only at the site where the computer(s) was/were located, but also would be committed on the real property where the affected computer server was located;

8. That in this instance, the alleged computer server at issue was located on real property owned by North Carolina A & T State University.

The trial court denied defendant's final motion to suppress.

The jury found defendant guilty of accessing a government computer without authority (for the purpose of executing a scheme or artifice to defraud), accessing computers, and identity theft. The trial court suspended defendant's sentences on all of the convictions. Defendant appeals both the orders denying her multiple motions to suppress evidence and her judgments.

II. Waiver

[1] The State contends defendant has waived her issues on appeal due to her failure to provide this Court with a transcript so that we could review whether defendant preserved her arguments before the trial court. The State is correct that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. App. P. Rule 10(a). But here, for reasons not entirely clear to this Court, on 30 August 2013, the trial court entered an order requiring the State to provide transcripts to defendant's attorney and ordering "AOC to pay for the transcripts." The State did not appeal this order and thus had the responsibility, based upon the trial court's order, to pay for and provide the transcripts. Neither in the brief nor at oral argument has the State explained why it failed to comply with the trial court's order. In this unusual situation, the lack of complete transcripts before this Court is the responsibility of the State and we cannot penalize defendant for a failure to show that her arguments were preserved in the transcript. We therefore will not consider any arguments regarding waiver made by the State since the accuracy of this argument cannot be confirmed without transcripts, which the State, in violation of a trial court order, failed to provide. In the interest of justice, we must assume that defendant presented her arguments to the trial court, and we will consider defendant's arguments. *See* N.C.R. App. P. 2.

III. Motions to Suppress

Defendant contends that the trial court erred in denying her motions to suppress because the search warrant was not based on sufficient probable cause; A&T campus police were without jurisdiction to execute the search warrant on private property and not on the A&T campus; and her Fourth Amendment rights were violated.

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress

> is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Johnson, ___ N.C. App. ___, ___, 737 S.E.2d 442, 445 (2013) (citation omitted).

A. Probable Cause

[2] Defendant contends her motions to suppress should have been allowed because the search warrant issued for her home, person, and vehicle lacked probable cause on four grounds: (1) the jurisdiction of A&T campus police, (2) hearsay, (3), bias, and (4) over-breadth of the items to be seized.

> > A search warrant may be issued only upon a finding of probable cause for the search. This means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought and that such object will aid in the apprehension or conviction of the offender.
>
> In *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), North Carolina adopted the totality of the circumstances test for examining whether information properly before the magistrate provides a sufficient basis for finding probable cause and issuing a search warrant. The standard, established by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L.Ed. 2d 1453 (1983), is as follows:
>
> > The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying

> > hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
>
> When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present.

State v. Hunt, 150 N.C. App. 101, 104-05, 562 S.E.2d 597, 600 (2002) (citations, quotation marks, ellipses, and brackets omitted).

We will address the issue of jurisdiction of the campus police more fully below in the section regarding jurisdiction. Addressing defendant's other objections to the search warrant in turn, we first note that defendant's hearsay argument is without merit. "[P]robable cause may be founded upon hearsay[.]" *State v. Severn*, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (citations and quotation marks omitted). Defendant's next objection is that Detective Tillery was biased against her. We are not aware of any case law nor has defendant directed us toward any indicating that the investigating officer's negative view or bias against a defendant may invalidate the application for the search warrant. Regardless of the investigating officer's attitude, the question remains whether the facts as presented to the magistrate establish "there is a fair probability that contraband or evidence of a crime will be found in a particular place[;]" *Hunt*, 150 N.C. App. at 105, 562 S.E.2d at 600. There was information to support the issuance of the search warrant, including a letter from Time Warner Cable to Detective Tillery which identified defendant's IP address as the source of the fraudulent emails.

Lastly, as to the items to be seized, the trial court ultimately agreed with defendant that any information regarding her civil case was beyond the scope of the criminal investigation and suppressed "any and all correspondence of any kind, whether electronic or in paper form, between the defendant and" her attorney; thus, defendant actually received the very relief she was seeking regarding any issues of over-breadth in the search. Accordingly, we view defendant's argument "that the items sought to be seized would include items necessary to the ongoing employment litigation" to be irrelevant, in light of the fact that this evidence was suppressed. These arguments are overruled.

B. Jurisdiction of Campus Police

[3] The more difficult question is the jurisdiction of the campus police to carry out a search of a private residence which was not on the campus of A&T. Defendant argues that her motions to suppress should have been allowed because the A&T campus police acted beyond their statutory authority by executing a search warrant at her home. "A search warrant may be executed by any law-enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved." N.C. Gen. Stat. § 15A-247 (2009). "The territorial jurisdiction of a campus police officer shall include all property owned or leased to the institution employing the campus police officer and that portion of any public road or highway passing through such property or immediately adjoining it, wherever located." N.C. Gen. Stat. § 116-40.5(a) (2009). Furthermore, North Carolina General Statutes §§ 74E-6, 74G-6, and 160A-288 provide campus police with the ability to cooperate with other law enforcement agencies and enter into joint agreements and mutual aid agreements that extend the campus police agencies jurisdiction. *See* N.C. Gen. Stat. §§ 74E-6(d); 74G-6(c); 160A-288 (2009). In 1998, A&T and the City of Greensboro entered into an "AGREEMENT FOR POLICE COOPERATION AND MUTUAL AID" ("Agreement") which provided that:

> The Campus Law Enforcement Agency will have primary authority for investigation as described in Paragraph 2.2, although such investigation may require that officers of the Campus Law Enforcement Agency make inquiries and arrests beyond the perimeter of Campus in the following cases:
>
> > An offense committed on Campus for which [the] alleged perpetrator or suspect is no longer present on campus, whether or not officers are in active and immediate pursuit[.]

Thus, the A&T campus police had authority to investigate "[a]n offense committed on Campus" even if the suspect "is no longer present on" the campus. Thus, the question is whether defendant's offense was "committed on Campus[.]" Defendant was charged with accessing computers under North Carolina General Statute § 14-454(b) and accessing a government computer without authority under North Carolina General Statute § 14-454.1(b); both of these crimes are in Article 60 of the North Carolina General Statutes. *See* N.C. Gen. Stat. §§ 14-454; -454.1 (2009). North Carolina General Statute § 14-453.2 provides, "Any offense under

this Article [60] committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received in this State. 'Electronic communication' means the same as the term is defined in G.S. 14-196.3(a)." N.C. Gen. Stat. § 14-453.2 (2009). North Carolina General Statute § 14-196.3(a) defines "[e]lectronic communication" as "[a]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system." N.C. Gen. Stat. § 14-196.3(a). Under this broad definition of electronic communication, *see id.*, defendant "sent" an "electronic communication" when she accessed the email account of an employee of A&T and sent a false email. N.C. Gen. Stat. § 14-453.2; *see* N.C. Gen. Stat. §§ 14-454; -454.1. Under N.C. Gen. Stat. § 14-453.2, defendants "offense[s were] committed on Campus" since she sent the email through the A&T computer servers on the campus and pursuant to the Agreement, A&T campus police had jurisdiction to execute a search warrant at her private home. This argument is overruled.

C. Fourth Amendment

[4] Lastly, defendant contends that her Fourth Amendment rights were violated due to Detective Tillery's egregious actions, since he knew about her pending civil litigation against his employer and quite deliberately chose to seize documents related to that case, including confidential attorney-client communications. While we agree that Detective Tillery's conduct was inappropriate and in intentional violation of defendant's attorney-client privilege, the fact remains that he had probable cause for the search warrant and due to the Agreement with the City of Greensboro, he also had the legal authority to execute the search warrant. We understand defendant's outrage that an employee of her opponent in civil litigation—and a public university of this state, no less—used his legal authority to obtain and execute a search warrant against her, with the civil litigation clearly being a primary focus of his interest. Instead of deferring to the Greensboro Police Department to handle the criminal investigation and prosecution, A&T used its authority to obtain "discovery" in the civil lawsuit which it never would have been able to obtain in the civil case.[1] The A&T police searched defendant's home, person, and

1. Perhaps aware of the appearance of a conflict of interest and with concern about their authority to execute the search warrants off campus, the A&T police did have one Greensboro officer accompany them for the search of defendant's home, but the Greensboro Police Department had no other involvement in obtaining or execution of the search warrant, so far as our record reveals.

vehicle for items pertaining to both the civil case and the criminal matter, and then Detective Tillery intentionally took items which he knew were subject to attorney-client confidentiality and related only to the civil case. But the trial court properly suppressed the evidence which was subject to the attorney-client privilege, and defendant has failed to raise any legal grounds which make either the search warrant or its execution invalid. Because defendant has no legal grounds to contend her Fourth Amendment rights were violated, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
DONALD EUGENE BORDERS, Defendant

NO. COA13-1208

Filed 2 September 2014

1. Search and Seizure—evidence—DNA from cigarette butt—voluntarily relinquished to officer—no reasonable expectation of privacy

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress DNA evidence extracted from the butt of defendant's cigarette. Defendant voluntarily accepted the police officer's offer to throw away the cigarette butt. Because defendant voluntarily gave the officer his cigarette butt, defendant abandoned the cigarette butt and no longer had a reasonable expectation of privacy in the property, even though he placed the cigarette butt in the officer's control inside of the curtilage of his home. As the property was abandoned, the officers' subjective intent in effectuating the valid assault on a female warrant was irrelevant.

2. Venue—motion to change venue—defendant failed to meet burden

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to change venue. Defendant did not meet his burden of showing that the trial court improperly denied his motion for a change of venue.

3. Evidence—expert testimony—properly admitted

The trial court did not err in a first-degree murder case by admitting into evidence expert opinion testimony offered by two doctors where the testimony was reliable.

Appeal by defendant from judgments entered 29 January 2013 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 22 May 2014.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Donald Eugene Borders ("Defendant") appeals from a jury verdict finding him guilty of raping and murdering Margaret Tessneer ("Ms. Tessneer"). Defendant argues (i) that the trial court erred by admitting DNA evidence obtained by officers after effectuating an arrest based on an unrelated warrant at his domicile; (ii) that the trial court erred by denying his motion for a change of venue because pretrial publicity made it impossible to empanel an impartial jury; and (iii) that the trial court abused its discretion in allowing the admission of expert testimony that Ms. Tessneer died from asphyxiation because the testimony was unreliable and lacked a proper foundation. After careful review, we find no error in the trial court's judgments.

I. Facts & Procedural History

Defendant was indicted on 11 January 2010 for rape and felonious breaking and entering in File Nos. 09 CRS 057186 and 09 CRS 05187. Defendant was also indicted on 8 March 2010 for first-degree murder in File No. 10 CRS 00285. Defendant stood trial in Cleveland County Superior Court, beginning on 13 November 2012 and ending on

29 January 2013. The record and trial transcript below tended to show the following facts.

Immediately prior to Defendant's trial, the trial court held a suppression hearing concerning a DNA sample acquired from a cigarette used by Defendant, the facts surrounding which are discussed in Section III *infra*. After the hearing on Defendant's motion to suppress the DNA evidence, Defendant twice moved for a change of venue; neither request was granted. The jury was empaneled and the State called Amy Fredell ("Ms. Fredell"), a Service Division Supervisor with the Shelby Police Department, as its first witness.

A. Events of 20 September 2003

Ms. Fredell testified that on 20 September 2003, the Shelby Police Department received a 911 call requesting that an officer be dispatched to 1024 Railroad Avenue, where a death had occurred. Patrol Officer Victor Haynes ("Officer Haynes") was dispatched to the residence, where Officer Haynes saw Ms. Tessneer, an elderly woman, lying on a bed in the home. Ms. Tessneer's feet were on the floor, she was clothed in a light-colored nightgown, her eyes were fixed, and her mouth was open. Officer Haynes observed false teeth next to her body on the bed. Officer Haynes did not find a pulse or observe her breathing. Officer Haynes stated that Ms. Tessneer felt cold. Officer Haynes cleared the residence and then went outside to ensure that emergency medical service personnel ("EMS") came to the residence.

Louie Ledford ("Mr. Ledford") of EMS arrived at the scene. Mr. Ledford entered with Officer Haynes, checked Ms. Tessneer's vital signs, and found that Ms. Tessneer had passed away. Officer Haynes surveyed the home and found two cement blocks stacked outside of Ms. Tessneer's bedroom window as well as some phone lines that had been cut on the same side of the house. Mr. Ledford testified Ms. Tessneer was not breathing when he arrived at her home. After taking Ms. Tessneer's pulse, Mr. Ledford told Officer Haynes that she was dead, closed her eyes with his gloved fingers, and covered her body with a sheet. Mr. Ledford described the body as "morbid," having bruising on the wrists and arms, and stated that a pool of blood collected around Ms. Tessneer's body. Mr. Ledford did not notice any signs of struggle.

Ms. Tessneer's daughter, Libby Clark ("Ms. Clark"), testified that on 20 September 2003, Ms. Clark took her husband to the doctor's office, stopped by Hardee's to purchase a biscuit, and purchased another biscuit to take to her mother. Ms. Clark arrived at her mother's home at around 11 A.M. Ms. Clark stated that upon leaving her car, she noticed

a cement block underneath her mother's bedroom window, which she thought was unusual. Ms. Clark then walked up the home's steps and through the unlocked screen door, which her mother usually kept locked. Ms. Clark then saw her mother laying on her bed. Ms. Clark ran to Ms. Tessneer's phone to dial 911, but found that the phone did not work. Ms. Clark tried another phone, which also did not work. Ms. Clark then ran to a neighbor's home, asking the woman inside to dial 911 and then went to her uncle's home, which was near Ms. Tessneer's residence.

Another of Ms. Tessneer's daughters, Peggy Sparks ("Ms. Sparks"), testified. Ms. Sparks spent her lunch break on 19 September 2003 with her mother. Ms. Sparks stated that her mother was "in good spirts," that Ms. Tessneer was laughing and that Ms. Sparks enjoyed the visit. Ms. Sparks stated that her mother was not dating anyone at the time and showed no signs of injuries on 19 September 2003. Ms. Sparks described her mother's habit of locking both her screen door and main door at her home. Ms. Sparks stated that both doors were locked when she visited her mother on 19 September 2003 and that the screen door did not appear damaged.

Crime Scene Investigator Todd Vickery ("Investigator Vickery") performed the crime scene walkthrough on 20 September 2003. Investigator Vickery observed that Ms. Tessneer's false teeth were lying next to her on the bed, that some pantyhose were also on the bed, and that some blood was on the bed's mattress pad. Investigator Vickery also noticed a small tear on the entry door to the screened-in front porch, near the door's latch. Investigator Vickery then dusted for fingerprints, took photographs, and began collecting physical items. Investigator Vickery stated that "[o]ther than the area around Ms. Tessneer, the house appeared to be neat and in order."

Gaston Memorial Hospital pathologist Dr. Steven Tracy ("Dr. Tracy") testified at trial as an expert in forensic pathology, over Defendant's objection. Dr. Tracy performed an autopsy of Ms. Tessneer on 22 September 2003. Dr. Tracy stated that Ms. Tessneer had bruising to her arms, legs, one of her feet, left shoulder, and abdomen. Dr. Tracy believed Ms. Tessneer's injuries occurred within twenty-four hours of her death. Ms. Tessneer also had hemorrhaging over the surface of her arms. Dr. Tracy noted that many elderly people have surface hemorrhages. Dr. Tracy stated that without knowing Ms. Tessneer, he did not know whether the hemorrhages were there before or after the bruising occurred. Ms. Tessneer's right forearm also contained an abrasion near her hemorrhages.

Dr. Tracy described a tear to the outer portion of Ms. Tessneer's panties and a small amount of blood on the panties. Dr. Tracy also stated that Ms. Tessneer had a small abrasion to her vagina.

Dr. Tracy also used an SBI sexual assault evidence collection kit ("sexual assault kit") and took swabs from Ms. Tessneer's vagina, cheek, and rectum. In February 2004, the North Carolina State Bureau of Investigation Crime Laboratory ("SBI") reported that its testing showed the presence of sperm on the vaginal swab taken from Ms. Tessneer's sexual assault kit. A DNA profile of the evidence was created from the vaginal swab, but no DNA match was made at that time.

Immediately after the autopsy, Dr. Tracy withheld his opinion as to the cause of death. Dr. Tracy stated that the bruises on the body did not in and of themselves account for Ms. Tessneer's death, and no other anatomical findings apparent at that point explained her cause of death. Dr. Tracy's autopsy report lists the cause of death as undetermined, but contained a discussion stating that Dr. Tracy was "considering suffocation." Dr. Tracy stated that he waited for microscopic slides and a toxicology report to come back, and after ruling out "any other reasonable cause of death to a reasonable degree of medical certainty," Dr. Tracy opined that Ms. Tessneer died of asphyxiation secondary to suffocation. Dr. Tracy stated that this may have occurred after Ms. Tessneer's mouth was covered with a soft object, "such as a pillow or cushion, a piece of clothing or a hand." Dr. Tracy also testified that markings or injuries typically do not appear if the suffocation was effectuated by a soft object, and that injuries from suffocation are often very difficult to detect.

Dr. Tracy testified that police contacted him in 2009 and asked if he would consider changing his 2003 opinion about the cause of death. Dr. Tracy stated that the police did not suggest suffocation. Dr. Tracy also has not modified his written autopsy report to reflect suffocation. Dr. Tracy stated that he was willing to add an addendum to his report indicating that Ms. Tessneer died of asphyxiation, secondary to suffocation, but had not amended the autopsy report to reflect that view. Dr. Tracy stated that he always believed "to a reasonable degree of medical certainty that Ms. Tessneer died of asphyxiation." Dr. Tracy became even more confident in this opinion after receiving information about the examination of the sexual assault kit and lack of other findings as to Ms. Tessneer's cause of death.

Dr. John D. Butts ("Dr. Butts"), a retired chief medical examiner for the State of North Carolina, testified at trial. Defendant did not object to Dr. Butts being tendered as an expert in the field of forensic pathology.

Dr. Butts stated that he had consulted with Dr. Tracy in December 2003 and that the two had agreed the best designation for the cause and manner of Ms. Tessneer's death was "undetermined" because "the evidence was overwhelmingly [sic] that Ms. Tessneer's death was not the result of natural causes" but that there was not sufficient evidence to state the cause of death.

Dr. Butts later learned about the sexual assault kit's contents in 2009 after being contacted by the local district attorney. Dr. Butts prepared another report after learning of the evidence derived from the sexual assault kit's contents in which he opined that Ms. Tessneer had died from "external forces or causes rather than some natural process" at the hands of another individual. Dr. Butts stated in this report that "the environment and circumstances under which [Ms. Tessneer] was found were highly suspicious. There was evidence of entry into the house. Her telephone line had been cut or disabled." Dr. Butts also testified that her body was found in an unusual position for a natural death, that there was injury to her body, disturbances to her clothing, bruises on her body, and bruises in the entrance to Ms. Tessneer's vagina. Dr. Butts testified the toxicological tests revealed the presence of the pain medication Ms. Tessneer used, but that the amount was not excessive. Dr. Butts also noted the lack of a catastrophic natural event, findings consistent with an advanced disease process, or stroke, or any "evidence of a significant underlying medical condition either in her history or in the autopsy report upon examination that would explain her death." Dr. Butts testified that given the circumstances, the "most common mechanism of death would be an asphyxiation." Dr. Butts also testified that the autopsy report was not amended and that no one had coerced him into changing his opinion concerning the cause of death.

B. 2009 Investigation of Ms. Tessneer's Death

Agent John Kaiser ("Agent Kaiser") testified that he was contacted by Detective Rich Ivey ("Detective Ivey") in April 2009 to assist in the investigation of Ms. Tessneer's death. Detective Ivey was working in the Shelby Police Department at that time. Agent Kaiser and Detective Ivey worked through the case file and devised an investigative strategy. The two noticed that there was a suspect book in the case file as well as a DNA profile from the sexual assault kit; they resolved to work through the suspect book to clear individuals in the book or to find a match. There were around thirty individuals listed in the book, including Defendant.

On 4 May 2009, Detective Ivey and Agent Kaiser found Defendant at his mother's residence in Cherryville, where he lived. Defendant refused

to comply with or submit to police officers' request for a DNA sample. Officers visited Defendant on a total of four separate occasions at his home and requested a DNA sample; officers visited on 4 May 2009, 6 May 2009, 8 May 2009, and once more after 8 May 2009 and prior to Defendant's arrest on 16 May 2009.

Agent Kaiser contacted Officer James Brienza ("Officer Brienza") on 13 May 2009 and asked Officer Brienza to serve an active warrant for assault on a female on Defendant. Agent Kaiser asked Officer Brienza to obtain DNA evidence from Defendant, "either from a drink can or some abandoned material."[1] Officer Brienza verified that the assault on a female warrant was still active and then served the warrant on Defendant on 16 May 2009 at his mother's residence in Cherryville.

Officer Brienza arrived at the Cherryville residence between 12:00 A.M. and 2:00 A.M. on 16 May 2009. Officer Brienza knocked at the door and spoke with Defendant's mother. Defendant's mother allowed Officer Brienza into her home, where Officer Brienza found Defendant asleep. Officer Brienza woke Defendant up and told Defendant to come with him so he could serve the arrest warrant. Defendant got dressed and was taken outside in handcuffs. Defendant was handcuffed in the front of his body.[2]

Officer Brienza noticed a pack of cigarettes on the nightstand near where he found Defendant and "felt like there was a good opportunity to take advantage of possible D.N.A. gathering at that point from a cigarette butt." Officer Brienza "asked [Defendant] if he wanted to smoke a cigarette before we left," to which Defendant replied affirmatively.

Officer Brienza testified that Defendant smoked a cigarette "[o]utside in the front porch area towards the driveway, next to the car. We had walked from the front porch area and down to my vehicle" where Defendant smoked the cigarette. Officer Brienza testified that Defendant did not smoke the entire cigarette, but that Defendant was allowed "enough time to take several hits off of the cigarette – several drags."

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1. Agent Kaiser stated that he purposefully left his instruction to Officer Brienza vague so that Officer Brienza would obtain a DNA sample off of a drink can, a cigarette, or another object.

2. In his affidavit attached to the motion to suppress, Defendant asserts that he was handcuffed with his hands behind his back. Defendant also stated that one of the police officers pulled a cigarette from his cigarette pack and placed it in his mouth so he could smoke. During Officer Brienza's testimony at trial, Officer Brienza stated that he handcuffed Defendant in front of his body and no other evidence was provided tending to show that Defendant was handcuffed behind his back.

After Defendant took these cigarette drags, Officer Brienza "asked him if he would like me [to] discard the cigarette and told him that we needed to leave." Officer Brienza stated that Defendant responded affirmatively to his offer to discard the cigarette.

Officer Brienza, who was wearing gloves, "took the cigarette from his mouth and acted like [he] was going to get rid of the cigarette." Officer Brienza then "extinguished the end of the cigarette on the ground and cupped it, put it in a plastic bag[,] and took [Defendant] to jail." Defendant objected to the admission of this evidence under the Fourth Amendment of the United States Constitution, under "Article 19 – Article 1, Section 19, 20 and 23 of the North Carolina Constitution and also under State versus Reed." Defendant's objection was overruled by the trial court.

Officer Brienza stated that no part of the cigarette which touched Defendant's mouth had made contact with the ground. Officer Brienza also testified that after processing Defendant at the jail, he called Agent Kaiser to tell him about the evidence he had gathered and released the cigarette into his custody thereafter. Officer Brienza was the only officer to serve the warrant and approach Defendant initially, although other officers arrived later in a "support role."

Officer Brienza testified that he had two goals that evening: (i) to serve a warrant and (ii) to obtain a DNA sample. Officer Brienza stated that obtaining the DNA sample was the primary goal of his visit. Officer Brienza recounted that Defendant carried the cigarette outside and that Defendant was in his custody when Defendant smoked the cigarette, as well as when Defendant was asked whether he wanted Officer Brienza to discard the cigarette.

After Officer Brienza delivered the cigarette butt to Agent Kaiser, Agent Kaiser sent the cigarette butt to the SBI, which performed DNA tests on the cigarette butt. After Agent Kaiser learned that the DNA test results matched the DNA profile derived from a swab in Ms. Tessneer's sexual assault kit, Agent Kaiser obtained a second arrest warrant charging Defendant for murder, rape, and breaking and entering. Agent Kaiser and Officer Brienza served Defendant with the warrants at his mother's home on 28 December 2009. Agent Kaiser and Officer Brienza showed Defendant a picture of Ms. Tessneer and asked whether he recognized her; Defendant said he did not recognize her and denied ever having been in contact with her. Agent Kaiser and Detective Ivey also obtained a search warrant authorizing them to collect a suspect evidence collection kit from Defendant, whereby Defendant was required to provide the

officers with a cheek swab. The DNA profile extracted from the cheek swab matched the DNA profile collected from the sperm found in Ms. Tessneer's sexual assault kit.

After the State rested its case at trial, Defendant moved to dismiss the case, and his motion was denied by the trial court. Defendant did not testify at trial, nor did Defendant present evidence. The trial court denied Defendant's renewed motion to dismiss. On 28 January 2013, the jury returned verdicts finding Defendant guilty of first-degree murder on a felony murder theory; first-degree rape; and felonious breaking and entering. The trial court arrested judgment with respect to the first-degree rape conviction. The trial court then sentenced Defendant to life in prison without the possibility of parole based upon the first-degree murder conviction. The trial court also sentenced Defendant to a concurrent term of ten to twelve months imprisonment based upon the felonious breaking and entering conviction. Defendant provided timely notice of appeal on 29 January 2013.

II. Jurisdiction & Standard of Review

Defendant appeals as of right from a decision of the trial court. N.C. Gen. Stat. §§ 7A–27(b), 15A–1444(a) (2013).

The first issue concerns whether the trial court erred in denying a motion to suppress the DNA evidence. This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*. *State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217, *disc. rev. denied*, 359 N.C. 191, 607 S.E.2d 646 (2004).

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779, *cert. granted* ___ N.C. ___ (2014). "[D]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

The second issue on appeal concerns the trial court's denial of Defendant's motions for a change of venue. The third issue concerns Defendant's objections to expert testimony regarding the cause of death. Both the second and third issue are reviewed under an abuse of

discretion standard. *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (reviewing the admissibility of expert testimony under an abuse of discretion standard); *State v. Whitaker*, 43 N.C. App. 600, 603, 259 S.E.2d 316, 318 (1979) (reviewing the denial of a change of venue motion under an abuse of discretion standard).

"Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

III. Analysis

A. Motion to Suppress DNA Evidence

[1] Defendant makes three principal arguments concerning the first issue. First, Defendant argues that he did not willfully relinquish control of his cigarette butt to Officer Brienza. Second, Defendant argues that because the cigarette butt was given to Officer Brienza within the curtilage of his home, Defendant had a reasonable expectation of privacy in the cigarette butt and the DNA derived from it. Third, Defendant argues that the ruse crafted by Officer Brienza and Agent Kaiser to obtain his DNA violated the Fourth Amendment.

In this section, we first set forth the facts established at the hearing concerning Defendant's motion to suppress. We then discuss the fundamental principles that guide our inquiry, including our binding precedents relating to searches within the curtilage, trickery, and abandoned property. We then apply our precedents to address Defendant's arguments.

i. Pre-Trial Hearing and Order on Motion to Suppress

The trial court held a pretrial hearing concerning Defendant's motion to suppress the DNA evidence obtained as a result of Officer Brienza's seizure of a cigarette butt containing Defendant's DNA. At the hearing, Agent Kaiser noted that Defendant had denied officers' earlier requests to provide a DNA sample on four separate occasions prior to Officer Brienza's arrest of Defendant on 16 May 2009.

Agent Kaiser and Detective Ivey initially approached Defendant at his mother's residence on 4 May 2009 and told Defendant that they were investigating the death of three elderly women in 2003. Defendant refused to consent to the giving of a DNA sample. Defendant refused to provide a DNA sample three additional times and told police that he had retained an attorney after the fourth request. Agent Kaiser did not

believe the police had sufficient evidence to request the issuance of a search warrant or an arrest warrant in connection with Ms. Tessneer's death at that time.

After Defendant refused to voluntarily provide a DNA sample, Agent Kaiser spoke with Vivian Borders, Defendant's ex-wife. Vivian Borders told police that she had sought two warrants for Defendant's arrest, one for damage to personal property and another for assault on a female. Agent Kaiser located the warrant for assault on a female, which was active and held in the Gaston County Warrant Repository. Agent Kaiser then contacted Officer Brienza and requested that he serve the assault on a female warrant on Defendant.[3] Agent Kaiser also requested that Officer Brienza collect DNA from Defendant, and made suggestions about collecting a soda can or a cigarette. Agent Kaiser also wanted Officer Brienza to take the DNA sample without Defendant's knowledge. Agent Kaiser said he wasn't sure what he told Officer Brienza, but that he "had in [his] mind [that] it could be at the jail. It could be in the car in transit. It could be, you know, any different scenarios that could have played out."

Agent Kaiser described Defendant's arrest at 2 A.M. on 16 May 2009 and Defendant's smoking of a cigarette before leaving his mother's home that evening. Agent Kaiser said that Officer Brienza offered Defendant a cigarette, which Defendant smoked prior to entering Officer Brienza's patrol car. Officer Brienza "asked [Defendant] if he — meaning [Defendant] — wanted Brienza to discard the cigarette. [Defendant] told Brienza he did and allowed Brienza to take the cigarette butt from his mouth."

Agent Kaiser stated that if Officer Brienza was not initially successful in obtaining a DNA sample upon arrest, the purpose of serving the warrant in the late evening was to keep Defendant in custody and develop another plan to capture his DNA.

Officer Brienza recounted the same facts as Agent Kaiser, saying that he offered Defendant a cigarette and "asked if he would let me dispose of the cigarette." On cross, Officer Brienza was asked if he had said "you want me to take that and throw it away," and Officer Brienza responded affirmatively. Officer Brienza said he took the cigarette from Defendant's mouth, extinguished it, cupped it in his hand, and placed the cigarette into an evidence bag. Officer Brienza confirmed that he

3. The assault on a female charge was eventually dismissed.

was wearing latex gloves. Officer Brienza also said he would not have allowed Defendant to bring the cigarette into the police car.

The trial court entered an order denying Defendant's motion to suppress the DNA evidence collected from the cigarette butt. In its order, the trial court made these relevant findings of fact:

> 8. When Officer Brienza said it was time to leave the premises, the officer asked the defendant if he wanted the officer to dispose of the cigarette. The defendant replied affirmatively. Officer Brienza removed the cigarette from the defendant's lips. Unbeknownst to the defendant, the officer kept the cigarette butt in his cupped hand. The officer later placed the cigarette butt in a plastic evidence bag.
>
> 9. The defendant did not give consent to the officer's removal of the cigarette butt from the premises of the residence, and he was unaware that the cigarette butt had been taken by the officer.
>
> . . .
>
> 20. Officer Brienza obtained the cigarette butt while the he [sic] and the defendant were standing in the driveway of the residence of the defendant's mother. The driveway was bounded on both sides by the front yard of the residence.

The trial court then concluded as a matter of law that

> 1. The area where Officer Brienza obtained the cigarette butt was located within the curtilage of the residence, and it was an area in which the defendant had a reasonable expectation of privacy.
>
> 2. The defendant consented to the removal of the cigarette from his lips, and he authorized Officer Brienza to dispose of the butt. By doing so the defendant relinquished possession of the butt and any reasonable expectation of privacy with regard to it. That he did so in a protected area as a result of trickery is of no consequence.

ii. Guiding Principles in Search and Seizure Jurisprudence

The guiding principles in this case are derived from the Fourth Amendment to the United States Constitution and Section 20 of the North Carolina Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; N.C. Const. art. I, § 20 ("General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."); *see also* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.").

"[T]he touchstone of [Fourth] Amendment analysis has been . . . whether 'a person has a constitutionally protected reasonable expectation of privacy.' " *Oliver v. United States*, 466 U.S. 170, 177 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Further:

> The Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable. No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given great weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.

State v. Phillips, 132 N.C. App. 765, 770, 513 S.E.2d 568, 572 (1999) (citation, quotation marks, and alterations omitted).

An individual's expectation of privacy is "necessarily . . . of a diminished scope" when taken into police custody. *Maryland v. King*, ___ U.S. ___, ___, 133 S. Ct. 1958, 1978 (2013) (citation, quotation marks,

and alterations omitted). DNA evidence may also be obtained without consent of a suspect after "officers make an arrest supported by probable cause to hold for a serious offense . . . ." *Id.* at ___, 133 S. Ct. at 1980. Our General Statutes allow for compulsory DNA sample collection from a suspect arrested for any one of several offenses. N.C. Gen. Stat. § 15A-266.3A(f) (2013). Defendant was initially arrested pursuant to N.C. Gen. Stat. § 14-33(c)(2) (2013), which is not one of the enumerated offenses for which police officers may compel the collection of DNA evidence. *See* N.C. Gen. Stat. § 15A-266.3A(f).

"Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Katz*, 389 U.S. at 357 (citations and quotation marks omitted). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.*

One such exception allows police to conduct warrantless searches of garbage left for regular curbside collection. *California v. Greenwood*, 486 U.S. 35, 38 (1988). Our Supreme Court has recognized that "a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage of a defendant's home." *State v. Hauser*, 342 N.C. 382, 386, 464 S.E.2d 443, 446 (1995). However, *Hauser* also held that "the defendant may have retained *some expectation of privacy in garbage placed in his backyard out of the public's view*, so as to bar search and seizure by the police themselves entering his property." *Id.* at 388, 464 S.E.2d at 447 (emphasis added). This Court identified three factors relevant to the *Hauser* inquiry in *State v. Reed*, 182 N.C. App. 109, 112, 641 S.E.2d 320, 322, *writ denied*, *review denied*, *appeal dismissed*, 361 N.C. 701, 653 S.E.2d 155 (2007): "(1) the location of the garbage; (2) the extent to which the garbage was exposed to the public or out of the public's view; and (3) 'whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to police.' " *See id.* (quoting *Hauser*, 342 N.C. at 386, 464 S.E.2d at 446). This exception becomes relevant in conjunction with the principles governing the seizure of abandoned property discussed *infra*.

The State may also not violate a constitutional right indirectly if the State was not permitted to take that same action directly. *State v. Griffin*, 154 N.C. 611, 615, 70 S.E. 292, 293 (1911) (" 'What the state

may not do directly it may not do indirectly.' " (quoting *Bailey v. State of Alabama*, 219 U.S. 219, 244 (1911))); *see also Henderson v. Mayor of City of New York*, 92 U.S. 259, 263 (1875) ("That which cannot be done directly will not be permitted to be done indirectly."); *State v. Behrman*, 114 N.C. 797, 807, 19 S.E. 220, 223 (1894) ("A declaration excluded by the Constitution, as in violation of individual right, will not be allowed to accomplish indirectly what it is not permitted to do directly.").

"Evidence obtained in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures is generally excluded at trial." *State v. Banner*, 207 N.C. App. 729, 732, 701 S.E.2d 355, 358 (2010). The exclusionary rule that has developed under Fourth Amendment jurisprudence is also applicable to "evidence obtained in violation of the North Carolina Constitution." *Id.*; *see also State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988). "[O]ur constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others." *Carter*, 322 N.C. at 723, 370 S.E.2d at 561.

iii. Curtilage

"The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Florida v. Jardines*, ___ U.S. ___, ___, 133 S. Ct. 1409, 1414 (2013). However, "when it comes to the Fourth Amendment, the home is first among equals." *Id.* At the core of the Fourth Amendment is the " 'right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The area "immediately surrounding and associated with the home" is known as the curtilage, and is considered "part of the home itself" for Fourth Amendment purposes. *Id.* (citation and quotation marks omitted). "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.' " *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

Curtilage includes the "yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270, *writ denied*, *review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002). Evidence obtained from a trash can located within the curtilage may also be subject to the exclusionary rule if not placed there for routine collection. *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271 ("[B]ecause the trash can was within the curtilage of [the] defendant's home and because the contents of the trash can were

not placed there for collection in the usual and routine manner, [the] defendant maintained an objectively reasonable expectation of privacy in the contents of his trash can.").

iv. Trickery

"The known official may engage in deception leading the consenting party to conclude that the official's objective is other than criminal prosecution or that the official's objective relates to a form of criminal activity different from that which actually prompted the official to seek consent." Wayne R. LaFave, 4 Search & Seizure § 8.2(n) 176 (5th ed. 2012). However, "there is no common understanding as to what constitutes permissible deception in enforcing the criminal law." *Id.* at 181.

Employing fraud or trickery in collecting evidence does not, by itself, render evidence inadmissible. *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983), *overruled on other grounds as stated in State v. Abbott*, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987).("The use of trickery by police officers in dealing with defendants is not illegal as a matter of law. The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt admissible. The admissibility of the confession must be decided by viewing the totality of the circumstances . . . ." (internal citations omitted)); *State v. Chambers*, 92 N.C. App. 230, 233, 374 S.E.2d 158, 160 (1988) (holding that a police officer did not unlawfully obtain a statement from a defendant by asking him whether he would find "ass prints" on the hood of a vehicle in a rape case). Further, "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Moran v. Burbine*, 475 U.S. 412, 423 (1986). While "police deception *might* rise to a level of a due process violation," it did not do so in a case in which the police deliberately did not allow a defendant to speak with his attorney absent the defendant's request for an attorney. *Id.* at 415, 432, 433–34.

Other state courts have also allowed officers to use trickery to obtain DNA evidence in connection with the service of valid arrest warrants for unrelated crimes. *See Com. v. Ewing*, 854 N.E.2d 993, 1001 (Mass. App. Ct. 2006), *aff'd*, 873 N.E.2d 1150 (Mass. 2007) (holding that "[t]he defendant had no expectation of privacy in cigarette butts" and a drinking straw that the defendant "voluntarily abandoned as trash" while being interviewed at the police station house after law enforcement served an

arrest warrant for an unrelated crime); *see also State v. Athan*, 158 P.3d 27, 31–33 (Wash. 2007) (upholding a ruse by police against a challenge lodged under the Washington Constitution where a defendant was sent a letter from a fictitious law firm and his saliva was collected from an envelope on the return letter).

v. Abandoned Property

"The protection of the Fourth Amendment does not extend to abandoned property." *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 730 (1981); *see also* Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 175 (4th ed. 2011) ("The Fourth Amendment does not apply to searching or seizing abandoned property. The reason is fairly clear. A person cannot assert a violation of a legitimate expectation of privacy if he or she has intentionally relinquished an interest in the property."). There is not a reasonable expectation of privacy when a person "voluntarily puts property under the control of another . . . [and] he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person." *State v. Jordan*, 40 N.C. App. 412, 415, 252 S.E.2d 857, 859 (1979). If a party abandons property, "[t]here can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241 (1960); *see also Phillips*, 132 N.C. App. at 771, 513 S.E.2d at 572 (upholding a trial court's decision to deny a motion to suppress because "defendant lost any expectation of privacy he might have had" in property by giving the property directly to a friend).

However, property may not be abandoned if it is done as a direct result of a law enforcement officer's illegal search or seizure. *See California v. Hodari D*, 499 U.S. 621, 627–29 (1991) (holding that abandoned cocaine was not the "product of an unlawful seizure" and was thus not excluded); *Hester v. United States*, 265 U.S. 57, 58 (1924) (upholding officers' examination of illegal whiskey bottles dropped by defendant and a companion); *State v. Cooke*, 54 N.C. App. 33, 44, 282 S.E.2d 800, 808 (1981), *modified as aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982) (holding that when one discards property as the product of an illegal search, a reasonable expectation of privacy exists and the property is not abandoned); *State v. Williams*, 71 N.C. App. 136, 138, 321 S.E.2d 561, 563 (1984) (holding that a dropped jacket in a public place was abandoned); *Cromartie*, 55 N.C. App. at 223–24, 284 S.E.2d at 730 (holding there was abandonment when the defendant discarded the property into a public street and abandoned the property).

This Court has also held that "for abandonment to occur, the discarding of property must occur in a public place; one simply cannot abandon property within the curtilage of one's own home." *Reed*, 182 N.C. App. at 114, 641 S.E.2d at 323; *see also People v. Gallego*, 117 Cal. Rptr. 3d 907, 911 (Cal. Ct. App. 2010) (holding that a defendant does not have a reasonable expectation of privacy in a cigarette butt that was discarded on a public sidewalk). In *Reed*, police arrived at the defendant's apartment seeking a DNA sample, where they met the defendant on his patio. *Reed*, 182 N.C. App. at 110, 641 S.E.2d at 321. The defendant did not agree to provide a DNA sample, and spoke with police while he smoked two cigarettes on his patio. *Id.* The defendant took apart the first cigarette butt, removed the filter's wrapper and "shred[ed] the filter before placing the remains in his pocket." *Id.* The defendant flicked the second cigarette butt at a trash pile in the corner of his patio. *Id.* The butt "struck the pile of trash and rolled between defendant and one of the detectives," the detective kicked the butt into a "grassy common area," and the detective thereafter collected the cigarette. *Id.* The State thereafter presented evidence showing that the DNA on the cigarette butt matched a stain found on the alleged victim's shirt. *Id.* This Court held that the defendant had a reasonable expectation of privacy on his patio and that the trial erred by allowing the evidence to be admitted at trial. *Id.* at 110–11, 641 S.E.2d at 321.

vi. Application

This is a close case that lies squarely at the intersection of the foregoing principles of law. Officer Brienza's search was conducted as part of serving an unrelated arrest warrant. The arrest was effectuated despite Defendant's refusal on *four separate occasions* to provide officers with a DNA sample. The arrest was effectuated at his residence at 2:00 A.M. by a police officer who was explicitly asked by another officer to collect a DNA sample from Defendant. Defendant also relinquished the cigarette butt directly to a police officer, rather than throwing the cigarette butt to the ground within the curtilage or placing it in a trash receptacle in the home or its curtilage.

We address first Defendant's argument that he did not relinquish control of the cigarette butt willingly. The record tends to show that Defendant was cuffed in front of his body and that Officer Brienza escorted him from his bedroom to the carport. Officer Brienza gave Defendant the option to smoke a cigarette in the carport area, which Defendant chose to do. Officer Brienza then lit the cigarette for Defendant. Officer Brienza then asked Defendant "[w]ould you like me to take that cigarette from you and *throw it away*." Defendant agreed

to let Officer Brienza take the cigarette, which Officer Brienza removed from Defendant's mouth and placed into an evidence bag. Officer Brienza said he would not have allowed Defendant to take the cigarette into his vehicle.

Based upon the foregoing facts, the trial court concluded that Defendant relinquished control of the cigarette willingly. Officer Brienza asked Defendant first if he wanted to smoke a cigarette, to which Defendant responded affirmatively. Officer Brienza then asked Defendant if he could take the cigarette to *throw it away*, and Defendant agreed. Officer Brienza then took the cigarette from Defendant's mouth and placed it in the evidence bag.

Defendant was handcuffed in the front of his body and took several puffs of his cigarette, although it is unclear whether he used his hands to smoke the cigarette. If Defendant had the ability to move his hands, he had the ability to throw the cigarette away himself and could have told Officer Brienza that he did not wish to give him the cigarette. If Defendant did not have the ability to move his hands, he then would have had the ability to spit the cigarette from his mouth into the curtilage. If Officer Brienza had collected the cigarette under any of those scenarios, admission would be barred under *Reed* and *Rhodes*. *Reed*, 182 N.C. App. at 110–11, 641 S.E.2d at 321; *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. In short, there is evidence tending to indicate that Defendant voluntarily accepted Officer Brienza's offer to throw away the cigarette butt and accordingly Defendant's first argument fails.

Defendant next argues that the attendant circumstances surrounding this case give rise to a reasonable expectation of privacy that requires suppression of the cigarette butt as evidence. The controlling inquiry is whether Defendant had a reasonable expectation of privacy in the cigarette butt that he voluntarily provided to Officer Brienza. Based upon controlling case law, we are bound to hold that he did not.

The location where Officer Brienza seized the cigarette butt was clearly within the curtilage of the residence: Defendant was standing in between the carport and the officer's police vehicle. The trial court properly held as much in its order denying the motion to suppress. Under *Reed*, *Rhodes*, and *Hauser*, Defendant could have spit the cigarette butt onto the ground in the carport, placed the cigarette into a trash can that was not intended to be collected, or left the cigarette butt somewhere else in the curtilage and the cigarette butt would have been subject to suppression. *Hauser*, 342 N.C. at 386, 464 S.E.2d at 446; *Reed*, 182 N.C. App. at 110–11, 641 S.E.2d at 321; *Rhodes*, 151 N.C. App. at 215, 565

S.E.2d at 271. However, the cigarette was not placed within a trash can, on the ground, or in any other container; the cigarette butt was placed in the gloved palm of Officer Brienza. As such, the trial court found that Defendant "relinquished possession of the butt and any reasonable expectation of privacy with regard to it" and that the location where Defendant relinquished control was "of no consequence." We agree with the trial court's assessment.

As in *Phillips* and *Jordan*, Defendant relinquished control of property, here a cigarette butt, to another party. *Phillips*, 132 N.C. App. at 771, 513 S.E.2d at 572; *Jordan*, 40 N.C. App. at 415, 252 S.E.2d at 857. In *Phillips*, the defendant threw drugs into a friend's lap after seeing police and while both were inside the defendant's car. 132 N.C. App. at 767, 513 S.E.2d at 570. The defendant told the friend to bring the drugs to defendant's apartment. *Id.* The defendant's friend left drugs in the defendant's mailbox, which was affixed to the front door of his apartment. *Id.* at 767, 769–70, 513 S.E.2d at 569–70. The defendant's friend told officers where the drugs were hidden, and officers seized the drugs from the mailbox. *Id.* at 766, 513 S.E.2d at 570. The defendant argued that he had a reasonable expectation of privacy in the mailbox, but this Court held that the defendant's actions in throwing the drugs into his friend's lap removed "any expectation of privacy he might have had in his property." *Id.* at 771, 513 S.E.2d at 572. Similarly, this Court held in *Jordan* that a defendant who put drugs into his female passenger's purse had relinquished his expectation of privacy in that item by placing the property under the control of another. 40 N.C. App. at 415, 252 S.E.2d at 859. In both *Phillips* and *Jordan*, property was relinquished to another person inside a vehicle, an area which also creates a higher expectation of privacy than a public area. *See Phillips*, 132 N.C. App. at 771, 513 S.E.2d at 572; *Jordan*, 40 N.C. App. at 415, 252 S.E.2d at 857. In both cases, this Court upheld admission of the evidence.

Here, Defendant gave a cigarette butt to a police officer while in handcuffs and while in the officer's custody. Certainly a reasonable person's expectation of privacy would be diminished while in custody and handcuffed. *See, e.g.*, *Williamson v. State*, 993 A.2d 626, 635–36, 635–36 n.1 (Md. 2010), *aff'd as stated in Corbin v. State*, 52 A.3d 946, 952 (2012) (holding that the defendant did not have an expectation of privacy in a cup he "voluntarily discarded" on the floor of his jail cell, because he "could not reasonably expect that the police would not collect, and potentially investigate, the trash he discarded in his cell"), *cert. denied*, ___ U.S. ___, 131 S. Ct. 419 (2010). Accordingly, as the trial court found, the fact that Defendant placed the cigarette butt in Officer Brienza's

control inside of the curtilage of his home is of no consequence to the analysis because Defendant ceded control of the property to Officer Brienza voluntarily after Officer Brienza's request. Thus, Defendant's second argument on appeal fails.

Defendant lastly argues that Agent Kaiser and Officer Brienza's use of trickery to obtain the cigarette butt requires that the evidence be suppressed. We note initially that we are troubled by the actions of Agent Kaiser and Officer Brienza in serving the earlier warrant upon Defendant. The use of one warrant for the intended purpose of conducting a search not supported by probable cause may, under other circumstances, violate the prohibition against general warrants in the North Carolina Constitution. *See* N.C. Const. art. I, § 20. Secondly, the officers' actions in this case also very nearly run afoul of the general prohibition that the State may not take actions having the effect of violating an individual's constitutional rights indirectly if they could not take that same action directly. *See, e.g.*, *Griffin*, 154 N.C. 611, 70 S.E. 292, 293 (1911). However, because the police did not commit an *illegal* act in effectuating the valid arrest warrant and because the subjective motives of police do not affect the validity of serving the underlying arrest warrant, we cannot agree with Defendant's final challenge to the trial court's decision. Defendant also did not argue that the police had used the initial arrest warrant as a general warrant. There may be circumstances in which an appellate court prohibits law enforcement officers from using an arrest warrant to effectuate the ends sought to be achieved by a general warrant; however, without such an argument, it is not this Court's duty to decide a doctrine of this constitutional scope affecting the jurisdiction of the State.

When an individual "discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it." *Cromartie*, 55 N.C. App. at 225, 284 S.E.2d at 731. However, as stated *supra*, the underlying motivations for stopping a motorist or effectuating an arrest are not relevant so long as the underlying arrest was valid. *See, e.g.*, *State v. Parker*, 183 N.C. App. 1, 8, 644 S.E.2d 235, 241 (2007) ("A law enforcement officer's subjective motivation for stopping a motorist is irrelevant to the validity of a traffic stop if the stop is supported by probable cause.").

Standing alone, deception does not render a defendant's confession or relinquishment of evidence inadmissible. *See Jackson*, 308 N.C. at 574, 304 S.E.2d at 148 ("[W]hile deceptive methods or false statements

by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible . . . ."); *State v. Graham*, ___ N.C. App. ___, ___, 733 S.E.2d 100, 105 (2012), *review denied*, 366 N.C. 432, 736 S.E.2d 492 (2013)("[D]eception is not dispositive where a confession is otherwise voluntary.").

There is no indication that Defendant's arrest for the two-year-old charge of assault on a female was invalid. While it is apparent that Officer Brienza and Agent Kaiser strategized to use this arrest warrant for the purposes of obtaining a DNA sample from Defendant, "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Moran*, 475 U.S. at 423; *see also Ewing*, 854 N.E.2d at 1000 (upholding arrest of a defendant on an unrelated warrant, which police used to obtain a DNA sample). While we agree with Defendant that abandonment of property resulting from *illegal* police conduct is not abandonment, there was no such illegal activity here. *Cf. State v. Joe*, ___ N.C. App. ___, ___, 730 S.E.2d 779, 783 (2012) (holding that because officers only discovered a bag of cocaine near where Defendant was unlawfully arrested and handcuffed, the contraband was the product of an illegal arrest and was properly suppressed). Without illegal activity by the police, the abandoned property was properly seized, even though police did not have probable cause to obtain it in the absence of abandonment. *See State v. Johnson*, 98 N.C. App. 290, 297, 390 S.E.2d 707, 711 (1990). Thus, Defendant's third principal argument for suppression fails.

Because Defendant voluntarily gave Officer Brienza his cigarette butt after Officer Brienza offered to throw away the cigarette butt, Defendant abandoned the cigarette butt and no longer had a reasonable expectation of privacy in the property. As the property was abandoned, the officers' subjective intent in effectuating the valid assault on a female warrant was irrelevant. For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress the DNA evidence. We now turn to Defendant's arguments concerning his motion for change of venue and the admission of expert testimony at trial.

B. Change of Venue

[2] Defendant next argues that the trial court abused its discretion by denying his motion to change venue. We disagree.

If a trial court determines that there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial," the trial court must transfer the proceeding to another county in the prosecutorial district or order a special venire. N.C. Gen. Stat. § 15A-957 (2013).

"To obtain a change of venue, a defendant must show a specific and identifiable prejudice against him as a result of pretrial publicity." *State v. Rogers*, 355 N.C. 420, 429, 562 S.E.2d 859, 866 (2002). In meeting this burden, "a defendant must show *inter alia* that jurors with prior knowledge decided the case, that defendant exhausted his peremptory challenges, and that a juror objectionable to defendant sat on the jury." *State v. Robinson*, 355 N.C. 320, 327, 561 S.E.2d 245, 250–51 (2002) (quotation marks, citation, and alterations omitted). Further, "[t]he determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion." *State v. Yelverton*, 334 N.C. 532, 540, 434 S.E.2d 183, 187 (1993).

Juror *voir dire* may present "persuasive evidence that the pretrial publicity was not prejudicial or inflammatory" through the jurors' responses to questioning about their knowledge of the case. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). In *Richardson*, nearly every juror "admitted to having read about the case in the newspaper or having heard about it on television." *Id.* When the jurors were questioned further about the details of the particular incident, several of the jurors apologized for not remembering details and all of the jurors "unequivocally answered in the affirmative when asked if they could set aside what they had previously heard about defendant's case and determine defendant's guilt or innocence based solely on the evidence introduced at trial." *Id.* Accordingly, our Supreme Court held that the trial court did not abuse its discretion in *Richardson*. *Id.* at 481, 302 S.E.2d at 805; *see also State v. Walters*, 357 N.C. 68, 78, 588 S.E.2d 344, 351 (2003) ("[E]ach juror about whom defendant complains indicated that he or she would be fair and impartial and decide the case on the evidence that was presented. Also, the jurors indicated that they would disregard any information they heard or read prior to the trial."); *State v. Wallace*, 351 N.C. 481, 513, 528 S.E.2d 326, 346 (2000).

Ultimately, "[i]f each juror states unequivocally that he can set aside what he has heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue." *State v. Moore*, 335 N.C. 567, 586, 440 S.E.2d 797, 808 (1994).

Here, potential jurors were questioned at length about their knowledge of Defendant's case and the pretrial publicity concerning Defendant's case. When prospective jurors indicated that they had knowledge of the case and formed an opinion about the case that they could not set aside, they were removed from the jury.

Five of the twelve jurors ("Jurors A–E") indicated that they had not seen, heard, or read any information about the case before jury selection. One juror ("Juror F") did not have any knowledge of the case prior to jury selection, but saw Defendant's photograph on the front page of a newspaper at Walgreens in between the first and second day of the jury selection process. Juror F did not read any information contained in the article and said she would follow the judge's instructions concerning the presumption of Defendant's innocence.

Another juror ("Juror G") said, during *voir dire*, that he seemed to have "heard something about it years and years ago," that his memory was vague, that he had not read or heard any information recently, and that he had not formed an opinion about the case. One juror ("Juror H") said she read headlines in the local paper around a week and a half before jury selection and that she didn't remember anything about the case except that "it was an up and coming something." Juror H also said she understood that the newspaper was not evidence, that the newspaper did not cause her to form an opinion, and that she had no presumptions about Defendant's guilt or innocence in the case.

Two jurors ("Juror I" and "Juror J") were familiar with media accounts of the case. Juror I said she had read a paragraph in a newspaper article in which she learned that the case was a "cold case" reopened because of DNA, that the underlying incident concerned occurred in 2003, and that the incident was in Cleveland County. Juror I swore that she knew the newspaper story was not evidence, that she should disregard that information, and that she had not formed an opinion. Juror J said he saw a television story two nights prior to jury selection. Juror J said "[a]bout all I heard was that they was [sic] looking for jurors for the case," that he was using his computer while watching it and that he did not know any other facts prior to jury selection. Juror J also said "[a] man's innocent until he's proven guilty" and that he would have no problem returning a not guilty verdict if the State could not prove its case. Juror J also said he saw a news report that "a man had raped this older woman and killed her" and that the woman's name was Tessneer.

"Juror K" had read a "small article on Yahoo" about the case and said he had not formed any opinions about Defendant's guilt or innocence. Juror K said the article reported that "jury selection was about to begin," and that it caught his eye because he had been summoned for jury duty. Juror K said the article described the charges and that "[i]t did, though, talk about that there were two other cases out there that, I'm not sure who but somebody, they said related."

"Juror L" had read in the Shelby Star newspaper that Defendant was accused of "breaking in and killing a woman in Cherryville, and there were two other murders that were considered to be similar, although he has not been accused of those." Juror L also said she remembered that the victims lived close together. Juror L said she had not formed an opinion about the guilt or innocence of the defendant, but did read that there was "some information about DNA evidence" and that she was "a believer in DNA." Juror L said she would have no hesitation about returning a not guilty verdict if the State did not meet its burden of proof. Juror L said she had discussions with friends at work about the case. Juror L said the conversation was that the court would be looking for jurors, but the group did not discuss the facts of the case. One gentleman who was Juror L's supervisor said "he went to church with the daughter of one of the victims" but was unsure which person he was referring to. Juror L said there were three crimes and that one was linked to this case, but that she did not know that Defendant had any relation to any of the victims in the case, including Ms. Tessneer. Juror L also said that she would presume Defendant to be innocent, put aside the article she read, listen to the evidence, and begin with a "clean slate."

Neither of the alternate jurors had read or heard anything about the case prior to jury selection. The foregoing tends to show that all jurors either indicated that they had no prior knowledge or that if they had read any information, they could put it aside at trial.

Defendant argues that his case resembles *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983). However, this case is distinguishable from *Jerrett*. In *Jerrett*, ten of the twelve jurors, as well as both alternate jurors, "had heard about the case." *Id.* at 257, 307 S.E.2d at 349. Four jurors knew the defendant's family or relatives. *Id.* The jury's foreman said he had personally heard one of the victim's family members "emotionally discussing the case." *Id.* Six of the jurors knew or were familiar with the State's witnesses. *Id.* The jury was examined collectively, rather than individually. *Id.* at 257–58, 307 S.E.2d at 349. The crime occurred in Alleghany County, which had a population of 9,587 at that time. *Id.* at 252 n.1, 307 S.E.2d at 346 n.1.

Here, six of the jurors had no knowledge of the case prior to the jury selection process. Neither of the alternate jurors had knowledge of the case prior to jury selection. The jury was selected using individual *voir dire*. None of the jurors selected knew any of the State's witnesses. The population of Cleveland County was 97,489 according to Defendant, a population 87,902 larger than the population of Allegheny County considered in *Jerrett*. Accordingly, we do not believe the situation presented

here is similar to *Jerrett* and hold that Defendant did not meet his burden of showing that the trial court improperly denied his motion for a change of venue.

C. Expert Testimony

[3] Defendant next argues that the expert opinion testimony of Dr. Tracy and Dr. Butts was unreliable and should not have been admitted at trial under the rules of evidence. We disagree.

North Carolina Rule of Evidence 702(a) controls the admission of expert opinion testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2009).[4] The admissibility of the expert testimony in the present case is evaluated under the three-step inquiry, outlined by our Supreme Court in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004): "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* (citations omitted).

As far as the first portion of the *Howerton* inquiry is concerned, reliability is a "preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony." *Id.* at 460–61, 597 S.E.2d at 687–88. The expert's opinion does not have to be *conclusively* proven or *conclusively* reliable to be admitted into evidence. *Id.* Any questions that remain about the "quality of the expert's conclusions" go to the weight that the trier of fact may give the testimony, rather than the testimony's admissibility. *Id.* Further, "the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Id.* at 459, 597 S.E.2d at 687.

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4. Rule 702 was amended by the General Assembly in 2011, but that change does not apply to Defendant's case since he was indicted on 11 January 2010. *See* 2011 Sess. Laws 1048, 1049, ch. 283, § 1.3 (stating that the amendment applies to defendants indicted after 1 October 2011). The federal standard announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) now applies in North Carolina under this Court's ruling in *State v. McGrady*, ___ N.C. App. ___, ___, 753 S.E.2d 361, 367 (2014), *review allowed*, ___ N.C. ___, 758 S.E.2d 864 (2014).

State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991) provides an example in which our Supreme Court allowed an expert in forensic pathology to opine about the victim's cause of death when no physical evidence existed to show the cause of death. *Id.* at 573, 406 S.E.2d at 842. In *Annadale*, the forensic pathologist listed the cause of death as an "incision of the throat," which the pathologist admitted was based on information provided by law enforcement officers. *Id.* at 573, 406 S.E.2d at 847. In *Annadale*, our Supreme Court also noted that the forensic pathologist was the Chief Medical Examiner, was accepted as an expert in forensic pathology, and was well-qualified to provide an opinion that was helpful to the jurors. *Id.* The forensic pathologist was also subjected to cross-examination by the defendant's counsel. *Id.* Our Supreme Court held under these circumstances, the trial court did not err in allowing the forensic pathologist to provide his opinion concerning the cause of the victim's death, even without physical evidence showing the cause of death. *Id.*

We face a similar situation in this case. Here, the forensic pathologists examined the body and eliminated other causes of death while drawing upon their experience, education, knowledge, skill, and training. Both doctors knew from the criminal investigation into her death that Ms. Tessneer's home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her panties were torn, and that DNA obtained from a vaginal swab containing sperm matched Defendant's DNA samples. The doctors' physical examination did not show a cause of death, but both doctors drew upon their experience performing such autopsies in stating that suffocation victims often do not show physical signs of asphyxiation. The doctors also eliminated all other causes of death before arriving at asphyxiation, which Defendant contends is not a scientifically established technique. However, the reliability criterion at issue here is nothing more than a preliminary inquiry into the adequacy of the expert's testimony. *Howerton*, 358 N.C. at 460–61, 597 S.E.2d at 687–88. Accordingly, the doctors' testimony met the first prong of *Howerton* so that "any lingering questions or controversy concerning the *quality* of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Id.* at 461, 597 S.E.2d at 688 (emphasis added).

Concerning the second portion of the *Howerton* inquiry, "the trial court must determine whether the witness is qualified as an expert in the subject area about which that individual intends to testify." *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. "Whether a witness has the requisite skill to qualify as an expert in a given area is *chiefly a question of*

fact, the determination of which is ordinarily *within the exclusive province of the trial court*." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987) (emphasis added). "[A] jury may be enlightened by the opinion of an experienced cellar-digger, or factory worker, or shoe merchant, or a person experienced in any other line of human activity. Such a person, when performing such a function, is as truly an 'expert' as is a learned specialist . . . ." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 184 at 701–02 (7th ed. 2011) (footnotes omitted).

Here, the trial court accepted both Dr. Tracy and Dr. Butts as experts in forensic pathology. Defendant did not object to Dr. Butts being qualified as an expert in the field of forensic pathology, but did unsuccessfully object to Dr. Tracy being qualified as an expert in forensic pathology. Dr. Butts had performed around 6,700 to 6,800 forensic autopsies. Both Dr. Butts and Dr. Tracy were cross-examined by Defendant. The trial court conducted *voir dire* prior to allowing their testimony. Under these facts, it is clear that the trial court did not abuse its discretion.

The third component in the *Howerton* test is whether the testimony is relevant. Relevant evidence is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401 (2013). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Tadeja*, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (quotation marks, citation, and alterations omitted).

Defendant argues that "[t]his evidence was extremely prejudicial," although Defendant also argues that "[t]he cause of death was important," noting that a different result might have been reached had the jury not heard the doctors' opinions as to the cause of death. Defendant essentially argues that the evidence *was important and relevant*, but makes an additional argument that the evidence was prejudicial. We find Defendant's argument concerning relevancy without merit. Accordingly, we hold that the trial court did not abuse its discretion in allowing the expert testimony of Dr. Tracy and Dr. Butts.

IV. Conclusion

For the reasons stated above, we find no error in the trial court's judgments.

NO ERROR.

Judges ERVIN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
REGINA ANN HAWK, Defendant

No. COA14-204

Filed 2 September 2014

1. Evidence—blood alcohol test performed at hospital—no different results if excluded

The trial court did not err in a felony death by motor vehicle and reckless driving case by admitting evidence of the blood alcohol test performed by the hospital as part of its treatment of defendant's injuries. Given the evidence that defendant had consumed a substantial amount of alcohol so as to impair her ability to drive, there was no reasonable possibility that the jury would have reached a different result had the blood test results been excluded.

2. Evidence—testimony—conversion of blood plasma test results—blood alcohol concentration

The trial court did not err in a felony death by motor vehicle and reckless driving case by allowing a State's witness to testify regarding the conversion of the blood plasma test results used by the hospital to the legal standard for blood alcohol concentration. Given the evidence that defendant had consumed a substantial amount of alcohol so as to impair her ability to drive, there was no error admitting this testimony.

Appeal by defendant from Judgment entered on or about 11 July 2013 by Judge Michael E. Beale in Superior Court, Montgomery County. Heard in the Court of Appeals 12 August 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Carrie D. Randa, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

Regina Hawk ("defendant") appeals from the judgment entered after a Montgomery County jury found her guilty of felony death by motor vehicle and reckless driving. We find no prejudicial error at defendant's trial.

I. Background

Defendant was indicted for felony death by motor vehicle under N.C. Gen. Stat. § 20-141.4(a1) (2011) and reckless driving under N.C. Gen. Stat. § 20-140(a) (2011). Defendant pled not guilty and proceeded to jury trial. At trial, the State's evidence tended to show that on the evening of 3 September 2011, defendant was hanging out with friends and drinking beer. After picking up her friend Derisa Comer, defendant drove her SUV to another friend's house to cook out and drink beer. When she arrived around 10 p.m., she told Randy East that she had consumed about three beers.

Defendant drove Mr. East, Cody Bailey, Pam Singleton, and Ms. Comer to the store to pick up more beer. Around 1:40 a.m. on 4 September, as they were driving along the rural Aunt Queen Rd., defendant veered off to the side of the road, over-corrected back to the other side, and then pulled back to the right side. When she pulled back to the right side, her vehicle flipped over. Ms. Singleton was sitting in the back seat, but was not wearing her seatbelt. She was leaning forward to change the radio when the vehicle flipped. When it flipped, Ms. Singleton was partially ejected through the passenger side window. Defendant was stuck in the driver's seat, but the two men were unhurt and were able to get out. They left to get help.

Captain Stephen Hurley, with Montgomery County Rescue, was one of the first to respond to the scene. He checked Ms. Singleton for a pulse, but found none. The medical examiner later concluded that Ms. Singleton died from traumatic brain injury. Capt. Hurley noticed a strong odor of alcohol coming from the car and saw some beer cans and a bottle of tequila in the vicinity. Defendant had suffered massive trauma to her scalp, so he pulled her out of the vehicle. Once out of the vehicle, defendant just kept asking for a cigarette. Capt. Hurley noticed that she was slurring her words and thought that she seemed intoxicated.

Defendant was transported to Wake Forest Baptist Hospital for treatment. Dr. Chadwick Miller treated her when she arrived. He ordered the typical battery of tests for trauma victims, including a blood ethanol test to check for the presence of alcohol. He could not say who actually drew the blood for the test, nor what specifically happened to it on that night, though he did explain their normal procedure for drawing blood and sending it to the hospital's laboratory for testing. The laboratory used a Beckman Coutler DXC analyzer to test the blood. Dale Dennard, the Director of Pathology and Clinical Labs testified to the normal testing

procedure employed at the hospital. But he did not know which of their analysts actually tested defendant's blood sample.

The hospital records introduced at trial reflected that Dr. Miller had ordered a blood alcohol test as part of a standard battery of blood tests at 3:22 a.m. The tests returned a result of 212 milligrams of alcohol per deciliter of blood plasma. Based in part on this test, and defendant's behavior at the hospital, Dr. Miller diagnosed her with alcohol intoxication. Dr. Miller was "concerned that the patient was exhibiting behavior consistent with someone who may have a difficult time making decisions for themselves[.]"

Later on the morning of 4 September, Trooper Jeremy Anderson interviewed defendant in the hospital. Trooper Anderson testified that defendant was slow to respond to his questions and that her speech was slurred. When he asked defendant how much she had to drink, she responded, "at least a 12-pack." He opined that she was intoxicated, though he admitted that he did not know what medications she had been administered at that point.

Because the hospital blood test results were from a plasma sample and given in milligrams per deciliter, the State called Paul Glover to translate the blood plasma results to a whole blood alcohol concentration in grams per milliliter. Defendant objected to Mr. Glover's testimony because the State had only notified him of their intent to call Mr. Glover as an expert two days before trial. The prosecutor explained that the State did not know they would have to call Mr. Glover to testify about the conversion formula until the week prior to trial. Defendant did not move for a continuance. The trial court denied defendant's motion to exclude Mr. Glover's testimony, though it did delay his testimony until the following morning to allow defense counsel time to prepare. Mr. Glover explained how he converted the test results from the hospital's blood test to the accepted legal measure for blood alcohol concentration. He testified that using the accepted conversion formula results in a blood alcohol concentration of .17 g per 100 mL of whole blood.

After the close of the State's evidence, defendant elected to present evidence and testify on her own behalf.

II. Blood Test

[1] Defendant argues on appeal that the trial court erred in admitting evidence of the blood alcohol test performed by the hospital as part of its treatment of defendant's injuries. She contends that because the

State failed to show who actually drew the blood and who actually performed the test, it cannot be admissible. Even assuming defendant were correct, we hold that given the overwhelming evidence that defendant had consumed a substantial amount of alcohol so as to impair her ability to drive, any error in admitting the blood test was not prejudicial.

We review a trial court's decision to admit evidence over an objection concerning the chain of custody for an abuse of discretion. *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984). Erroneous admission of evidence only entitles the defendant to a new trial if she can show that the error was prejudicial. *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983); N.C. Gen. Stat. § 15A-1443(a) (2013). Such an error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Alston*, 307 N.C. at 339, 298 S.E.2d at 644 (quoting N.C. Gen. Stat. § 15A-1443(a)).

There are two accepted methods of proving impaired driving: proof of blood alcohol concentration (BAC) greater than .08 g per 100 mL of blood (or 210 liters of breath) or evidence that the defendant had consumed alcohol along with evidence of impairment. *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996) (holding that DWI is a single offense "which may be proven in . . . two ways"); *State v. Roach*, 145 N.C. App. 159, 163, 548 S.E.2d 841, 844 (2001) (discussing the two methods of proving impaired driving). So, the State can prove driving while impaired even absent evidence of defendant's BAC. *State v. Harrington*, 78 N.C. App. 39, 46, 336 S.E.2d 852, 856 (1985) (observing that "the State may prove DWI where the BAC is entirely unknown").

Here, the evidence, even excluding the blood test, showed that defendant lost control of her vehicle on a country road after consuming a substantial amount of alcohol and that she was appreciably impaired. When Trooper Jeremy Anderson interviewed defendant slightly before 4 a.m., she admitted drinking "at least a 12-pack." Testifying on her own behalf, defendant admitted drinking at least seven or eight beers before 10 p.m. that evening, though she denied being impaired. Captain Stephen Hurley, with Montgomery County Rescue, testified that when he arrived on the scene, he noticed the strong odor of alcohol. When he spoke with defendant, she just kept asking for a cigarette, slurring her words. He opined that she seemed intoxicated. Finally, Dr. Chadwick Miller treated defendant when she arrived at Wake Forest Baptist Hospital. Largely based on her behavior at the hospital, Dr. Miller diagnosed defendant with alcohol intoxication.

Thus, it is undisputed that defendant drank a large quantity of beer on the night in question before getting behind the wheel of her car. One law enforcement and two medical witnesses opined that she appeared intoxicated after the collision. *Cf. State v. Brown*, 87 N.C. App. 13, 20-21, 359 S.E.2d 265, 269 (1987) (holding that "the defendant's admission of being 'intoxicated' or having 'consumed too much beer' at 2:30 a.m.–3:00 a.m. is sufficient evidence from which the jury could infer that the defendant was impaired between 1:05 a.m. and 1:52 a.m."); *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002) (noting that the State need only prove appreciable impairment to sustain an impaired driving conviction), *disc. rev. denied*, 356 N.C. 692, 579 S.E.2d 96 (2003).

The only issue raised by defendant in her defense was the conduct of the other passengers. She and Ms. Comer claimed that the two men in the car were "picking at" Ms. Singleton, trying to bite her. They both testified that Ms. Singleton had climbed into Ms. Comer's lap in the front passenger seat. Both male passengers denied that they had been horsing around with Ms. Singleton or that she climbed into the front seat before the crash. Defendant claimed that Ms. Singleton's foot was on the steering wheel, so when she tried to turn the wheel it would not budge. According to defendant, when Ms. Singleton's foot came off the wheel, she lost control of the vehicle and went off the road. It is clear from the jury's verdict that they did not believe defendant's evidence.

The question for us is not whether the blood test evidence might have influenced the jury, but whether there is a reasonable possibility that, absent such evidence, the jury would have reached a different verdict. *See Alston*, 307 N.C. at 339, 298 S.E.2d at 644. Given the evidence here, we conclude that there is no reasonable possibility that the jury would have reached a different result had the blood test results been excluded. Therefore, we hold that defendant has failed to show that she was prejudiced by the admission of that evidence. *See id.*

III. Expert Testimony

[2] Defendant next argues that the trial court erred in allowing Paul Glover to testify for the State regarding the conversion of the blood plasma test results used by the hospital to the legal standard for blood alcohol concentration. The challenged testimony only related to the blood test evidence. For the same reasons that admission of the blood test was not prejudicial, admission of Mr. Glover's testimony was not prejudicial. Therefore, even assuming this testimony was admitted in error, defendant is not entitled to a new trial. *See id.*

IV. Conclusion

For the foregoing reasons, we conclude that defendant has failed to show that her trial was affected by prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
DONTE MACON, DEFENDANT

No. COA14-122

Filed 2 September 2014

1. Identification of Defendants—photo identification by officers from database—EIRA not applicable

The Eyewitness Identification Reform Act (EIRA) did not apply in a prosecution for carrying a concealed firearm and possession of a firearm by a felon where officers identified defendant from a database. Two officers saw defendant during a chase that followed an investigatory stop at a convenience store, another officer suggested that their description sounded like defendant, and the first two officers identified defendant from photos in their database. EIRA does not apply to such identifications because they are not lineups; the Legislature did not intend to prevent police officers from consulting photographs in their database to follow up leads given by other officers.

2. Constitutional Law—due process—photo identification—independent in-court identification

Normal due process rules applied in a prosecution for carrying a concealed firearm and possession of a firearm by a felon even if the Eyewitness Identification Reform Act did not. Even if the procedure by which officers identified defendant from a database was impermissibly suggestive, the officers' in-court identification of defendant from their encounter during a chase was from an independent source and the trial court did not err by denying defendant's motion to suppress.

Appeal by defendant from Judgment entered on or about 10 July 2013 by Judge Henry W. Hight, Jr. in Superior Court, Vance County. Heard in the Court of Appeals 12 August 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jonathan Shaw, for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STROUD, Judge.

Donte Macon ("defendant") appeals from the judgment entered after a Vance County jury found him guilty of carrying a concealed weapon and possession of a firearm by a felon. Defendant argues that the trial court erred in admitting in-court identifications by two police officers whose testimony was tainted by impermissibly suggestive out-of-court identification procedures. We hold that the trial court did not err by admitting the in-court identifications.

I. Background

On 8 October 2012, defendant was indicted for carrying a concealed weapon and possession of a firearm by a felon. Defendant pled not guilty. Before trial, defendant moved to suppress both the in-court and out-of-court identifications of him by Officer D.L. Ragland and Sergeant J. Ragland. He argued that the officers violated the Eyewitness Identification Reform Act (EIRA) and his constitutional rights by viewing only a single photograph to identify defendant as the perpetrator.

By order entered 11 July 2013, the trial court denied defendant's motion to suppress. Based on the uncontested findings of fact, around noon on a sunny 31 August 2012, Officer Darryl Ragland and Sergeant Jamie Ragland of the Henderson Police Department were on patrol when they saw a green Honda parked behind a convenience store. When they returned to the convenience store thirty minutes later, the same green Honda was still parked in the same location. Based on their experience with drug transactions in this area, they suspected that the occupants were engaging in the sale of heroin, so they approached the vehicle to make an investigatory stop. They saw one person sitting on the driver's side of the Honda when a person with dreadlocks got into the passenger's side. As the officers approached, the Honda pulled off, drove a short distance, then stopped. The passenger got out of the Honda and looked directly at Officer Ragland. Officer Ragland had an unobstructed view of the passenger's face from about 10 feet away. He noticed that

the passenger was a light-skinned black male with long dreadlocks and green eyes. The passenger took off running, so Officer Ragland followed him. Officer Ragland asked the passenger to stop, but he refused. During the pursuit, the passenger discarded an object before jumping over a fence.

Sergeant Ragland noticed that the passenger was running away but did not initially get a good look at him. Sergeant Ragland got back into his police car to try to cut off the fleeing passenger. As the passenger jumped over a fence, Sergeant Ragland saw him from about 5 to 7 yards away. He had an unobstructed view of the fleeing man, who then climbed another fence and escaped. The officers could not catch him.

Two more officers arrived on scene, including Officer Burrell. Officer Ragland told Officer Burrell what he had seen and described the passenger. Officer Burrell said that the person he described "sounds like Donte Macon." Officer Ragland and Sgt. Ragland then returned to the Henderson Police Department and entered the name "Donte Macon" into their RMS database. When the system returned a photograph of defendant, Sgt. Ragland said, "That's him." Both Officer Ragland and Sergeant Ragland recognized the person in the photograph as the passenger who fled from the green Honda. The officers then pulled up another photograph of defendant and confirmed that he was the man they saw earlier. At the hearing, both officers "identified the defendant in open Court as the person they saw on August 31, 2012 with 100% certainty."

Based on these facts, the trial court concluded that the EIRA did not apply here and that the procedure used to identify defendant was not unduly suggestive. The trial court further concluded that the in-court identifications made by both officers were "of independent origin" from the procedure used to identify defendant. Therefore, the trial court denied defendant's motion to suppress.

At trial, the State's evidence tended to show the facts as found by the trial court. Additionally, Officer Ragland testified that he looked on the ground where defendant had discarded the object during the chase and found a small caliber handgun. Officer Ragland picked it up with a leaf and brought it back to the police department's evidence locker. Both officers testified, over objection, that defendant was the person they saw fleeing on 31 August 2012. The police tested the recovered firearm for fingerprints, but were unable to find any prints sufficient for testing. The State also introduced evidence of defendant's prior felony conviction.

After the State rested its case-in-chief, defendant testified on his own behalf. He denied that he was at the convenience store on 31 August 2012

and denied possessing a firearm of any kind. He testified that on the day in question he was with his "baby's mother" at her house in Henderson. Defendant stated that he was aware that, as a felon, he was not allowed to possess firearms, so he stayed away from them.

The jury found defendant guilty of both charges. The trial court sentenced defendant to 14-26 months imprisonment. Defendant gave notice of appeal in open court.

II. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress the in-court identifications made by the officers because the procedure they used to identify him violated the EIRA and his constitutional due process rights. We disagree.

A. Standard of Review

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *State v. Boozer*, 210 N.C. App. 371, 378, 707 S.E.2d 756, 763 (2011) (citation and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 720 S.E.2d 667 (2012). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Robinson*, ___ N.C. App. ___, ___, 727 S.E.2d 712, 715 (2012) (citation and quotation marks omitted). We review questions of statutory interpretation *de novo*. *Johnson v. Robertson*, ___ N.C. App. ___, ___, 742 S.E.2d 603, 605 (2013).

B. North Carolina Eyewitness Identification Reform Act

[1] Defendant argues that the police failed to abide by the lineup procedures required by the EIRA, codified at N.C. Gen. Stat. § 15A-284.52 (2011). The State counters, and the trial court concluded, that the EIRA does not apply here. At the hearing on defendant's motion to suppress, the State argued that the EIRA did not apply because the use of a single photograph to identify a suspect is not a "photo lineup," and that, furthermore, it does not apply to identifications made by police officers in the course of their investigation. We agree that the identification based on two photographs here was not a "lineup" and, therefore, was not subject to the procedures outlined in the EIRA.

The trial court made the following findings of fact, none of which are challenged by defendant:

> 6. That on August 31, 2012 Detective Darryl L. Ragland and Sgt. Jamie Ragland were on routine patrol as police officers with the City of Henderson Police Department assigned to the narcotics unit.
>
> 7. That Darryl Ragland has been employed with the Henderson Police Department for 3 years and seven months and was so employed on August 31, 2012.
>
> 8. That Jamie Ragland was employed with the City of Henderson Police Department for 21 years and was so employed August 31, 2012.
>
> 9. That as the officers were driving an unmarked police vehicle in the City of Henderson on August 31, 2012, they noticed a green Honda motor vehicle with a person on the driver's side parked behind Alex Market Store at the corner of Maple Street and Nicholas Street in Henderson.
>
> 10. That as the officers continued on patrol they drove by the Alex Market and noticed that the green Honda remained parked behind the market for a period of thirty minutes.
>
> 11. That this was suggestive of drug activity (sale of heroin) to the officers.
>
> 12. That the officers drove up behind the green Honda to initiate an investigative stop.
>
> 13. That it was approximately 12 noon with bright sunlight when the officers drove up behind the Honda.
>
> 14. That the officers viewed a person enter the passenger side of the Honda.
>
> 15. That there was a person sitting on the driver['s] side[] of the green Honda.
>
> 16. That Officer D. L. Ragland and Sgt. Ragland noted that the person getting into the Honda had dread locks.
>
> 17. That the Honda pulled off as the officers approached, went a short way and then stopped.

18. That the passenger got out of the Honda.

19. That Officer Darryl Ragland got out of the unmarked police vehicle.

20. That the passenger then looked directly at Officer Ragland.

21. That at this point, Officer Darryl Ragland had an unobstructed view of the passenger and most specifically the passenger's face.

22. That Officer Darryl Ragland was 10 feet from the passenger when he saw his face.

23. That from this face to face between Officer D. L. Ragland and the passenger, Officer[] Ragland noticed that the passenger was an African-American male, light skinned, long dreads and green eyes.

24. That Officer Darryl Ragland did not know the passenger before this time.

25. That the passenger began running.

26. That Officer Darryl Ragland asked the fleeing man to stop.

27. That Officer Darryl Ragland pursued the fleeing man who did not stop.

28. That during the pursuit, Officer D. L. Ragland saw the fleeing man discard an object before he jumped over a fence.

29. That Officer D. L. Ragland stopped his pursuit and discovered a small caliber handgun which had been discarded by the fleeing passenger.

30. That until the passenger ran, Sgt. James J. "Jamie" Ragland saw no interaction between Officer Darryl Ragland and the exiting passenger as he focused on the person on the driver's side of the green Honda.

31. That at the point in time when Sgt. Ragland noticed that Officer Darryl Ragland began to chase the fleeing passenger, Sgt. Ragland noted only that the passenger was an African-American male with light skin and dreads.

32. That Sgt. Ragland tried to follow the chase by car in hopes of being able to cut off the fleeing passenger.

33. That as Sgt. Ragland drove he could see the chase behind houses that faced Nicholas Street.

34. That Sgt. Ragland saw that the fleeing passenger was coming upon a fence and drove his car behind a house in an effort to apprehend the passenger.

35. That as the passenger came over a fence . . . he turned around.

36. That Sgt. Ragland had a clear unobstructed view of the fleeing passenger who looked straight at him.

37. That Sgt. Ragland was about 5 to 7 yards from the fleeing passenger.

38. That Sgt. Ragland noted that the fleeing passenger was an African-American male with light skin and dreads.

39. That the fleeing passenger was able to climb another fence and escaped.

40. That other Henderson Police Officers Sgt. Collier and Officer Burrell arrived on the scene.

41. That Officer D. L. Ragland reported to Sgt. Collier and Officer Burrell what had occurred together with a description of the person who fled.

42. That Officer Burrell said that he sounds like Donte Macon.

43. That both Sgt. Ragland and Detective Ragland went directly to the Henderson Police Department and entered the name of Donte Macon into the automated RMS system.

44. That when a photograph of Donte Macon was pulled up on the screen, Sgt. Ragland said "That's him."

45. That both Detective Ragland and Sgt. Ragland immediately recognized that the person in the photo was the same person who fled from Alex's Market.

46. That this identification occurred within 10 to 15 minutes of the encounter with the fleeing passenger at Alex's Market.

> 47. That another photo of Donte Macon was provided by the RMS system.
>
> 48. That this photo of Donte Macon was also identified by both Officers as the person who fled from Alex's Market.
>
> 49. That D. L. Ragland identified the defendant, Donte Macon, as the person who fled the area behind Alex's Market, as the person who he chased and as the person who discarded a handgun on August 31, 2012.
>
> 50. That Jamie Ragland identified the defendant, Donte Macon, as the person he saw coming over a fence and who escaped on August 31, 2012.
>
> 51. That both Officer Ragland and Sgt. Ragland identified the defendant in open Court as the person they saw on August 31, 2012 with 100% certainty.

In general, out-of-court eyewitness identifications can be classified as "lineups," "photographic identifications," or "showups." *See generally*, Wayne R. LaFave, et. al., *Criminal Procedure* §§ 7.4(d), (e), (f) (3d ed. 2007). Other commentators distinguish between three types of out-of-court identifications: live lineups, photo lineups, and showups. *See* Robert L. Farb, Arrest, Search , and Investigation in North Carolina 558 (4th ed. 2011). The EIRA defines a lineup as either a live lineup or a photo lineup. N.C. Gen. Stat. § 15A-284.52(a). Both types of lineups under the EIRA are defined by the use of a number of subjects—one suspect and several "fillers." The statute defines "photo lineup" as "[a] procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime." N.C. Gen. Stat. § 15A-284.52(a)(7). It requires lineups to be conducted by an independent administrator and specifies the procedure for picking the fillers, among a number of other quite specific procedures for administering the lineup. N.C. Gen. Stat. § 15A-284.52(b).

Interpreted broadly, these provisions could be read to prohibit all showups, an effect we have held the Legislature did not intend. *State v. Rawls*, 207 N.C. App. 415, 423, 700 S.E.2d 112, 118 (2010). Similarly, these provisions could be read to prohibit any use of photographs to make an identification other than in a photo array.

We hold that the EIRA does not apply to such single-photograph identifications because they are not lineups. The use of a single photograph (or two photographs of the same person, as here) to make

an identification has been criticized as "highly suggestive." LaFave, *Criminal Procedure* § 7.4(e). The same is true of showups. *See State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (describing showups as "suggestive and unnecessary"). Nevertheless, we held in *Rawls* that there was no indication that the Legislature intended the EIRA to ban showups, and the Legislature has not since amended the statute to indicate otherwise. *Rawls*, 207 N.C. App. at 423, 700 S.E.2d at 118.

The procedure used here might be called a photographic showup; it has similar benefits and suffers from similar weaknesses as a live showup, in which the witness is confronted with a single suspect, often in handcuffs or otherwise detained. *Compare Turner*, 305 N.C. at 364, 289 S.E.2d at 373 (describing showups as "the practice of showing suspects singly to witnesses for purposes of identification") *with* LaFave, *Criminal Procedure* § 7.4(e) n. 85-86 (collecting cases that describe various uses of a single photograph to make an identification, many of which criticize the practice as "suggestive"). In both cases, only a small number of suspects were presented to the witness (three in *Rawls*, one here) a short time after the crime was committed.

As we noted in *Rawls*, our Supreme Court has recognized the benefits of the showup as an investigative technique. *Rawls*, 207 N.C. App. at 422, 700 S.E.2d at 117. We observed in *Rawls* that "the showup is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime, allowing an innocent person to be released with little delay and with minimal involvement with the criminal justice system." *Id.* (citations, quotation marks, brackets, and ellipses omitted). Like a live showup, the photographic showup here was done promptly after the officers saw the passenger flee, while their memory of the incident was still fresh. Even more than a live showup, the technique used by police here allowed them to determine at an early stage of their investigation whether the lead they received from a fellow officer was worth pursuing. We do not believe that the Legislature intended to prevent police officers from consulting with a photograph in their database to follow up on leads they are given by other officers. Therefore, we hold that the trial court correctly concluded that the EIRA does not apply here.

C. Impermissibly Suggestive Identification Procedure

[2] Even if the EIRA does not apply, the normal due process rules still do. Defendant argues in the alternative that the procedure employed here was impermissibly suggestive. We hold that even assuming the

procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source.

The trial court found that Officer Ragland was "10 feet from the passenger when he saw his face." The passenger "looked directly at Officer Ragland." Sgt. Ragland "had a clear unobstructed view of the fleeing passenger who looked straight at him[,]" from "about 5 to 7 yards" away. Given that both officers had a clear and unobstructed view of the suspect, the trial court concluded that "the in-court identification of the accused by Officer Darryl Ragland and by Sgt. Jamie Ragland is of independent origin." Defendant does not challenge this conclusion.

Even assuming the out-of-court identification procedure was impermissibly suggestive, the officers' in-court identifications would still be admissible if those in-court identifications had an origin independent of the impermissible procedure. *State v. Knight*, 282 N.C. 220, 226, 192 S.E.2d 283, 287 (1972); *State v. Jordan*, 49 N.C. App. 561, 566, 272 S.E.2d 405, 409 (1980); *State v. Pulley*, 180 N.C. App. 54, 64-65, 636 S.E.2d 231, 239 (2006), *disc. rev. denied*, 361 N.C. 574, 651 S.E.2d 375 (2007). Since the trial court concluded that the in-court identifications had an "independent origin," and "were not tainted by any pretrial identification procedure," and defendant does not challenge that conclusion, we must hold that the trial court did not err in denying defendant's motion to suppress the in-court identifications. *See Jordan*, 49 N.C. App. at 566, 272 S.E.2d at 409.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err by denying defendant's motion to suppress and admitting the in-court identifications.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

[236 N.C. App. 192 (2014)]

STATE OF NORTH CAROLINA
v.
JAMES DOUGLAS TRIPLETT

No. COA13-1289

Filed 2 September 2014

1. Evidence—recorded message—impeach credibility—cross-examination—prejudice

The trial court erred in a first-degree murder under the felony murder rule case by refusing to allow defendant to cross-examine his sister, a witness for the State, about a recorded message. The message was relevant to attack the witness's credibility and to show her bias against defendant and defendant's family, and it was within defendant's right to bear the risk of prejudice resulting from the cross-examination. Furthermore, defendant was prejudiced by the trial court's error as the witness was the only witness who testified that defendant was aware of the plan to rob victim. Without evidence that defendant was aware of the plan to rob the victim, it is likely the jury would not have found defendant guilty of robbery and burglary, the felonies underlying defendant's conviction for first degree felony murder.

2. Appeal and Error—issue not addressed—use of defendant's silence against him—addressed on retrial

The Court of Appeals did not address defendant's argument that trial court improperly allowed the State to use his silence against him in a first-degree felony murder case. Having already determined defendant's entitlement to a new trial based on the trial court's refusal to allow defendant to cross-examine a State's witness with a recorded message, the Court left the issue for the trial court to resolve in defendant's retrial.

Appeal by defendant from judgment entered 18 February 2013 by Judge Edgar B. Gregory in Wilkes County Superior Court. Heard in the Court of Appeals 9 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General John H. Watters, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

McCULLOUGH, Judge.

James Douglas Triplett ("defendant") appeals from the judgment entered upon his conviction for first degree felony murder. For the following reasons, we grant a new trial.

I. Background

On 19 April 2010, a Wilkes County Grand Jury indicted defendant on charges of first degree murder, robbery with a dangerous weapon, and first degree burglary. Following various pretrial motions by defendant, defendant's case came on for jury trial in Wilkes County Superior Court on 4 February 2013, the Honorable Edgar B. Gregory, Judge presiding.

The evidence at trial tended to show that after a day of drinking and drug use, defendant, his brother Eddie Triplett, and two other men, Ben Watson and Dillon Walsh, went to the residence of Bruce Barnes ("victim") on the evening of 9 December 2009 in search of drugs. While present at victim's residence, the men got into a skirmish with victim, during which defendant fatally stabbed victim.

At trial, the State prosecuted the case on the theory that defendant, Eddie, Ben, and Dillon had planned to rob victim of his drugs and defendant killed victim in perpetration of the robbery. Defendant, on the other hand, maintained throughout trial that he was ignorant of any plan to rob victim. Defendant testified that he agreed to go to victim's house to get high and passed out on the way to victim's house. Defendant did not recall anything from the ride to victim's house. Defendant testified he woke up and came to when he heard Dillon holler "He's got a gun. He's got a gun." At that point, defendant realized Eddie and Dillon were in a fight with victim and he entered the fight. Defendant testified he did not intend to kill victim but stabbed victim to protect Eddie, Dillon, and himself.

On 18 February 2013, the jury returned verdicts finding defendant guilty of robbery with a dangerous weapon, second degree burglary, and first degree murder under the first degree felony murder rule. The trial court then arrested judgment on defendant's convictions for robbery with a dangerous weapon and second degree burglary and entered judgment on defendant's conviction for first degree felony murder. Defendant was sentenced to life imprisonment with the possibility of parole. Defendant gave oral notice of appeal in open court following sentencing.

II. Discussion

Now on appeal, defendant raises the following two issues: whether the trial court erred by: (1) preventing defendant from cross-examining his sister, Teresa Ogle, with a recording of a voicemail message she left for defendant's other sister in order to attack Ogle's credibility; and (2) allowing the State to use defendant's silence against him.

Voicemail Message

[1] At trial, defendant's sister Teresa Ogle testified as a witness for the State. During her testimony, Ogle explained that defendant lived with her in a single wide mobile home on family land at the time of the incident in early December 2009. Although Ogle owned the mobile home, another of defendant's sisters, Connie Jennings, owned the land.

In response to questioning by the State on direct examination, Ogle described what happened the night of 9 December 2009 when defendant returned home after the altercation. On the whole, Ogle's testimony was damaging to defendant.

Specifically, Ogle testified that she worked third shift security and was getting ready for work when defendant came home on 9 December 2009 at approximately 10:40 p.m. Defendant entered the mobile home alone, but Eddie, Ben, and Dillon followed closely behind. Ogle recalled that Eddie had been stabbed in the leg and defendant's clothes were bloody. At first, defendant claimed he shot a deer and, while trying to cut the deer's throat, had stabbed Eddie in the leg. Defendant, however, quickly changed his story, admitting he killed a man and stating he was no different than Jack Keller, defendant's grandfather who killed defendant's grandmother. As the men discussed what they should do with their clothes, Ogle overheard defendant tell the other men they were going to burn their clothes in a barrel. Yet, Ogle did not see the men dispose of their clothes because she left for work. Ogle testified that as she was leaving, defendant gave her two intertwined pot holders. Ogle claimed she did not know what was inside of the pot holders, but admitted she disposed of them over the side of a bridge on her way to work.

Ogle testified that defendant later told her that he knew Ben had planned to rob victim and that he took a knife from her kitchen before they went to victim's residence because he knew victim had a gun. Ogle confirmed that a large knife was in fact missing from her kitchen knife set.

Ogle additionally testified that sometime after defendant was arrested and charged with victim's murder, she received a phone call

from defendant. Ogle recalled that during their conversation, defendant indicated he did not want her to testify against him. When Ogle said she would tell the truth, defendant began cussing, indicated that he wanted her to lie, and hung up.

On cross-examination, the defense sought to attack Ogle's credibility with questions concerning statements made by Ogle to family members that were inconsistent with her trial testimony. The defense's questions tended to suggest that Ogle played a larger role in destroying evidence following victim's death but that Ogle was lying on the witness stand to protect herself. The defense also inquired into Ogle's mental health, drug use, and past sexual activity. When the defense asked Ogle if she remembered engaging in risky sexual behavior, the State objected and the jury was excused while *voir dire* was conducted.

Prior to the jury's return following *voir dire* and a morning break, the defense informed the court that it also intended to cross-examine Ogle with a recording of a voicemail message she left for Shay Waddell, another of defendant's sisters. With the jury still out, the court instructed the defense to play the recording of the message. In the message, Ogle made hostile statements toward Shay, calling her names, denouncing her relationship with her family, and threatening to call "the law" and the D.A.

Upon inquiry by the court, the defense explained the message was left on 5 December 2011, after the charges were brought against defendant and around the time Ogle made allegations that other members of defendant's family were threatening her to keep her from testifying. The defense contended the message suggested Ogle had something to hold over the rest of defendant's family's head through her testimony in defendant's case and argued it should be able to cross-examine Ogle with the message to demonstrate Ogle's animus and bias towards defendant and their family.

In response to the defense's argument, the State explained that it believed the message was left in response to the family's eviction of Ogle from the family land and was not related to the charges against defendant. The State further explained that as a result of the eviction and surrounding events, Connie Jennings, the sister who owned the land, had been charged with interfering and intimidating a State's witness for her actions against Ogle. The State then objected to the introduction of the message, contending it was "unrelated to the charges [in the present case] and more related to the charges of intimidating the State's witness as well as the eviction process."

In explaining his opinion that the evidence should not come in under Rule 403, the trial judge indicated that evidence regarding what the family has done would be prejudicial to defendant, who was not responsible for the eviction or message. The court explained that introducing the message would invite evidence of the eviction that is not relevant and could mislead and confuse the jury. The trial judge then issued the following ruling:

> I rule that this tape may not be played before the jury; that I really have problems with Rule 402 and whether it's relevant. I rule under 403 that the probative value is substantially outweighed by the confusion of the issues involving her eviction and the problems that she might have had with her sisters; that there is no -- it's not fair to tie whatever problem she had with her sisters to the defendant; that may be prejudicial to the defendant. He may be prejudiced by allowing that kind of evidence.
>
> I think the same kind of things can be asked of her, whether she has hard feelings and all of that sort of thing. But I rule -- and I sustain the objection to the tape. And the tape will be made part of the record, if you would like for it be, but it may not be played before the jury.

In response to the trial court's ruling, the defense again requested that it at least be able to play the last portion of the message where Ogle threatened "to call the law and to go to the District Attorney if they keep messing with her[.]" The defense reiterated its argument that this threat was relevant for impeachment purposes because it showed Ogle's bias and Ogle's willingness to do whatever it takes to hurt defendant and his family.

Yet, the trial court stood firm, stating:

> I decline that request for the same reasons, that I think it would open up an area that would be confusing to the jury; that you may ask her about any problems, if you desire, about her feelings about her family. But anything about an eviction, it seems to me that that are things that don't relate to the defendant necessarily, and it's possible that the jury could be prejudiced towards the defendant by something that his sisters did that he didn't even know about.
>
> . . . .

> It opens up areas that are not necessary and are confusing. And under Rule 403 and the balancing test, I'm going to keep it out as the gatekeeper of the evidence.

Despite the court's ruling, defendant made it clear that "it [was his] wish that [the message] be played, notwithstanding whatever prejudice may be possible, and that it is his request that it be done and that he desires that it be played at his murder trial."

Thereafter, in response to questions concerning Ogle's relationship with her family, Ogle testified that she had no hard feelings towards defendant or her family for supporting defendant. Ogle stated she loved her family and they loved her too.

Now on appeal, defendant contends Ogle was a key witness and the trial court erred in refusing to allow his defense to cross-examine her with the message in order to show her bias and attack her credibility. Upon review, we agree with defendant.

As our Supreme Court has explained,

> North Carolina Rule of Evidence 611(b) provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Id.*, Rule 611(b) (2005). However, such evidence may nonetheless be excluded under Rule 403 if the trial court determines "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*, Rule 403. We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (citing *State v. Al-Bayyinah*, 359 N.C. 741, 747-48, 616 S.E.2d 500, 506-07 (2005), *cert. denied*, 547 U.S. 1076, 126 S.Ct. 1784, 164 L.Ed.2d 528 (2006)). An abuse of discretion results when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *Id.* (citations and internal quotation marks omitted).

State v. Whaley, 362 N.C. 156, 159-60, 655 S.E.2d 388, 390 (2008). We are, however, mindful that "criminal defendants . . . must be afforded wide

latitude to cross-examine witnesses as to matters related to their credibility." *Id.* at 161, 655 S.E.2d at 391.

As detailed above, in this case the trial court indicated it had serious doubts as to whether the message was relevant and, thus, admissible under Rule 402. The trial court then excluded the evidence under Rule 403, finding the probative value of the message was substantially outweighed by confusion of the issues and unfair prejudice to defendant.

First, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Upon review in this case, we hold the message relevant to attack Ogle's credibility and show Ogle's bias towards defendant and defendant's family.

As the parties explained, the message arose as a result of the family's efforts to persuade Ogle from testifying against defendant, including Ogle's eviction from the family land. Although the message would certainly be relevant in the case of intimidating a State's witness and the foreclosure proceedings, as argued by the State, the message is also relevant in the present action to show possible bias by Ogle against defendant. Moreover, the message is clearly relevant to attack Ogle's credibility as it calls Ogle's testimony that she held no hard feelings against her family into doubt.

Second, Rule 403 requires the trial court to weigh the probative value of the evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). In this case, because the trial court questioned the relevance of the message, the trial court could not have properly weighed the probative value of the message against the dangers of unfair prejudice and confusion.

Moreover, defendant requested for a second and third time that the message be allowed into evidence despite the potential prejudice to his case. We find it within defendant's right to bear the risk of prejudice and cross-examine Ogle with the message. As our Supreme Court explained in *State v. Lewis*, 365 N.C. 488, 496, 724 S.E.2d 492, 498 (2012),

> [g]enerally, the trial court has broad discretion in determining whether to admit or exclude evidence, and we are sympathetic to the trial court's legitimate worry that the evidence could complicate the case to defendant's detriment . . . . However, we have long held that

> "[c]ross-examination of an opposing witness for the purpose of showing . . . bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party."

Id. at 496, 724 S.E.2d at 498 (quoting *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954) (citations omitted)). Where the defense believes the risk of informing the jury of potentially prejudicial evidence is worth taking, any error that results would be invited by defendant. *Id.* at 496, 724 S.E.2d at 498-99 (citing N.C. Gen. Stat. § 15A-1443(c)). Thus, as our Supreme Court held in *Lewis*, "[g]iven the importance this Court places on a party's right to cross-examine an opposing witness for bias," *Id.* at 496-97, 724 S.E.2d at 499, we hold it was the defense's decision to chance the risk of prejudice and the trial court erred by excluding the evidence.

We further hold defendant was prejudiced by the trial court's error. Ogle was a key witness for the State and the only witness that testified defendant was aware of the plan to rob victim. Without evidence that defendant was aware of the plan to rob victim, it is likely the jury would not have found defendant guilty of robbery and burglary, the felonies underlying defendant's conviction for first degree felony murder.

In arguing the trial court did not err by excluding the message, the State cites this Court's decision in *State v. Withers*, 111 N.C. App. 340, 432 S.E.2d 692 (1993). This Court described the situation in *Withers* as follows,

> [D]efendant[, who was charged with larceny and possession of stolen property,] attempted to introduce a tape recording to impeach the testimony of Rita Jones and to show her motive to testify against him. On direct examination, Ms. Jones testified that she did not threaten her husband or anyone at the Stanley Rescue Squad. Defendant, however, offered a telephone answering machine tape recording [from her husband's voicemail] in which Ms. Jones profanely threatened to go to the authorities in Lincolnton and report her husband, who had been present when the property had been taken and when it had been divided.

Id. at 346-47, 432 S.E.2d at 696-97. This Court then affirmed the trial court's decision to exclude the recording, explaining that

> [w]hile the tape in question directly contradicts Ms. Jones' earlier testimony denying making threats to "get back" at

> her husband, the tape does not tend to prove or disprove any of the essential elements of either crime charged. Furthermore, the threats made on the tape are not directed at defendant. On direct examination, defendant's witness, Joyce Jones, testified to the threat which Ms. Jones made, so that the impeaching evidence was disclosed to the jury. Considering these factors and the extreme profanity contained on the tape, we believe the tape posed a danger of misleading the jury, causing undue delay and being cumulative.

Id. at 348, 432 S.E.2d at 697.

While both cases involve the exclusion of a recorded message under Rule 403 that a defendant sought to introduce to attack the credibility of a key witness, we find the present case distinguishable in one key respect. Among the factors considered in *Withers*, this Court noted the exclusion of the evidence was not error because the impeachment evidence came in through the testimony of another witness. *See id.* In the present case, however, the evidence defendant sought to admit was never introduced. Although the State is correct in asserting the evidence tended to show that defendant's family was "mad" at Ogle, there was no evidence that Ogle reciprocated those feelings. In fact, Ogle testified she loved her family and had no hard feelings towards them.

<u>Right to Remain Silent</u>

During the State's cross-examination of defendant, the State questioned defendant on his failure to mention self-defense to investigators early in the investigation. The State then argued to the jury during closing that defendant "waited till he heard the State's case and then concocted his story to try and navigate the waters to see if he could come up with some story that [the jury] might buy and spare justice for him."

[2] Now, in defendant's second issue on appeal, defendant contends the trial court improperly allowed the State to use his silence against him. Having already determined defendant is entitled to a new trial based on the trial court's refusal to allow defendant to cross-examine Ogle with the recorded message, we do not address the merits of this second issue as it is unclear from the record before this Court whether the statements were made before or after defendant was in custody and Mirandized. We leave this issue for the trial court to resolve in defendant's retrial.

III. Conclusion

For the reasons discussed above, we hold defendant is entitled to a new trial.

New trial.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANTWON TERRELL ROGERS

No. COA13-1430

Filed 2 September 2014

1. Appeal and Error—mootness—motion for appropriate relief—new trial granted

A motion for appropriate relief (MAR) was dismissed as moot where defendant was granted a new trial.

2. Sentencing—habitual felon—indictment revealed during substantive felony trial—no curative instruction—new trial

The trial court erred by not intervening ex mero motu to instruct the jury to disregard evidence of defendant's habitual felon indictment, in addition to sustaining the objection. The trial for the substantive felony is held first and the habitual felon indictment is revealed to the jury only after a conviction.

Appeal by Defendant from judgment entered 26 April 2013 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for Defendant.

STEPHENS, Judge.

On 18 June 2012, Defendant Antwon Terrell Rogers was under surveillance by a team from the "career criminal unit" of the Raleigh Police Department ("RPD"), which was seeking to serve Defendant with an outstanding warrant and a grand jury indictment for having attained the status of an habitual felon. The surveillance team did not know where Defendant lived, but saw Defendant drive up to and then enter a house at 312 North King Charles Drive in Raleigh. A woman, later identified as Defendant's girlfriend, Felisha Sandifer,[1] was a passenger in the car and entered the house with Defendant.

About ten officers with the career criminal unit surrounded the house, and several officers knocked on the door. A woman answered the door and stated that she lived in the home. When the officers told her they were looking for Defendant, the woman called Defendant to come outside. The officers handcuffed and arrested Defendant without incident.

After receiving consent from the homeowner, officers conducted a search which revealed a purse on the kitchen table. The purse contained mail addressed to Sandifer, marijuana, and a clip loaded with twelve .40 caliber bullets. When confronted by the officers, Sandifer initially claimed the marijuana and clip both belonged to her, but then admitted that the clip belonged to Defendant. At trial, Sandifer testified that Defendant put the clip in her purse when the police arrived at the house. Sandifer gave the officers permission to search her car, and a handgun was discovered under the passenger seat. The gun, which bore a stamp reading "Detroit Police Department," matched the clip found in Sandifer's purse. Sandifer denied having a gun and stated that it must have belonged to Defendant. Officers later determined that the gun was stolen. While Defendant was being held in jail after his arrest, he made several phone calls to Sandifer and asked her to take responsibility for the gun.

On 23 July 2012, Defendant was indicted on charges of possession of a firearm by a felon and possession of a stolen firearm. On 11 December 2012, Defendant was indicted for having attained the status of an habitual felon. At the 22 April 2013 session of superior court in Wake County, a jury found Defendant not guilty of possession of a stolen firearm, but guilty of possession of a firearm by a convicted felon. In a separate proceeding, the jury found that Defendant was an habitual felon. The

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1. Sandifer apparently went by the name "Felisha Requer" in June 2012, but used the last name Sandifer at trial.

trial court imposed an active sentence of 93-124 months in prison, from which Defendant gave notice of appeal in open court.

On 28 March 2014, Defendant filed a motion for appropriate relief ("MAR") in this Court contemporaneously with his appellate brief. The MAR was referred to this panel by order entered 8 April 2014. In his MAR, Defendant contends that his prior record level for sentencing was improperly calculated. Because we grant Defendant a new trial, we dismiss his MAR as moot.

Discussion

On appeal, Defendant argues that the trial court (1) erred in failing to instruct the jury to disregard evidence about his habitual felon indictment when such evidence was elicited during Defendant's trial on the underlying charges, (2) abused its discretion in denying his motion for a mistrial, (3) violated his Sixth Amendment rights by allowing Defendant's trial counsel to make the final decision regarding cross-examination of a witness, and (4) erred in making an inadequate inquiry regarding Defendant's request for substitute counsel. We conclude that Defendant is entitled to a new trial.

Defendant argues that, during the trial on the principal charges against him, the trial court erred by failing to intervene and instruct the jury to disregard evidence of Defendant's habitual felon indictment. We agree.

Our General Statutes provide that, when a defendant faces trial for having attained the status of an habitual felon, the "indictment that the person is an habitual felon *shall not be revealed* to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged." N.C. Gen. Stat. § 14-7.5 (2013) (emphasis added). In other words, "[t]he trial for the substantive felony is held first, and only after [a] defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (citation omitted). This procedural division between the trial on the underlying felonies and the trial on the habitual felon indictment

> avoids possible prejudice to the defendant and confusion by the jury considering the principal felony with issues not pertinent to guilt or innocence of such offense, notably the existence of the prior convictions necessary for classification as an habitual felon, and further precludes the jury from contemplating what punishment might be imposed

> were [the] defendant convicted of the principal felony and subsequently adjudicated an habitual felon.

State v. Wilson, 139 N.C. App. 544, 548, 533 S.E.2d 865, 868-69 (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 279, 546 S.E.2d 394 (2000).

This Court has held that, where the State introduces evidence of a defendant's pending habitual felon indictment in violation of section 14-7.5, even after sustaining an objection by the defendant, "a curative instruction [i]s necessary because, when evidence is rendered incompetent by statute, it is the duty of the judge *ex mero motu* to intervene and *promptly instruct the jury* that the evidence is incompetent." *State v. Thompson*, 141 N.C. App. 698, 704, 543 S.E.2d 160, 164 (citation and internal quotation marks omitted; emphasis in original), *disc. review denied*, 353 N.C. 396, 548 S.E.2d 157 (2001). Further, "where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error[,]" whether or not the defendant objects to the evidence. *State v. McCall*, 289 N.C. 570, 577, 223 S.E.2d 334, 338 (1976) (citation omitted).

Here, during the direct examination of RPD Officer Derrick Jack, one of the officers involved in Defendant's surveillance and arrest, the following exchange took place:

> [OFFICER JACK]: I was attempting to go serve a pair of outstanding warrants on [Defendant]. He actually had one outstnading [sic] warrant and an outstanding grand jury indictment for a habitual.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.

While acknowledging that the quick objection of defense counsel and the proper sustaining of that objection by the trial court prevented the witness from uttering the word "felon," Defendant contends that "the jury could fill in the blank" based on Officer Jack's earlier testimony about his job on the career criminal unit: "We're a unit that's [sic] our purpose is to seek out repeat offenders, repeat felon offenders. Generally they are subject eligible [sic] for the North Carolina habitual felon to kind of a third-strike type law." However, as Defendant also notes, defense counsel objected to and moved to strike this testimony. The trial court sustained the objection and instructed the jury, "Disregard that last statement." "The law presumes that jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004) (citation

omitted), *cert. denied*, *sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). However, if the jurors here disregarded only Officer Jack's "last statement[,]" as directed by the trial court, they were still made aware that his work involved "repeat offenders, repeat felon offenders."

Despite the fact that Officer Jack's challenged testimony was interrupted and stopped before he added "felon" after "habitual," we believe Officer Jack's testimony that Defendant had "an outstanding grand jury indictment for a habitual" did require striking and a curative instruction from the trial court. We agree with Defendant that the jury would have been able to "fill in the blank" and conclude that Defendant was facing "an outstanding grand jury indictment for [being an] habitual" felon, criminal, offender, or some other synonymous term. Any of those words used to complete Officer Jack's description of the "outstanding grand jury indictment" would have subjected Defendant to the harms contemplated in *Wilson*, to wit, "possible prejudice to the defendant and confusion by the jury considering the principal felony with issues not pertinent to guilt or innocence of such offense[.]" 139 N.C. App. at 548, 533 S.E.2d at 868-69.

As this Court noted in *Thompson*, section 14-7.5 bars revelation to the jury of the *pending indictment* that the defendant is an habitual felon. 141 N.C. App. at 704, 543 S.E.2d at 164 (citation omitted). Thus, in that case, we found no error because

> [n]o evidence of any *indictment* of [the] defendant as an habitual felon was introduced, nor [wa]s there any evidence in the record that [the] defendant was *indicted* or sentenced as an habitual felon. Instead, the State asked [the] defendant only whether he had been told that he qualified as an "habitual offender." *See, e.g.*, *State v. Aldridge*, 67 N.C. App. 655, 659, 314 S.E.2d 139, 142 (1984) (holding that cross-examination of a defendant which disclosed prior felonies, but did not disclose an *indictment* as an habitual felon, did not violate N.C. Gen. Stat. § 14-7.5).

Id. at 704-05, 543 S.E.2d at 164-65 (emphasis added); *see also State v. Owens*, 160 N.C. App. 494, 586 S.E.2d 519 (2003) (holding that section 14-7.5 was not violated where the State cross-examined the defendant about a prior conviction for being an habitual felon, because the State's questions did not refer to a *pending habitual felon indictment* against the defendant, but instead simply served to elicit information on the

defendant's criminal record). This reasoning led to the grant of a new trial for a defendant in a recent unpublished opinion from this Court in which the State elicited testimony from a defendant about his pending habitual felon indictment:

> Q. And before you left, you said, "Carla, you don't have any felonies"?
>
> A. No, I did not.
>
> Q. You told her this is going to be your fourth felony. You're a habitual felon?
>
> A. No, I did not.
>
> Q. Well, you know, in fact, that you are, correct?
>
> A. You indict me on habitual.
>
> Q. Is that a "yes"?
>
> A. "Yes."

State v. Eaton, __ N.C. App. __, 722 S.E.2d 797 (2012) (unpublished opinion), *available at* 2012 N.C. App. LEXIS 372, at *11-12, *disc. review denied*, 366 N.C. 568, 738 S.E.2d 371 (2013). Just as here, in *Eaton* the entire phrase "pending indictment for being an habitual felon" was never used. However, the questions in context had the effect of revealing to the jury that the defendant indeed faced such an indictment, and as a result, we held that admission of such evidence was prejudicial error requiring a new trial. *Id.* We discern no meaningful distinction between the phrases "You indict me on habitual" and "an outstanding grand jury indictment for a habitual" and believe that both alert the jury to a defendant's pending habitual felon indictment.

In light of our case law and the intent behind section 14-7.5, we conclude that, in addition to sustaining the objection by defense counsel, the trial court was required to give a curative instruction regarding Officer Jack's reference to "an outstanding grand jury indictment for a habitual." The trial court's failure to give such an instruction was reversible error and Defendant is entitled to a new trial. Given our resolution of this issue, we need not address Defendant's remaining arguments or the issue raised in his MAR.

NEW TRIAL.

Judges CALABRIA and ELMORE concur.

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT COMMUNITY CHARTER SCHOOL AND LINCOLN CHARTER SCHOOL, Plaintiffs
v.
CLEVELAND COUNTY BOARD OF EDUCATION, D/B/A CLEVELAND COUNTY SCHOOLS, Defendant

No. COA13-893-2

Filed 2 September 2014

1. Schools and Education—charter school funding—restricted funds

The trial court erred in a charter school funding case by failing to make sufficient findings of fact concerning the origins, purpose, and uses of the various funding sources at issue. The Court defined "restricted" funds as those funds which have been designated by the donor for some specific program or purpose and the matter was remanded for specific findings and appropriate conclusions applying this definition of "restricted" funds.

2. Attorney Fees—local school board—not state agency

The trial court erred a charter school funding case by awarding plaintiffs attorneys' fees under N.C.G.S. § 6-19.1. Defendant Cleveland County Board of Education is a local school board and, thus, is not a state agency for purposes of § 6-19.1.

Judge HUNTER, JR., Robert N. concurring in part and dissenting in part.

Appeal by defendant from Judgment entered on or about 13 February 2013 and Order and Judgment entered 2 April 2013 by Judge Jesse B. Caldwell III, in Superior Court, Cleveland County. Heard in the Court of Appeals 23 January 2014 and Opinion filed 3 June 2014. Petition for Rehearing allowed 10 July 2014.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Allison B. Schafer and Christine T. Scheef for N.C. School Boards Association, amicus curiae.

STROUD, Judge.

The Cleveland County Board of Education, d/b/a Cleveland County Schools ("CCS" or "defendant"), appeals from the judgment entered by the trial court on or about 13 February 2013, wherein it concluded that certain funds that CCS had placed in Fund 8 should have been placed into the local current expense fund and distributed on a *pro rata* basis to the plaintiff charter schools. CCS also appeals from an order awarding plaintiffs attorneys' fees.

On 3 June 2014, we filed an opinion holding that the 2010 amendments applied to the present case as clarifying amendments. Plaintiffs filed a petition for rehearing, which we allowed. Upon reexamination, we clarify the definition of "restricted" funds as used in our prior case law and applicable to the school year in question without relying on the subsequent amendments. We remand for the trial court to apply the correct definition of "restricted" funds and to make appropriate findings of fact. We reverse the trial court's order awarding attorneys' fees.

I. Background

On 9 January 2012, Thomas Jefferson Classical Academy Charter School, Piedmont Community Charter School, and Lincoln Charter School ("plaintiffs") filed a complaint in superior court, Cleveland County, alleging that CCS had failed to pay them the proper per-pupil amount required by statute. Plaintiffs specifically contended that CCS wrongfully moved approximately $4.9 million from the local current expense fund, which must be shared with the charter schools, to a "special revenue fund," which is not shared. Plaintiffs alleged that they were owed approximately $102,480. Plaintiffs sought a declaratory judgment that CCS must allocate the funds as plaintiffs contended the statute required, recovery in the amount of $102,480, and attorneys' fees under N.C. Gen. Stat. § 6-19.1. CCS answered, denying that their transfer of the funds to the special revenue fund violated any of the applicable statutes and that plaintiffs were owed anything.

The case was tried by the superior court sitting without a jury. The parties each presented evidence to support their claims. Plaintiffs primarily relied on the testimony of David Lee, financial director for CCS. Mr. Lee prepared an audit report of CCS' finances, which used various state budget codes for different revenue sources. Many of the funding sources that CSS had placed in the special revenue fund were classified by Mr. Lee as "unrestricted." Defendant presented a number of witnesses who administered various programs within the CCS system who

testified about their funding sources and the use of those funds. After two days of testimony, the trial court took the matter under advisement.

The trial court entered its judgment on 21 February 2013, wherein it found that defendant had misappropriated approximately $2,781,281 that should have been placed in the current expense fund rather than the special revenue fund. It found that Mr. Lee had admitted that $2,109,377 of the funds, called "Column A," were "unrestricted." It further found, based on Mr. Lee's testimony and that of the other CCS administrators, that $671,904 of the funds, listed under "Column B" and "Column C" were "(a) part of moneys made available to CCS for its current operating expenses, (b) used by CCS to operate its general K-12 programs and activities, and (c) not restricted to purposes outside CCS's general educational programs." It concluded that defendant owed plaintiffs $57,836 collectively and entered judgment against CCS in that amount. Defendant filed written notice of appeal from the 21 February 2013 judgment on 18 March 2013.

Plaintiffs then filed a petition for attorneys' fees under N.C. Gen. Stat. § 6-19.1(a). The trial court, by order and judgment entered 2 April 2013, granted plaintiffs' petition and awarded them $47,195.90 in attorneys' fees. Defendant filed written notice of appeal from the 2 April 2013 judgment and order on 30 April 2013.

II. "Restricted" Funds

Defendant argues that the trial court erred in finding that various revenue sources were not "restricted" and concluding that these funds were therefore subject to a per-pupil distribution to the plaintiff charter schools. We clarify the definition of "restricted" funds, hold that the trial court did not make sufficient findings of fact to support its judgment, and remand for further proceedings.

A. Standard of Review

> When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. . . . Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment.

Jackson v. Culbreth, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citations, quotation marks, and brackets omitted).

B. Charter School Funding and the Uniform Budget Statute

The allocation of funds between local school administrative units and charter schools is governed by N.C. Gen. Stat. § 115C-238.29H (2009). That statute requires the local school administrative unit to "transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b). This Court has interpreted the phrase "local current expense appropriation" to be "synonymous with the phrase 'local current expense fund' in the School Budget and Fiscal Control Act, N.C.G.S. § 115C–426(e)." *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002), *disc. rev. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). We have further held that charter schools "are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund." *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 460, 655 S.E.2d 850, 854 (*Sugar Creek I*), *disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 460 (2008). It is immaterial that the school board has earmarked particular funds for a specific purpose if the funds have been deposited in the local current expense fund. *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 676 (*Sugar Creek II*) (holding, *inter alia*, that the trial court did not err in concluding that funds designated for students affected by Hurricane Katrina were subject to per-pupil distribution to charter schools because they were placed in the current local expense fund, as opposed to a separate fund), *disc. rev. denied*, 363 N.C. 663, 687 S.E.2d 296 (2009).

The local current expense fund is defined by N.C. Gen. Stat. § 115C-426(e) (2009)[1]:

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with

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1. This statute has since been amended twice, but neither of these amendments applies to the 2009-2010 school year. N.C. Sess. Laws 2010-31, § 7.17(c)(stating that the amendments apply beginning with the 2010-2011 school year); N.C. Sess. Laws 2013-355, § 2(a), § 8 (amending § 115C-426 and stating that the amendments become effective when the act becomes law but do not affect pending litigation); *Charter Day School, Inc. v. New Hanover County Bd. of Educ.*, ___ N.C. App. ___, ___ n.4, 754 S.E.2d 229, 235 n.4 (2014) (noting that the amendments do not apply "retroactively").

> the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(c) also permits the creation of "other funds . . . to account for trust funds, federal grants restricted as to use, and special programs." Thus, we have held that "the provisions of Chapter 115C . . . do not require that all monies provided to the local administrative unit be placed into the 'local current expense fund' (Fund Two)." *Thomas Jefferson Classical Academy v. Rutherford County Bd. of Educ.*, 215 N.C. App. 530, 543, 715 S.E.2d 625, 633 (2011), *disc. rev. denied and app. dismissed*, ___ N.C. ___, 724 S.E.2d 531 (2012). "Restricted funds" kept in a fund separate from the local current expense fund are exempt from per-pupil distribution to the charter schools. *Id.* at ___, 715 S.E.2d at 630 ("[I]f funds are placed in the 'local current expense fund' and not held in a 'special fund,' they must be considered as being part of the 'local current expense fund' used to determine the *pro rata* share due to the charter schools."). The local school board has the authority to place such restricted funds in a separate fund. *Id.* at ___, 715 S.E.2d at 634 ("*Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund."); *Sugar Creek I*, 188 N.C. App. at 460-61, 655 S.E.2d at 855. However, we have never defined what "restricted funds" are or who has the authority to make that determination.

Thus, there are two fundamental questions we must address here: (1) does the local school board have discretionary authority to allocate funds into the local current expense fund or a separate fund as it sees fit?; and if not, (2) did defendant here properly classify the funds at issue as restricted?

N.C. Gen. Stat. § 115C-426(e) states that the local current expense fund

> *shall* be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

"It is well established that the word 'shall' is generally imperative or mandatory." *Chandler ex rel. Harris v. Atlantic Scrap & Processing*, ___ N.C. App. ___, ___, 720 S.E.2d 745, 750 (2011) (citation and quotation marks omitted), *aff'd and remanded*, ___ N.C. ___, 749 S.E.2d 278 (2013). Consistent with this Court's decisions in *Sugar Creek I*, *Sugar Creek II*, and *Thomas Jefferson*, as well as the plain language of N.C. Gen. Stat. § 115C-426(e), we conclude that the local school administrative unit may deposit any "restricted" funds into a fund separate from the current expense fund. *See Thomas Jefferson*, 215 N.C. App. at 544, 715 S.E.2d at 634; *Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 855. By contrast, any funds covered by N.C. Gen. Stat. § 115C-426(e) must be deposited into the local current expense fund. We further conclude that the determination of which funds may be placed in a separate fund is a question of law and not solely in the discretion of the local school board, given the mandatory language found in the budget statute. *See Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 750 (holding that the Industrial Commission has no discretion in determining an interest award when the relevant statute employed the word "shall").

Because the issue of whether funds are "restricted" or not is an issue of law, we further hold that the determination of whether funds that accrued to the local school administrative unit were "restricted" is a conclusion of law rather than a finding of fact. "A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties." *Puckett v. Norandal USA, Inc.*, 211 N.C. App. 565, 570, 710 S.E.2d 356, 359 (2011) (citation and quotation marks omitted). Relevant findings of fact would concern the origin, purpose, and ultimate use of the funds, not their designation as "restricted."

C. Defining "restricted" funds

"Restricted" is not a term found in any of the relevant statutes. Rather, it is a gloss this Court has put on the statutory definitions found in N.C. Gen. Stat. § 115C-426. It was the Court's shorthand for those monies that can be placed in a separate fund, i.e. those from "trust funds, federal grants restricted as to use, and special programs" which must be accounted for separately. N.C. Gen. Stat. § 115C-426(c). We have already held that a donor of "restricted funds" does not need to require that they be placed in a separate fund for the local school administrative unit to do so. *Thomas Jefferson*, 215 N.C. App. at 543, 715 S.E.2d at 634. Thus, the question is not what accounting method was required by the donor, but whether the funds have a limited use and specific purpose, such as to fund a special program. *See Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 855. Moreover, "federal grants restricted as to use[] and special programs" clearly have operating expenses and most will serve some portion of the K-12 population, but that fact does not make the funds "unrestricted."

The guidance from the Department of Public Instruction that we reviewed in *Thomas Jefferson* indicated that Fund 8 was a new, separate fund "to separately maintain funds that are restricted in purpose and not intended for the general K–12 population in the LEA." *Thomas Jefferson*, 215 N.C. App. at 537, 715 S.E.2d at 630. This definition nicely captures the Legislature's intent in allowing local school administrative units to separate special funds from the local current expense fund.

The use of funds to operate a program for the K-12 population does not make the funds unrestricted. Instead, unrestricted funds are those that could be used for *all* of the K-12 population *without restriction.* To label any funds which serve even a portion of the K-12 population as "unrestricted" would contravene the legislature's intent to allow local school administrative units to place monies from grants "restricted as to use" or funds for "special programs" into a separate fund. Nearly any funds (except those for Pre-K programs) given as a grant to a local school administrative unit will be used to operate *some* program for *some* of the K-12 population. Based on the prior cases and the language of the applicable statutes, we define "restricted" funds as those funds which have been designated by the donor for some specific program or purpose, rather than for the general K-12 population of the local school system.

The local school administrative unit should place such restricted funds into a fund separate and apart from the local current expense

fund, and if it fails to do so, the funds may lose their "restricted" status. *See id.* at ___, 715 S.E.2d at 634 (holding that "it is incumbent upon the local administrative unit to place restricted funds into a separate fund."); *Sugar Creek II*, 195 N.C. App. at 361, 673 S.E.2d at 676 ("If donations or other moneys are intended for special programs, they should be held in a special fund.").

D. Application

The trial court's judgment included no findings on the origins or nature of the funds for each source of funding. Instead, the trial court assessed the programs in bulk as either "restricted" or "unrestricted." It did so apparently on the basis that Mr. Lee testified that these particular funds were "unrestricted." First, we note that it is unclear what Mr. Lee's understanding of the definition of "restricted" was, as this was never explicitly stated, but he seems to have based his characterization of the funds on the state budget codes he used for each funding source. As both Mr. Lee and Mr. Merritt, the expert witness called by plaintiffs, acknowledged, the budget codes do not dictate how the funds are spent and funds classified as "unrestricted" may still have a specific purpose. Given our definition of "restricted" funds, we believe that the trial court's current findings of fact are inadequate for us to review its conclusion that various funds were "unrestricted" when it failed to make findings on the origins, purposes, and uses of the challenged funds. The fact that Mr. Lee may have classified funds of a certain origin as "unrestricted" is not dispositive of the issue.

Although we agree with the dissent that the definition of "restricted funds" may be complex in its application, we believe that the complexity is unavoidable, considering the prior case law and statutory language which we must follow. All students served by both the public school systems and charter schools throughout the state must be treated equally and the law must be applied uniformly in all of the school systems. If the local school boards and trial courts have no clear definition of "restricted funds," even if all are acting in good faith and seeking to comply with the governing statutes, different school boards and trial courts may determine their own differing definitions and thus allocate funds differently. In fact, in this case, various witnesses seemed to have different ideas of the definition of "restricted funds." We also agree that the complexity of identifying "restricted funds" may foster additional litigation, but the absence of a definition of the term probably fosters even more litigation. Fortunately, our legislature has recently amended N.C. Gen. Stat. § 115C-426 and this amendment should clarify the identification of the

funds which the General Assembly intends to be included in the local current expense fund. Unfortunately, this amendment does not apply to this case.

Given the extensive record and the facts in evidence as to each program, we believe that there is sufficient evidence in the record for the trial court to make specific findings about the funds at issue here. Therefore, we remand this case for the trial court to enter a revised judgment with specific findings about the origins, purpose, and uses of the various funding sources at issue and appropriate conclusions applying the definition of "restricted" funds outlined above.

III. Attorneys' Fees

Defendant next argues that the trial court erred in awarding plaintiffs attorneys' fees under N.C. Gen. Stat. § 6-19.1 because a local school board is not a state agency. We agree.

N.C. Gen. Stat. § 6-19.1 (2011) allows the trial court to award attorney's fees to a party prevailing over a state agency in a civil action. This Court has held that the definition of "agency" for the purposes of § 6-19.1 is the same as the definition of an "agency" under the Administrative Procedures Act (APA). *Izydore v. City of Durham (Durham Bd. of Adjustment)*, ___ N.C. App. ___, ___, 746 S.E.2d 324, 326, *disc. rev. denied*, ___ N.C. ___, 749 S.E.2d 851 (2013). The APA defines an "agency" as

> an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

N.C. Gen. Stat. § 150B-2(1a) (2011) (emphasis added). Accordingly, we have held that local governmental units, like municipalities and counties, are not subject to the attorney's fees provisions of N.C. Gen. Stat. § 6-19.1. *Izydore,* ___ N.C. App. at ___, 746 S.E.2d at 326 (holding that "local governmental units—such as respondents—are not 'agencies' for purposes of § 6–19.1."). Local school boards and local school administrative units are local governmental units, and, as such, are not "agencies" for the purpose of the APA. *See* N.C. Gen. Stat. § 115C-5(5)-(6) (defining "local school board" as "a city board of education, county board of education, or a city-county board of education" and a "local school administrative unit" as "a subdivision of the public school system

which is governed by a local board of education. It may be a city school administrative unit, a county school administrative unit, or a city-county school administrative unit."); *Coomer v. Lee County Bd. of Educ.*, ___ N.C. App. ___, ___, 723 S.E.2d 802, 803 (observing that "local boards of education are generally excluded from the requirements of the APA."), *disc. rev dismissed*, 366 N.C. 238, 731 S.E.2d 427, *disc. rev. denied*, 366 N.C. 238, 731 S.E.2d 428 (2012).

Plaintiffs contend that the local school boards are subject to § 6-19.1 because we have held that they "are deemed agents of the State for purposes of providing public education." *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 55 N.C. App. 134, 140, 285 S.E.2d 110, 114 (1981), *app. dismissed and disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982). Yet, our Supreme Court has noted that "[a]n agent of the State and a state agency are fundamentally different . . . ." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997); *see also Green v. Kearney*, 203 N.C. App. 260, 272, 690 S.E.2d 755, 764 (2010) (noting the distinction between a state agent and a state agency). In that same opinion, the Supreme Court quoted a prior opinion for the proposition that "[i]n no sense may we consider the [Local] Board of Education in the same category as the State Board of Education . . . ." *Meyer*, 347 N.C. at 106, 489 S.E.2d at 885 (citation and quotation marks omitted). Thus, local school boards are not state agencies for purposes of the APA and N.C. Gen. Stat. § 6-19.1 simply because they may be considered agents of the State in certain circumstances.

We hold that the trial court erred in awarding plaintiff attorney's fees under N.C. Gen. Stat. § 6-19.1 because defendant is not an agency for purposes of that statute. Therefore, we reverse the trial court's order allowing plaintiff's petition for attorneys' fees.

IV. Conclusion

For the foregoing reasons, we remand for the trial court to enter a revised judgment with appropriate findings of fact and conclusions of law as to the funds at issue. We further reverse the trial court's order awarding plaintiffs attorneys' fees.

REMANDED in part; REVERSED in part.

Judge DILLON concurs.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

I dissent from Section II of the majority opinion. The majority's definition of "restricted" funds adds unnecessary complexity to this Court's body of cases addressing school funding disputes between charter schools and local school boards.[1] The majority's definition is overly broad and may allow local school boards to sequester funds as "restricted" which should be apportioned to charter schools under N.C. Gen. Stat. §§ 115C-238.29H(b), 115C-426(c) (2009). For these reasons, I respectfully dissent.[2]

The majority defines "restricted" funds as "those funds which have been designated by the donor for some specific program or purpose, rather than for the general K-12 population of the local school system" and notes the requirement of *Thomas Jefferson I* that these funds be placed into a separate fund from the local current expense fund. *Thomas Jefferson I*, ___ N.C. App. at ___, 715 S.E.2d at 634. The majority then remands to the trial court for further findings of fact concerning the "origins, purpose, and uses of the various funding sources at issue" that it must then apply to this newly constructed definition of "restricted" funds.

In *Union Acad. v. Union Cnty. Pub. Sch.*, ___ N.C. App. ___, 735 S.E.2d 452, 2012 WL 5857373 (2012) (unpublished) this Court instructed the trial court on remand to determine, based on the rules set forth in *Thomas Jefferson I*, "the amount of restricted funds properly placed" in a separate fund. *Id.* at *5. Notably, this Court said "[w]ithout specific evidence as to what the funds in UCPS' Fund 8 actually were, any attempt by this panel to define 'restricted funds' would amount to an improper advisory opinion." *Id.* at *4.

Here, the trial court followed the exact procedure prescribed by *Union Academy*: the trial court collected what the majority describes as an "extensive record" and then examined the nature of the funds. The trial court relied on the testimony of the Chief Financial Officer of Cleveland County Schools ("CCS") to find as fact that $2,109,377 of the funds at issue in Column A were unrestricted in nature. The trial court

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1. As an initial matter, I agree with the majority that the holding in this case is limited to a small subset of funding disputes between charter schools and local education authorities due to the General Assembly's changes to N.C. Gen. Stat. § 115C-426 (2009). 2013 N.C. Sess. Laws 965, 978–80.

2. I agree with the majority opinion concerning attorneys' fees in Section III.

then found as fact that the roughly $671,904 at issue in Columns B and C were funds used for "(a) part of 'moneys made available' to CCS for its 'current operating expenses,' (b) used by CCS to operate its general K-12 programs and activities, and (c) not restricted to purposes outside CCS's general educational program . . . ." As the trial court properly took evidence, considered the "nature" of the funds, and determined that the funds were unrestricted in nature, the trial court has already followed the proper procedure under *Thomas Jefferson I* and the example provided in *Union Academy*. Accordingly, I would affirm the trial court.

The majority's definition unnecessarily adds a layer of complexity and will foster further litigation relating to charter school funding disputes for the 2009–10 school year. Funds appropriated by a donor to a local school district and designated for a "specific program or purpose" conceivably captures a wider variety of programs intended to benefit the general K-12 population of a local school system, including charter school students. This Court's prior cases have already lead to local school units "increasingly allocat[ing] monies for operating expenses to funds other than the local current expense fund"[3] as well as a bevy of litigation discussed *supra*. Creating an additional avenue for argument—that a particular budgetary item is a "specific program" or has a "specific purpose"—will only exacerbate those trends. For the foregoing reasons, I respectfully dissent.

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3. *See* Kara Millonzi, *Allocating Operating Monies Among Local School Unit Funds: Local Current Expense Fund vs. Fund 8*, Coates' Canons: NC Local Government Law, Univ. of N.C. Sch. Of Gov't. (June 10, 2014), http://canons.sog.unc.edu/?p=7721; *see also* Lisa Lukasik, *Deconstructing a Decade of Charter School Funding Litigation: An Argument for Reform*, 90 N.C. L. Rev. 1885, 1918 (2012) ("After the court of appeals' charter school-funding trilogy and the subsequent regulatory and legislative changes . . . the base amount of local per pupil funding for charter schools may fluctuate depending upon how local boards of education account for 'other' funds.").

KIRK ZUROSKY, Plaintiff-Appellant
v.
ALYSON G. SHAFFER, Defendant-Appellee

No. COA13-1364

Filed 2 September 2014

1. Divorce—equitable distribution—loss in property value—separation of asset and loss

The trial court did not abuse its discretion in an equitable distribution action by distributing the loss in value of a vacation home to defendant despite the fact that plaintiff received the asset. Appreciations and diminutions in value may be divided among the parties, even if the asset is distributed to one party while the passive loss is distributed to the other. The trial court conducted the proper statutory analysis, the evidence supported its findings, its findings supported its conclusions, and it specifically found that the diminution in value was divisible property.

2. Appeal and Error—unpublished opinion—use as authority—by trial court

The principle that an unpublished opinion may be used as persuasive authority on appeal if the case was properly submitted and discussed and there is no published case on point was applied to the trial court.

3. Divorce—equitable distribution—judgment—attached exhibits—clerical error

The trial court erred in an equitable distribution action by attaching to the amended judgment and order exhibits concerning distributions that were inconsistent with the decretal provisions. However, the errors were considered clerical and the case was remanded for correction.

4. Divorce—equitable distribution—stipulation—reward programs

The trial court did not err in an equitable distribution action where plaintiff alleged that the trial court had not adhered to the stipulations in the final pre-trial order concerning the value and distribution of a credit card and airline rewards programs. The parties had stipulated these items were marital but had not agreed to a value or distribution. The trial court made the determination to which the parties had agreed.

5. Divorce—equitable distribution—property tax decrease—extent of stipulation

The trial court did not err in an equitable distribution action by distributing equally a decrease in property taxes as part of interim distributions from an insurance policy to pay property taxes prior to the date of distribution. The trial court found the property to be marital, as the parties had stipulated, but the parties had reserved the right to dispute the classification and distribution of the property and the trial court did not err by distributing the decrease in property taxes equally.

6. Divorce—equitable distribution—tax refunds—divisibility stipulated—sufficiency of evidence of value—division not necessarily required

The trial court erred by in an equitable distribution action by finding that tax refunds were not marital or divisible and making no division where the parties had stipulated that the property was divisible. The matter was remanded for reclassification of the property and for distribution if there was credible evidence of value. The trial court is not required to distribute marital property if there is insufficient evidence of value.

7. Divorce—equitable distribution—value of business—active or passive change—no diminution in value

The trial court did not err in an equitable distribution case by not determining the active or passive components of the change in value of plaintiff's law firm between the date of separation and the date of divorce. The trial court specifically found that there was no evidence of the date of distribution value of the practice and used the same value for the date of separation and date of distribution. Without a diminution in value, there is no active or passive change to consider.

8. Divorce—equitable distribution—valuation of business—evidence—credibility—within judge's discretion

The trial court did not err in an equitable distribution action in its valuation of plaintiff's interest in his law practice. The credibility of the evidence in an equitable distribution action is for the trial court and the trial court does not err by not valuing an asset using evidence that it finds unreliable.

9. Divorce—equitable distribution—valuation of jewelry—expert testimony—defendant's testimony—discretion of judge

The trial court did not err in an equitable distribution action in its valuation of the parties' jewelry. It was within the trial court's discretion to rely on defendant's values instead of the values given by an expert.

10. Divorce—alimony and child support—defendant's income—no finding of bad faith—selection of reporting period

The trial court did not abuse its discretion in determining alimony and child support by not using defendant's actual income at the time of the order. The trial court did not expressly make a finding of bad faith, but found that defendant's numbers were not credible. The trial court's use of defendant's income from a period before he had reason to alter the reported figure was rational.

11. Child Custody and Support—support—retroactive—outside guidelines—standard—evidence sufficient

There was sufficient evidence to support an award of retroactive child support, although the case was remanded for correction of clerical errors. Neither party disputed that the case was properly outside the guidelines because of their combined incomes. An identical standard (the parties' ability to pay and the reasonably necessary expenses of the child) was applied to both prospective and retroactive child support because there was no prior child support order. There was sufficient evidence to support the trial court's award, although the case was remanded for the correction of errors involving the date of the complaints and the labeling of the type of child support awarded.

Appeal by plaintiff from judgment and order entered on 8 November 2013 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 8 May 2014.

Marshall & Taylor, P.C., by Travis R. Taylor, for Plaintiff-Appellant.

Hamilton Stephens Steele + Martin, PLLC, by Amy Simpson Fiorenza, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Kirk Zurosky ("Zurosky") appeals from a judgment and order entered on 8 November 2013. Zurosky argues (i) the trial court erred

in its distribution of marital property, and (ii) the trial court erred in its ordering of alimony and child support. After careful review, we affirm in part and reverse and remand in part.

I. Facts & Procedural History

Zurosky and Alison Shaffer ("Shaffer") married on 1 July 1995. Zurosky and Shaffer have two children. In December 2008, Zurosky stated his intention to leave the marital home. On 21 January 2009, the parties entered into an interim agreement ("Interim Agreement") which addressed the parties' separation, addressed the parties' financial responsibilities, and provided a temporary shared custody schedule for their two children. On 22 January 2009, the couple separated and Zurosky left the marital home.

Zurosky initiated the present lawsuit on 3 December 2009 and sought temporary and permanent child custody, equitable distribution, and a psychological evaluation of Shaffer. The complaint alleged Shaffer did not allow Zurosky to see his children according to the terms of the Interim Agreement. Shaffer filed an answer on 24 February 2010 generally denying the complaint's allegations and asserting counterclaims seeking child custody, child support, sequestration[1] of both the Providence Glen home (the marital home) and a black Lexus SUV, post-separation support, alimony, equitable distribution, attorney's fees, and requested an appraisal of Zurosky's interest in T&Z. Zurosky and Shaffer divorced in June 2010.

On 28 June 2010, the trial court held a hearing concerning temporary child support ("TCS") and post-separation support ("PSS"). On 6 August 2010, the initial equitable distribution pretrial conference scheduling and discovery order was entered. In compliance with this order, the parties filed equitable distribution affidavits, which were amended prior to entry of the final pre-trial order ("FPTO"). The FPTO contained stipulations and contentions regarding twenty-five marital and separate property items, seven marital and separate debt items, and six divisible property items. On appeal, Zurosky contends that the trial court did not comply with the FPTO with respect to five of those items: the value and distribution of two airline miles accounts, insurance policy disbursements, and tax refunds.

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1. "The process by which property is removed from the possessor pending the outcome of a dispute in which two or more parties contend for it." Black's Law Dictionary 1488 (9th ed. 2009).

On 31 August 2011, the trial court entered a TCS and PSS order. On 7 September 2011, Zurosky filed a motion to alter or amend the TCS and PSS Order. On 21 October 2011, Zurosky filed a motion for sanctions, which was granted in part against Shaffer for failing to produce documents in a timely manner and comply with discovery requests.

The trial court held hearings and took evidence regarding custody, equitable distribution, permanent child support, and alimony from November 2011 to June 2012. The trial court received testimony from both parties, business valuation experts, real estate appraisal experts, furniture appraisers, jewelry appraisers, family members, friends, coworkers, and employees. On 10 April 2013, Judge McThenia entered an Equitable Distribution Judgment and Permanent Child Support and Alimony Order ("April Judgment & Order").

In the trial court's April Judgment & Order, the trial court referenced two exhibits. Exhibit A shows the distribution and value of household goods and Exhibit B shows the distribution of marital and divisible assets and liabilities. Neither exhibit was attached to the April Judgment & Order.

On 7 May 2013, Zurosky appealed the April Judgment & Order. On 17 May 2013, Shaffer also appealed the April Judgment & Order. Shaffer filed a Motion for Rule 60 Relief on 29 July 2013 to correct a clerical mistake in the April Judgment & Order. The motion alleged the trial court failed to attach certain exhibits to the April Judgment & Order. The motion was granted on 8 November 2013.

Following the appeals and Motion for Rule 60 Relief, the trial court entered an Amended Equitable Distribution Judgment and Permanent Child Support and Alimony Order ("Amended Judgment & Order") on 8 November 2013, *nunc pro tunc* to 8 April 2013. The Amended Judgment & Order equitably distributed all marital property and contained 415 separate findings of fact. The trial court concluded an unequal distribution in favor of Shaffer, as outlined in the Amended Judgment & Order and attached exhibits, was equitable to both parties. In making its determination, the trial court made several findings addressing the factors laid forth in N.C. Gen. Stat. § 50-20(c) (2013):

> **(1) The income, property, and liabilities of each party at the time the division of property is to become effective.**
>
> Plaintiff/Husband's income greatly exceeded that of Defendant/Wife during the marriage and since the

DOS. Unless something unexpected happens, Plaintiff/Husband's income is likely to always remain ten (10) to twenty (20) times higher than that of Defendant/Wife. This is perfectly illustrated by his 2012 distributions, which indicate that in one month Plaintiff/Husband grossed more than Defendant/Wife did in the entire 2011 year. Additionally, Plaintiff/Husband is now sharing the Providence Glen Home with Ms. Zurosky, who is an attorney who earns a substantial income of her own and can contribute to Plaintiff/Husband's future shared expenses.

Not only does Plaintiff/Husband's income exceed that of Defendant/Wife, but also his career growth potential is also far greater than that of Defendant/Wife. Defendant/Wife has a very specialized area of practice (i.e., behavioral analysis and work with children on the autism spectrum). She is always going to be limited by time and travel restraints and a market which continues to limit her area of specialization.

The Court considered the property and liabilities of the parties at the time of the division of the property as is shown on Exhibits "A" and "B." The facts found below are all that could be determined by the preponderance of the evidence. The property in the exhibits includes property to be distributed to the parties which is still in existence but does not include any distributive award which may be determined by consideration of these factors.

As evidenced in the attached exhibits, the assets of Plaintiff/Husband exceed those of Defendant/Wife.

(3) The duration of the marriage and the age and physical and mental health of both parties.

The duration of the marriage is thirteen and one half (13 1/2) years.

Defendant/Wife is four (4) years older than Plaintiff/Husband.

Plaintiff/Husband is in excellent health.

Defendant/Wife has health issues including asthma, chronic pain coupled with a skin disorder. It is anticipated that Defendant/Wife will only be able to manage these

conditions as she ages, and that she will never be able to cure them. It is reasonable to assume that these painful conditions will not subside in the future and will likely impair, to some extent, her ability to function effectively and/or her quality of life in the future.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

Both parties have the minor children with them fifty percent (50%) of the time; but, Plaintiff/Husband has the former marital residence and will keep it for which the children will benefit. Plaintiff/Husband has sufficient household goods to maintain a comfortable living with the minor children in the Providence Glen Home.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

Plaintiff/Husband has a higher expectation of pension, retirement or other deferred compensation rights as co-owner of a law firm that maintains a 401K plan for all employees.

Defendant/Wife is self-employed and does not have access to a 401K plan, nor does she have a way to fund a retirement plan similar to that of Plaintiff/Husband. The only way she can fund a retirement plan is through savings.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

Defendant/Wife moved from Massachusetts to North Carolina with Plaintiff/Husband to support him in his dream to become a successful lawyer and to own his own firm. While in North Carolina, she helped Plaintiff/Husband build his law firm and make it as successful as it is today by taking care of the family and the home so that Plaintiff/Husband could focus on excelling in his career. Defendant/Wife supported Plaintiff/Husband emotionally,

financially, and in any other way he asked her to help. In so doing, Defendant/Wife sacrificed her ability to excel to the fullest level in her career.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

See Factor (6) above.

(9) The liquid or nonliquid character of all marital property and divisible property.

The primary liquid assets (the savings account and the CD) have all been spent but for the substantial savings account maintained by the partners in T&Z (estimated to be in excess of $1,000,000).

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

The primary liquid assets were the CD and BOA 4906 and 5460 (which have all been spent already). The primary asset is Plaintiff/Husband's interest [in] T&Z, (which is complicated to value but which is economically desirable to keep given the firm's profit margins).

Because of the downgrade in the residential real estate market, Plaintiff/Husband is going to be able to take both the Providence Glen Home and the Blowing Rock Home at a [sic] artificially low values. However, both of these assets have growth potential prospectively (and Plaintiff/Husband must agree with this assessment or else he would not have spent well over $100,000 in improving the Providence Glen Home cosmetically).

Since the DOS, Defendant/Wife has had to spend thousands of dollars to move herself and her furniture twice, [footnote omitted] and she will have to move a third time once she finds a permanent residence.

(11)(a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or

> **convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.**
>
> Defendant/Wife has been forced to spend the money she took from the CD to pay certain regular living expenses (for which Plaintiff/Husband was providing no support) and to defend herself in this protracted litigation. Defendant/Wife has had to pay in excess of Sixty Thousand Dollars and no/100 ($60,000) in noncompensable expert witness fees (only the trial time for with [sic] Mr. McDonald, Ms. Phillips, and Mr. Mitchell is compensable). Defendant/Wife will have incurred over Two Hundred Thousand Dollars and no/100 ($200,000) to try the issues in this case in the court system.
>
> **(12) Any other factor which the court finds to be just and proper.**
>
> Plaintiff/Husband is requesting that this Court award him all of the significant marital assets and allow him to enjoy all that he enjoyed during the marriage and more. All the while, Defendant/Wife has struggled to meet him on an even playing field and has not been allowed to enjoy a fraction of what she enjoyed during the marriage.
>
> Plaintiff/Husband has not been fully cooperative in the process of valuing his interest in T&Z. As a result, Defendant/Wife has had to spend substantial amounts of time and money she does not have trying to get to the truth about Plaintiff/Husband's business and future revenue potential. The trial itself has been time-consuming and expensive on all levels for Defendant/Wife. Plaintiff/Husband is being represented by Ms. Wallace, hislong [sic] time friend,. [sic] Plaintiff/Husband testified that to date that [sic] he has only paid Ms. Wallace Fifty Thousand Dollars and no/100 ($50,000), which the Court notes (from having first hand experience of Ms. Wallace's hourly rate and attorney's fess [sic] bills) is extremely inexpensive (particularly in a contentious case such as this for which we have been in Court more than three (3) weeks in-the [sic] last eight (8) months).

The trial court awarded a total of $6,800 per month in permanent alimony to Shaffer and a total of $4,604 per month in child support to

Shaffer. The trial court also held that Zurosky owed Shaffer $77,903 in retroactive child support from the date of the filing of his complaint, 3 December 2009, to 29 June 2012.[2] The missing exhibits from the April Judgment were attached to the Amended Judgment & Order.

In its equitable distribution of property, the trial court assessed the date of separation ("DOS") and date of distribution ("DOD") value of the Blowing Rock Home. The Blowing Rock Home is owned by Zurosky and his law partner Andre Tippens ("Mr. Tippens") as tenants in common. In its equitable distribution order, the trial court found that

> 114. At all times prior to the initiation of this lawsuit, Defendant/Wife believed that her name was on the deed to the Blowing Rock Home. Defendant/Wife had given Plaintiff/Husband a Power of Attorney to sign her name at closing, but she had no idea that she was never listed on the deed.
>
> . . .
>
> 117. During the marriage, Mr. Tippens used the house very rarely (no more than three (3) times since the residence was purchased). Instead, the parties and their children occupied the residence the majority of the time and frequently. The parties used the Blowing Rock Home as their primary vacation spot and spent weekends and holidays in the mountains. The Blowing Rock Home served a specific purpose for the parties, in that Defendant/Wife's chronic pain condition (which is described in greater detail hereinafter) was alleviated in colder/milder climates so that she tended to feel much better physically while visiting the Blowing Rock Home.
>
> . . .
>
> 119. Although Plaintiff/Husband testified multiple times that the Blowing Rock Home is the "T&Z firm" house, it is not the firm's asset or business property. It was not and currently is not used for business, and it serves no legitimate business purpose. It was not considered or valued as an asset of T&Z by either valuation expert.

2. In the record, the trial court states the date of the filing of the complaint as 3 December 2009. However, the complaint was filed on 23 December 2009.

> 120. The reality is that the Blowing Rock Home was Plaintiff/Husband and Defendant/Wife's personal vacation residence which Mr. Tippens pays for but used only infrequently prior to the DOS and has used no more frequently since the DOS.
>
> 121. The Court finds it credible that the only reason Defendant/Wife's name was not placed on the deed was because she was pregnant with [the parties' daughter] and did not participate in the closing or closing process. While this was not done intentionally to exclude Defendant/Wife, the result has been that Defendant/Wife has had no legal right to access the Blowing Rock Home since an unrelated third party owner, Mr. Tippens, has not allowed her access any more than has Plaintiff/Husband.
>
> 122. In the summer of 2009, Plaintiff/Husband locked Defendant/Wife out of the Blowing Rock Home and instructed her that she was no longer permitted to access, use, or enjoy the Blowing Rock Home. This has been difficult for Defendant/Wife not only because the Blowing Rock Home was a refuge from the heat for her, and it was a place she enjoyed vacationing with her children.
>
> 123. After restricting Defendant/Wife's access to the Blowing Rock Home, Plaintiff/Husband has continued to use it himself together with [Zurosky's current wife], her children, and his children at various times. Plaintiff/Husband has no restrictions on his use of the home and will continue to enjoy the benefits of this vacation residence because Plaintiff/Husband and Mr. Tippens do not intend to sell the Blowing Rock Home or to use it as a rental.

The parties also stipulated that the fair market value of the Blowing Rock Home decreased by $123,000 from the DOS to the DOD. The trial court found this decrease was divisible property and distributed the decrease to Shaffer, although Zurosky received the Blowing Rock Home.

In evaluating the value of the law firm, both parties submitted expert appraisals of T&Z and proposed valuations in the FPTO. In the FPTO, Zurosky contended the value of the firm was $830,000 (DOS) and $450,000 (as of the FPTO); Schaffer, contended the value to be $1,038,000 (DOS) and $554,000 (as of the FPTO). In her order, the trial court agreed with

Shaffer's expert that the DOS value of T&Z was $1,038,000 but found no credible evidence presented regarding the DOD value. Lacking such evidence the court held the DOS value of T&Z to be determinative of the DOD value.

The trial court also relied on jewelry valuations provided by Shaffer rather than expert testimony provided by Zurosky. Seven items of jewelry were considered in the equitable distribution order. The parties stipulated in the FPTO that all of the jewelry was marital property. Shaffer contended the total value of all jewelry items was $21,525 as of the DOS; Zurosky contended the total value was $74,060. Shaffer contended for the same values on the DOD; Zurosky contended for the same DOD values, except concerning Item E-13, a Tiffany brand platinum and diamond pendant. Zurosky contended that Item E-13 appreciated $450 from DOS to DOD. The trial court accepted Shaffer's valuations of all the jewelry, and all of the items of jewelry were distributed to Shaffer, except Item E-14 (a stainless steel and gold Rolex watch) that Zurosky received.

In its order, the trial court expressed concerns about the credibility of the evidence presented by Mr. Zurosky concerning his income.[3] Due to these concerns, the trial court relied on prior years' incomes rather than Zurosky's testimony concerning DOD income.

Zurosky filed timely written notice of appeal on 8 November 2013.

II. Jurisdiction & Standard of Review

This Court has jurisdiction over Defendant's appeal because the equitable distribution judgment and child support and alimony orders are final judgments of a district court in a civil action under N.C. Gen. Stat. § 7A-27(b)(2) (2013).

Zurosky's issues on appeal concern equitable distribution, alimony, and child support; all of these issues are reviewed under an abuse of discretion standard. *Wieneck-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) ("Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion."); *Kelly v. Kelly*, ___ N.C. App. ___, ___, 747 S.E.2d 268, 272 (2013); *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

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3. In his financial affidavits, Zurosky reported a $16,000 deficit each month between his income and expenses. The trial court found the numbers submitted by Zurosky were inconsistent with his actual financial condition.

"Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute . . . will establish an abuse of discretion." *Wieneck-Adams*, 331 N.C. at 691, 417 S.E.2d at 451 (internal citations omitted).

III. Analysis

A. Equitable Distribution Judgment

Pursuant to the North Carolina Equitable Distribution Act, the trial court is required to determine whether the property is marital or divisible and " 'provide for an equitable distribution of the marital property and divisible property between the partie[s].' " *Mugno v. Mugno*, 205 N.C. App. 273, 276–77, 695 S.E.2d 495, 498 (2010) (quoting N.C. Gen. Stat. § 50-20 (2009)). The trial court must follow a three-step analysis in making an equitable distribution: "(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property." *Id.* at 277, 695 S.E.2d at 498.

Marital property is

> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1) (2013). Divisible property includes

> a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
>
> b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.
>
> c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.
>
> d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

N.C. Gen. Stat. § 50-20(b)(4)(2013). Regarding the distribution phase, "there shall be an equal division by using net value of marital property and net value of divisible property" unless that result would be inequitable. N.C. Gen. Stat. § 50-20(c). "However, the trial court may conclude, within its discretion, that unequal distribution is equitable after considering the factors listed in N.C. Gen. Stat. § 50–20(c) and making sufficient findings of fact to support its conclusion." *Mugno*, 205 N.C. App. at 277, 695 S.E.2d at 498; *see also* discussion of Section 50-20(c) factors *supra*.

Zurosky argues the trial court erred in its equitable distribution order by (1) distributing the diminution in value of the Blowing Rock Home between DOS and DOD to Shaffer; (2) attaching exhibits to the order that were inconsistent with the written judgment; (3) deviating from the stipulations of the parties in the FPTO; (4) calculating the diminution in value between the DOS and DOD of Zurosky's interest in T&Z; and (5) erroneously calculating the value of the parties' jewelry. We address each in turn.

1 Diminution in Value of the Blowing Rock Home

[1,2] In the FPTO, the parties assigned $568,000 as the DOS fair market value of the entire Blowing Rock Home and $445,000 as the DOD fair

market value of the Blowing Rock Home, owned by Zurosky and his law partner Mr. Tippens as tenants-in-common. The trial court classified Zurosky's one-half tenant-in-common interest in the Blowing Rock home as marital property. Zurosky and Mr. Tippens continued to pay the Blowing Rock Home's mortgage from DOS to DOD. On the DOD, the outstanding mortgage balance on the Blowing Rock Home was $411,959.00. The net equity of the Blowing Rock Home on the DOD was distributed to Zurosky. The marital estate's portion of the passive loss ($61,500) was classified as divisible property and was distributed to Ms. Shaffer.

In distributing the passive loss, the trial court relied on *Wirth v. Wirth*, 204 N.C. App. 372, 696 S.E.2d 202, 2010 WL 2163367 (2010) (unpublished) ("*Wirth II*").[4] Zurosky argues that relying on this case was erroneous because it was an unpublished decision of this court and because the "plain language of N.C. Gen. Stat. § 20(b)(4)" presumes that the diminution in value of a marital asset is divisible unless the trial court finds that the change was the result of postseparation actions taken by one spouse. *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) ("*Wirth I*").[5]

Zurosky contends on appeal that the trial court's decision with respect to this issue was erroneous because it was manifestly unsupported by reason such that the evidence reveals no rational basis for the distribution. Zurosky contends that there is a legal presumption that all appreciation and diminution in value of the marital and divisible property must be distributed with the property unless the court finds that the change in value is attributable to the postseparation actions of one spouse. Essentially, Zurosky argues that since the court distributed the Blowing Rock property to him, its diminution in value should also have been distributed to him absent a court finding of misconduct on his part. We disagree.

In making its equitable distribution, the trial court relied extensively on the Section 50-20(c) factors and cited competent evidence in support of its findings, quoted in their entirety *supra*. The trial court also cited *Wirth II* to support the distribution of the diminution in value to Shaffer despite the fact that Shaffer did not receive the property. Although

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4. The trial court wrote in its order "*Wirth v. Wirth*, 204 NC 372, 696 S.E.2d 202 (2010)," apparently intending to refer to the unpublished decision of this court cited above.

5. Zurosky cites N.C. Gen. Stat. § 20(b)(4) (2013) in his brief, which is clearly a typographical error. We assume Zurosky intended to cite N.C. Gen. Stat. § 50-20(b)(4), which includes the definition of divisible property and is quoted *supra*.

Wirth II is an unpublished opinion, an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point. *State ex rel. Moore Cnty. Bd. Of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005); *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs. Div. of Health Serv. Regulation, Certificate of Need Section*, ___, N.C. App. ___, ___, 751 S.E.2d 244, 255 (2013). We see no reason why this principle should not apply in the trial courts and agree that *Wirth II* supports the trial court's decision.

In *Wirth II*, this Court approved a distribution of the entire passive loss of an asset to the party that did not receive the asset. 2010 WL 2163367 at *5. The asset at issue was a general contracting business. *Id.* at *1. The defendant in *Wirth II* argued, much like Zurosky, that "when dealing with divisible property consisting of post date of separation diminution in value of an asset, the trial court should always distribute the divisible property to the same party to whom the marital asset is distributed." *Id.* at *5 (alterations omitted).

Wirth II noted that the defendant in that case, as here, did not cite authority requiring the trial court to distribute an entire passive loss to "to the party who received the depreciated asset." *Id. Wirth II* is also persuasive because it recognized the premise upon which equitable distribution awards are based, namely that assets in an equitable distribution are to be *considered in their totality*, that equitable distribution of marital and divisible property is within a trial court's discretion, and that the division is performed under equitable principles that are, "*inter alia*, 'consistent with principles of justice and right.' " *Id.* at *6 (quoting Black's Law Dictionary 617 (9th ed. 2004)). As in *Wirth II*, "[i]n some circumstances, it is certainly most appropriate that a divisible loss should be distributed to the party who has received the related asset. However, *in light of the entire equitable distribution judgment, the previous opinion of this Court, and the record before us*, we cannot now say that the trial court abused its discretion" in distributing the entire passive loss to Shaffer as part of its equitable distribution judgment. *Id.* (emphasis added).

However, the trial court did not have to rely solely upon *Wirth II* and its reliance upon that decision was essentially lagniappe offered to provide an example in which this Court had approved distributing the passive loss associated with an asset to the party who did not receive the asset in question as part of an equitable distribution judgment. Since the trial court considered the Section 50-20(c) factors, discussed *supra*, and since its findings related to these factors were supported by

competent evidence, it was within the trial court's discretion to distribute the loss to Shaffer so the trial court did not err in doing so.

Because the trial court conducted the proper analysis under N.C. Gen. Stat. § 50-20(c) and its conclusions were supported by findings that were, in turn, supported by competent evidence, the trial court did not abuse its discretion by distributing the diminution in value to Shaffer despite the fact that Zurosky received the asset. We do not find the statutory presumption contained in N.C. Gen. Stat. § 50-20(b) to be of assistance to Zurosky, since the statute explicitly allows appreciation and diminution to be characterized as "divisible," and since the trial court specifically found that the diminution in value at issue here was divisible property. As such, appreciations and diminutions may be divided among the parties, even if the asset is distributed to one party while the passive loss is distributed to another. Accordingly, we affirm the trial court's distribution of the diminution in value of the Blowing Rock Home to Shaffer.

2. Attached Exhibits

[3] Zurosky next argues that the trial court erred in attaching exhibits that were inconsistent with the decretal provisions in the Amended Judgment & Order. We agree.

Clerical mistakes are "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . ." N.C. R. Civ. P. 60. A clerical error is defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation and quotation marks omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (citations and quotations marks omitted).

Here, the trial court attached a version of Exhibit B to the Amended Judgment & Order that did not correspond with the findings of fact and decretal section in the Amended Judgment & Order. In Exhibit B, the trial court awarded Shaffer fifty-five percent of the property and a distributive award of $771,620. However, in the findings of fact and decretal section, the trial court awarded Shaffer an equal distribution of property and a distributive award of $647,965.50 (after Rule 37 Sanctions). In the

Amended Judgment & Order, the trial court referenced the distributions outlined in both the findings of fact and Exhibit B, which conflict.

While Zurosky urges this Court to vacate the order in its entirety, we decline the invitation. Although we agree Exhibit B conflicts with the distribution described in the order, the errors do not merit vacating the order in its entirety. The errors made by the trial court are more properly considered clerical errors. Accordingly, we remand this case to the trial court to correct any inconsistencies between Exhibit B and the order.

3. Deviation from the FPTO

[4] Zurosky next argues the trial court erred in its distribution of property because the trial court failed to adhere to stipulations concerning five items contained in the FPTO. We agree with respect to the 2009 tax returns, but disagree concerning the other four items discussed by Zurosky.

N.C. Gen. Stat. § 50-20(d) (2013) provides:

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

Where an agreement provides for distribution of the parties' marital or divisible property, or both types of property, the agreement will be enforced. *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 435–36, 610 S.E.2d 301, 303 (2005). In such agreements, parties may stipulate to the classification, value and distribution of property. *See Sharp v. Sharp*, 116 N.C. App. 513, 521, 449 S.E.2d 39, 43 (1994). Further:

> Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. *While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision*, and it is essential that they be assented to by the parties or those representing them. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position.

Stovall v. Stovall, 205 N.C. App. 405, 409, 698 S.E.2d 680, 683 (2010) (citations, quotation marks, and alterations omitted) (emphasis added). Stipulations are also considered in the same manner as a typical contract between two parties. *Id.* at 409–10, 698 S.E.2d at 684.

Here, Zurosky argues the trial court departed from the FPTO regarding: (1) the reward points associated with the Merrill Accolades American Express Rewards charge card ("Item L-23"); (2) the miles and debt related to the US Airways Dividend Miles charge card ("Item L-24"); (3) the miles and debt related to a second US Airways Dividend Miles charge card ("Item L-25")[6]; (4) the disbursement from the Northwestern Mutual Policy #6959 ("Item I-18"); and (5) 2009 state and federal tax refunds. We address each item below.[7]

(i) Item L-23 – Merrill Accolades Reward Points

The trial court found that the reward points associated with Item L-23 were marital property; however, the trial court did not distribute this asset. The trial court found that it could not value Item L-23 on the DOS, so the property remained with the titled owner and was not distributed.

In the FPTO, the parties stipulated that Item L-23 was marital, but otherwise did not reach an agreement about it. Zurosky contended Item L-23 had no value both on the DOS and at present. Shaffer, on the other hand, contended the DOS and current values of Item L-23 were forty-eight dollars. Zurosky also contended that he should receive Item L-23, while Shaffer contended Item L-23 should be distributed to both herself and Zurosky.

The foregoing constitutes ample evidence showing the parties disagreed as to the value and distribution of Item L-23. The trial court made the determination that the parties agreed on, namely that Item L-23 was marital property. Accordingly, we hold the trial court did not err with respect to Item L-23.

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6. The charge cards in L-24 and L-25 were related to separate accounts.

7. Zurosky does not argue that the trial court erred in failing to distribute the property, but only that the order was incorrect because it did not adhere to the stipulations concerning each piece of property. As such, we do not address whether the trial court erred in choosing not to assign a value to these five items, but only whether the trial court erred in not enforcing the stipulations associated with each item.

(ii) Item L-24 – US Airways Dividend Miles #1

The trial court found that Item L-24 was marital property, but did not distribute Item L-24. Instead the trial court left Item L-24 with its titled owner, Shaffer. The court could not determine the DOS number or value of Item L-24. In the FPTO, the parties agreed Item L-24 was marital and should be distributed to Shaffer. However, the parties did not agree about the associated value of the miles. Zurosky contended that the airline miles' value as of the DOS and current value was unknown. Shaffer contended Item L-24 had no value on the DOS and nor did it have value currently.

As with Item L-23, the foregoing provides ample evidence to show the parties did not fully stipulate to the value of Item L-24. The trial court enforced the portion of the FPTO that the parties agreed on, that Item L-24 was marital property and that Shaffer should receive the property. Accordingly, the trial court did not err with respect to Item L-24.

(iii) Item L-25 US Airways Dividend Miles #2

The trial court found that Item L-25 was marital property and split the property equally between the titled owners. In the FPTO, the parties agreed that Item L-25 was marital. However, the parties did not agree as to the value or distribution of Item L-25. Zurosky contended both the DOS and current value of the property was zero dollars. Shaffer did not assign a DOS or current value for the property and marked "TBD" (to be determined) for the value. Zurosky contended that he should receive the property. Shaffer contended the property should be distributed to both parties.

The trial court found the property was marital, as agreed to in the FPTO. However, as with Item L-23 and Item L-24, the foregoing is ample evidence to show the parties did not fully stipulate to the value or distribution of Item L-25. Accordingly, the trial court did not err with respect to Item L-25.

(iv) Item I-18 – Northwestern Mutual Policy

[5] The trial court classified Item I-18 as marital property and made a series of interim distributions after DOS but prior to DOD. The trial court distributed $17,377 of the policy to Zurosky, which he used to pay the real property taxes associated with the Providence Glen Home. The order allowing this disbursement to Zurosky was made for the purpose of satisfying the property tax obligations associated with the former marital home. Within the order allowing this disbursement, the parties also "reserve[d] the right to argue as to the classification and distribution of

the funds at the Equitable Distribution trial." The trial court later distributed $34,000 to Shaffer on 1 November 2011 and $40,000 on 5 November 2011 as part of equitable distribution.

In its equitable distribution judgment, the trial court found that Item I-18 was marital property and that the DOD value of Item I-18 was $18,000, which the trial court distributed to Shaffer. In finding of fact 111, the trial court also found the decrease in property tax debt on the Providence Glen Home ($17,502.75) was divisible property and distributed the decrease equally between the parties.

The parties stipulated in the FPTO that the DOS value of Item I-18 was $105,922. The parties also stipulated that Zurosky and Shaffer should each receive part of Item I-18. However, the parties did not agree on the current value of Item I-18. Zurosky valued the property at $18,000, and Shaffer commented that she had no records concerning the current value of Item I-18.

Zurosky argues that the trial court's equal distribution of the $17,502 decrease in the Providence Glen Home's property taxes violated the FPTO. However, in the prior consent order which allowed the $17,377 disbursement from the insurance policy to Zurosky, both parties reserved the right to dispute the classification and distribution of the property. Additionally, the FPTO includes stipulations concerning Item I-18, not the decrease in property taxes on the Property Glen Home, which is what is addressed in the finding of fact that Zurosky contests. As such, the trial court did not err in distributing the decrease in property taxes equally, since the parties did not fully stipulate to the division of the decrease prior to the equitable distribution judgment and retained the right to contest the classification and distribution of the property.[8]

(v) 2009 Tax Refunds

[6] Finally, the trial court found that the 2009 tax refunds were "not marital or divisible property." The trial court found that Zurosky and Shaffer filed a joint return for their 2009 taxes that provided for any refund to be applied to Zurosky's individual 2010 state and federal tax returns. The total tax refunds from 2009 were $69,919.[9]

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8. The parties also did not fully stipulate to the remaining value of Item I-18 itself. The trial court correctly classified Item I-18 according to the parties' stipulation (specifically that the property was marital) and distributed the property to Shaffer.

9. This figure includes $57,321 in federal tax refunds and $12,598 in state tax refunds.

Zurosky and Shaffer both stipulated in the FPTO that the 2009 tax refunds were divisible property.[10] The parties did not stipulate as to the value of the 2009 tax refunds; Zurosky contended the refund's value was $4,135 and Shaffer contended that the refund's value was $5,827.

Rather than divide the property or make a finding that the evidence of value was not sufficiently credible to allow allocation of the 2009 tax refunds, the trial court found that the 2009 tax refunds were neither marital nor divisible property and made no division. This was in error, since the parties stipulated that this property was divisible. As such, we reverse and remand this case to the trial court to reclassify the property as divisible and to distribute the property if there is credible evidence supporting the value of the asset.[11]

4. Valuation of T&Z

In an equitable distribution case, the trial court is the fact-finder. *Grasty*, 125 N.C. App. at 739, 482 S.E.2d at 754. Fact-finders have a right to believe all, none, or some of a witness' testimony. *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965). Subjective opinions about the value of property are admissible and competent. *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983). An appellate court should not "second-guess values of . . . property where there is evidence to support the trial court's figures." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999) (citations and quotations omitted). We apply these principles to both the diminution in value of T&Z as well as the valuation of the jewelry Zurosky contests.

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10. In Shaffer's appellate brief, she also states, "the parties stipulated that the funds [the tax returns] were divisible . . . ."

11. This Court has held that a trial court is obligated to make specific findings regarding the value of property in an equitable distribution order. *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). However, the obligation to assign a value to marital property in an equitable distribution exists only when there is credible evidence supporting a finding concerning the value of the asset. *Albritton v. Albritton*, 109 N.C. App. 36, 40–41, 426 S.E.2d 80, 83–84 (1993).

Whether evidence is credible is in the discretion of the trial court. *Grasty v. Grasty*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754, *disc. rev. denied* 346 N.C. 278 (1997). Accordingly, a trial court is not *required* to distribute marital property if there is not sufficient evidence of value. *Id*; *see also* 1 N.C. Family Law Practice § 6:41 ("If the only evidence concerning a particular asset is 'wholly incredible and without reasonable basis' the asset need not be valued in an equitable distribution proceeding.").

(a) Active or Passive Changes

[7] Zurosky argues the trial court erred in its distribution of the diminution in value of T&Z because there was not a finding that the decrease was an active change. We disagree first that the trial court erred by deviating from the FPTO, as the parties did not stipulate to the divisibility of Zurosky's interest in T&Z.[12] We also disagree with Zurosky's contention that the trial court erred in distributing the diminution in value of T&Z to Shaffer because there was no diminution in value under the trial court's equitable distribution judgment.

The trial court specifically found there was no credible evidence concerning the DOD value of T&Z and accordingly used the same value at DOS and DOD: $1,038,000. The trial court stated in finding of fact 264 that there was no need to determine the active versus passive components of the change in value from the DOS to the DOD, which is correct because the DOD and DOS values are equal under the equitable distribution order. Without a diminution in value, there is not an active or passive change to consider, and the trial court did not err in choosing not to determine active or passive components for a net change of $0 between DOS and DOD. We next consider Zurosky's arguments concerning the valuation of T&Z the trial court chose to accept.

(b) DOD Value of T&Z

[8] Zurosky argues the trial court erred in its valuation of Zurosky's interest in T&Z. We disagree. Both parties hired business valuation experts to calculate the value of Zurosky's interest in T&Z. Zurosky's expert, Ms. Foneville, calculated T&Z's DOS value as $830,000 and DOD value as $450,000. Shaffer's expert, Mr. Mitchell, calculated T&Z's DOS value as $1,038,000 and DOD value as $554,000. The trial court accepted Mr. Mitchell's estimate for the DOS value of T&Z. The trial court found Mr. Mitchell's report addressed excess cash more thoroughly, contained a more accurate depiction of the owners' compensation, and did not contain the errors in calculations found in Ms. Foneville's report. The trial court also commented that Shaffer was at a disadvantage in gathering information pertaining to T&Z's value.

However, the trial court declined to accept Ms. Foneville or Mr. Mitchell's estimate of the DOD value. The trial court found the reports to be unreliable because the reports were dated six months apart and Mr. Mitchell's report was nine months old at the DOD. Further, the trial

12. Shaffer specifically marked "ND" for Not Divisible in the FPTO.

court considered the success of T&Z in 2012. Both experts computed the DOD value using T&Z's 2011 numbers. The trial court, finding the DOD values to be unreliable, chose to distribute the property at the DOS value ($1,038,000).

The trial court did not err in its use of the DOS value of T&Z. "The credibility of the evidence in an equitable distribution trial is for the trial court." *Grasty*, 125 N.C. App. at 739, 482 S.E.2d at 754. If the trial court finds evidence to be unreliable, it does not err in failing to value that asset using the unreliable evidence. *Id.* at 739, 482 S.E.2d at 754. Accordingly, it was within the trial court's discretion to use T&Z's DOS value instead of the DOD values provided by experts.

5. Valuation of Jewelry

[9] Zurosky next argues the trial court erred in its valuation of the parties' jewelry. The trial court relied on jewelry valuations provided by Shaffer rather than expert testimony provided by Zurosky. Zurosky's expert, Joey Stagnone, provided current values for some of the parties' jewelry. Stagnone estimated the current value of the platinum three-stone diamond ring as ten to twenty thousand dollars more than the DOS value. Stagnone also assigned a current value of $450 more than the DOS value for the Tiffany platinum and diamond "pinched heart" pendant. Shaffer estimated the DOS and current values of the jewelry to be between twenty-five to thirty percent of the purchase price. The trial court decided Zurosky's expert was not credible. As the fact-finder, the trial court is allowed to weigh the credibility of testimony. Accordingly, it was within the trial court's discretion to rely on Shaffer's values instead of the values given by an expert, and the trial court did not abuse its discretion.

B. Child Support and Alimony Order

1. Computation of Zurosky's Income

[10] Zurosky next argues the trial court erred in its award of alimony and child support because the trial court failed to use his actual income at the time of the order. We disagree.

A party's actual income at the time of the order is typically considered. *Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) (citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)). However, if a party acts in bad faith (e.g. deliberately depressing income or excess spending) the trial court may consider a spouse's capacity to earn. *Id.*; *Hartsell v. Hartsell*, 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008).

In *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), the trial court did not make a finding of bad faith or have evidence that the spouse deliberately depressed his income; the trial court used prior years' incomes because the trial court did not have sufficient evidence regarding his actual income. *Id.* at 649–50, 630 S.E.2d at 30–31. In *Diehl*, the husband's numbers were considered "highly unreliable," forcing the trial court to rely on previous years' income. *Id.* at 650, 630 S.E.2d at 30.

Here, the trial court did not expressly make a finding of bad faith or find that Zurosky schemed to deliberately depress his income. As in *Diehl*, the trial court expressed concerns about Zurosky's reported income and found that Zurosky's numbers were not credible. The trial court did not find Zurosky's reported income to be credible for several reasons: (i) Zurosky overstated his monthly tax payments; (ii) Zurosky reported he was operating at a significant deficit each month; (iii) Zurosky did not report a significant amount of spending in his financial affidavits; and (iv) the evidence conflicted concerning Zurosky's work habits post-DOS. To properly determine alimony and child support, the trial court relied on Zurosky's net income from 2003–08 as a reliable statement of his income.

Zurosky argues *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) controls this case. In *Godley*, this Court held the trial court erred by considering a spouse's income from 1984–88 for purposes of entering a judgment filed in 1991. *Id.* at 118, 429 S.E.2d at 393. However, the trial court in *Godley* did not find, as here, that the spouse provided unreliable income figures and expressed no concern about the income reported at the time of distribution; the trial court simply chose a different timespan to determine the spouse's income. *Id.* at 118, 429 S.E.2d at 393. *Godley* simply re-states the general rule that income at the time of the order is typically considered, and this Court then applied that general rule. *Id.* at 118, 429 S.E.2d at 393; *Megremis*, 179 N.C. App. at 182, 633 S.E.2d at 123.

This case is analogous to *Diehl*, as there were several concerns expressed by the trial court over the reliability of Zurosky's reported income. Zurosky also argues this case is distinguishable from *Diehl* because the trial court in *Diehl* used income from the two years preceding the order, and in this case, the trial court used Zurosky's income over a longer span, from 2003–08. *Id.* at 650–51, 630 S.E.2d at 31. We also disagree with this contention; the trial court's use of Zurosky's 2003–08 income simply reflects a choice by the trial court to consider Zurosky's income before Zurosky had reason to alter the reported figure. Accordingly, the trial court's use of Zurosky's income between 2003–08

was rational given the state of the evidence and did not constitute an abuse of discretion.

2. Retroactive Child Support

[11] Zurosky's final argument is that the trial court erred in awarding retroactive child support. We disagree and hold there was sufficient evidence to support the trial court's award. We remand to correct certain clerical errors within the trial court's order.

N.C. Gen. Stat. § 50–13.4(c) (2013) includes a presumption that the trial court shall apply the North Carolina Child Support Guidelines ("Guidelines"), which are promulgated by the Conference of Chief District Judges under the authority granted by N.C. Gen. Stat. § 50-13.4(c1) (2013).[13] The Guidelines also include certain presumptions which place child support orders outside of the Guidelines. *See Loosvelt v. Brown*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA13-747, 2014 WL 3409156 at *7–8 (2014); *see also* Guidelines, 2014 Ann. R. N.C. 50, available at http://www.nccourts.org/forms/documents/1226.pdf. One such presumption is that "[i]n cases in which the parents' combined adjusted gross income is more than $25,000 per month ($300,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule." Guidelines, 2014 Ann. R. N.C. 50. Here, the trial court found as fact that the parties' combined gross income was $61,011 per month, placing the parties' child support obligations outside of the Guidelines. Neither party disputes that the present case is properly outside of the Guidelines.

Prospective child support is support awarded from the time a party files a complaint for child support to the date of trial. *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996); *see also Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009). For prospective child support in *a non-Guidelines* child support case, the trial court must consider several factors to establish a child support obligation:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due

13. We also note that the General Assembly recently passed legislation which amends the obligation of the Conference of Chief District Judges to require it to prescribe guidelines for the computation of child support obligations in retroactive support cases. *See* N.C. Sess. Laws 2014-77, § 8. This statute was effective at the time it was passed, 15 July 2014, and is not applicable to the present matter.

> regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c); *see also Loosvelt*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2014 WL 3409156 at *6.

Retroactive child support is support "awarded prior to the time a party files a complaint. . . ." *Taylor*, 118 N.C. App. at 361, 455 S.E.2d at 446. Retroactive child support has two varieties, as outlined in *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000):

> The distinction between two types of retroactive support is pertinent *sub judice*. In the absence of an existing child support order, an amount of child support awarded prior to the date a party files a complaint therefor is properly classified as retroactive child support and is not based on the presumptive Guidelines. Although prospective child support based upon the presumptive Guidelines requires no factual findings regarding the child's reasonable needs or the supporting parent's ability to pay, the trial court must set out specific findings of fact in a reimbursement award for retroactive support, so as to reflect the court's consideration of the reasonably necessary actual expenditures under G.S. § 50–13.4(c) made on behalf of the child as well as the defendant's ability to pay during the period in the past for which retroactive support is sought.
>
> The second type of retroactive child support is that involved herein, *i.e.*, a retroactive increase in the amount provided in an *existing support order*.

Id. at 300–01, 524 S.E.2d at 583 (citations, alterations, and quotation marks omitted) (emphasis in original). In the case *sub judice*, there is no prior child support order so we apply the standard applicable to the first variety of retroactive child support. Accordingly, the trial court applies an identical standard to both prospective and retroactive child support payments; the standard outlined in N.C. Gen. Stat. § 50-13.4(c) that considers the parties' ability to pay as well as the reasonably necessary expenses made on behalf of the child.

The trial court ordered child support from 3 December 2009, the date the trial court listed for the filing of Zurosky's complaint, to 29 June

2012, the final hearing date.[14] Shaffer did not file a complaint seeking child support until 24 February 2010. Thus, there are two periods of child support granted under the trial court's order. The first is a retroactive child support award from 3 December 2009 to 24 February 2010 as listed on the order. This period is retroactive because it is an award granted prior to Shaffer's filing of a child support claim. *Taylor*, 118 N.C. App. at 361, 455 S.E.2d at 446. The second period spans from 24 February 2010 to 29 June 2012, or the period from the filing of the complaint to the final hearing date. This is prospective child support. *Id.*

We must next determine whether the trial court made sufficient findings under the relevant factors set forth in N.C. Gen. Stat. § 50-13.4(c) to support the retroactive and prospective child support awards. Here, there were long-form financial affidavits filed with the trial court as well as Shaffer's testimony concerning the children's reasonable and necessary expenses. The trial court made extensive findings of fact concerning the parents' income levels, the children's health, activities, educational needs, travel needs, entertainment, work schedules, living arrangements, and other household expenses. After careful review, we determine that sufficient evidence existed for (i) the trial court's award of retroactive child support from the filing of Zurosky's complaint on 3 December 2009 to the 24 February 2010 filing of Shaffer's child support complaint and (ii) the trial court's award of prospective child support from 24 February 2010 to 29 June 2012.

As noted above, the trial court used an incorrect date for both (a) the date the child support complaint was filed and (b) the date Zurosky filed his complaint. The trial court also mislabeled the type of child support provided in the relevant periods outlined above. We remand this portion of the trial court's order to correct these errors consistent with this opinion.

IV. Conclusion

For the reasons stated above, the trial court's judgment order is

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ERVIN and DAVIS concur.

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14. As provided above, the actual date Zurosky filed his complaint was 23 December 2009.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 September 2014)

Case	County	Disposition
BELL v. BELL No. 14-200	Wilkes (10CVD1004)	Affirmed in part; vacated and remanded in part
CENTURY FIRE PROT., LLC v. HEIRS No. 14-146-2	Catawba (12CVS1788)	Affirmed
CNTY. OF JACKSON v. MOOR No. 14-74	Jackson (12CVS219)	Reversed and Remanded
COLE v. UNITED PARCEL SERV., INC. No. 14-17	N.C. Industrial Commission (W67557)	Affirmed
IN RE GIBBS No. 13-1396	Dare (09SP380)	Affirmed
IN RE J.S. No. 14-142	Wake (13SPC3751)	Reversed and Remanded
IN RE MILLS No. 13-1440	Cabarrus (08E169)	Affirmed
SMITH v. McKINNON No. 14-189	Cumberland (11CVS10470)	Affirmed
STATE v. CHERRY No. 14-172	Nash (11CRS52350)	Affirmed
STATE v. GIDEON No. 14-38	Wake (12CRS214535)	Dismissed in part; No Error in part
STATE v. MACK No. 13-1173	Cleveland (11CRS3314-15)	No Error
STATE v. MOODY No. 14-10	Cabarrus (09CRS53217) (10CRS902)	No Error
STATE v. WALTERS No. 14-51	Robeson (05CRS12241) (05CRS55647)	No Error in Part; New Trial in Part

THOMAS F. ADCOX, Employee, Movant
v.
CLARKSON BROTHERS CONSTRUCTION COMPANY, Employer, and UTICA MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA14-313

Filed 16 September 2014

Workers' Compensation—attorney fees—award final—not specific assignment of error

The trial court erred in a workers' compensation case by finding that the Full Industrial Commission denied plaintiff's request for attorneys' fees in its 25 November 2008 opinion and award and, as a result, erred in dismissing his appeal on the grounds of res judicata. The deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission.

Appeal by plaintiff from order entered 17 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 August 2014.

R. James Lore, Attorney at Law, by R. James Lore; and Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by Kari L. Schultz and M. Duane Jones, for defendants-appellees.

GEER, Judge.

In a 27 March 2008 opinion and award, the deputy commissioner approved an attorneys' fee of 25% of the attendant care compensation awarded to plaintiff Thomas F. Adcox for his wife's services. Although defendants Clarkson Brothers Construction Company and Utica Mutual Insurance Company asked the Full Commission to reverse this award, the Commission, in a 25 November 2008 opinion and award, affirmed the deputy commissioner's opinion and award with modifications only as to the amount and rate of pay for the attendant care -- the Commission did not specifically address the 25% attorneys' fee award.

Subsequently, plaintiff filed a motion seeking an order requiring that the 25% be paid directly to plaintiff's counsel in order to alleviate the bookkeeping burden on plaintiff's wife. Defendants contended -- and the Commission agreed in an order entered 10 December 2012 – that the Commission's November 2008 opinion and award, by not specifically mentioning the attorneys' fees, necessarily denied plaintiff's attorneys' request for approval of a fee. Plaintiff appealed to the superior court, and the trial court dismissed his appeal on the grounds that the Commission had not, in its December 2012 order, denied a request for fees.

We cannot agree with the Commission's and defendants' position that the November 2008 opinion and award denied plaintiff's attorneys' request for fees. Defendants' contention that the Commission *sub silentio* reversed the deputy commissioner's award of fees is not tenable and is inconsistent with controlling authority. The Commission's silence in November 2008 on the issue of the deputy commissioner's award of attorneys' fee can be interpreted in only one of two ways: either the Commission affirmed the deputy commissioner or the Commission did not address the issue.

In either event, defendants bore the burden to appeal that opinion and award to this Court. When they failed to do so, the deputy commissioner's approval of an attorneys' fee became the law of the case, and the Commission had no authority to declare, in December 2012, that the original panel had reversed the deputy commissioner and denied plaintiff's request for approval of an attorneys' fee. Consequently, we reverse and remand to the trial court for further remand to the Commission for reconsideration of plaintiff's motion.

Facts

On 28 February 1983, while employed by defendant Clarkson, plaintiff suffered an admittedly compensable head injury that left him permanently and totally disabled. Defendant Clarkson and defendant Utica National Insurance Group agreed to compensate plaintiff for his disability at a weekly rate of $248.00.

In February 2003, the parties filed a settlement agreement pursuant to which defendants agreed to pay plaintiff a lump sum of $250,000.00 in reimbursement for attendant care services provided by plaintiff's family members, including his wife Joyce Adcox, from 28 February 1983 until 3 February 2003. The Commission approved a 25% attorneys' fee for plaintiff's counsel, which was deducted from the sum due plaintiff and paid directly to plaintiff's counsel. Thereafter, defendants authorized and

began providing plaintiff with 60 hours of in-home professional attendant care services per week, provided by Kelly Home Health Services.

In 2007, Mrs. Adcox retired, and plaintiff moved to have defendants pay Mrs. Adcox directly for attendant care services instead of Kelly Services. The matter was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. On 27 March 2008, the deputy commissioner entered an opinion and award allowing Mrs. Adcox to assume attendant care responsibilities seven days a week at a rate of $188.00 per day. In his award, the deputy commissioner ordered that "[a]n attorneys' fee of 25% of the attendant care compensation is approved for the Plaintiff's counsel."

Both parties appealed to the Full Commission. On 25 November 2008, the Full Commission entered an opinion and award affirming the deputy commissioner's opinion and award "with modifications including the amount of attendant care and rate of pay for said care." The Full Commission allowed Mrs. Adcox to assume attendant care responsibilities seven days per week for 16 hours per day at a rate of $10.00 per hour. The opinion and award did not mention the 25% attorneys' fee award to plaintiff's counsel. Plaintiff appealed to this Court for reasons unrelated to the 25% attorneys' fee award. Defendants chose not to appeal. On 8 December 2009, this Court affirmed the 25 November 2008 opinion and award. *See Adcox v. Clarkson Bros. Constr. Co.*, 201 N.C. App. 446, ___ S.E.2d ___, 2009 WL 4576065, 2009 N.C. App. LEXIS 2308 (2009) (unpublished).

On 12 July 2012, plaintiff filed a motion with the Full Commission requesting that it direct payment of the attorneys' fees to plaintiff's counsel. The motion explained that "Mrs. Adcox is responsible for her own income tax record-keeping and reporting of the attendant care income she receives. For tax purposes the failure by the carrier to direct separate checks makes it appear as though Mrs. Adcox's attendant care income is higher than it actually is." Plaintiff requested that defendants be ordered to deduct 25% of the compensation payable to Mrs. Adcox to be paid directly to plaintiff's counsel because the record keeping "has become burdensome for Mrs. Adcox."

A new panel of commissioners heard plaintiff's 2012 motion. Commissioners Linda Cheatham and Tammy R. Nance replaced Commissioners Dianne C. Sellers and Laura Kranifeld Mavretic from the original 2008 panel. Commissioner Danny Lee McDonald served on both panels. On 10 December 2012, the Full Commission entered an order denying plaintiff's motion.

The Commission found that both parties had appealed Deputy Commissioner DeLuca's opinion and award to the Full Commission. Regarding defendants' appeal, the Commission noted that although defendants had not specifically assigned error to the attorneys' fee award in their form 44, they had generally challenged each paragraph of the deputy's award and had addressed the 25% attorneys' fee award in their brief to the Commission. The Commission then concluded:

> The Full Commission's Opinion and Award filed on November 25, 2008 directs Defendants to pay Mrs. Adcox for attendant care services from the date of the filing of the Opinion and Award at a rate of $10.00 per hour, 7 days per week, 16 hours per day. The Opinion and Award does not include an award of attorneys' fees for Plaintiff's counsel.
>
> Plaintiff appealed the Full Commission's decision to the North Carolina Court of Appeals. Based upon a review of the Court's Opinion, it does not appear that Plaintiff assigned error to the Full Commission's decision in its Opinion and Award not to award an attorneys' fee to Plaintiff's counsel.
>
> As Plaintiff seeks to have the Full Commission direct Defendants to deduct and pay directly to counsel for Plaintiff attorneys' fees which have not been awarded by the Full Commission, Plaintiff's Motion to Direct Payment of Attorneys' Fees to Plaintiff's Counsel is hereby DENIED.

Commissioner McDonald -- the one commissioner who had served on the 25 November 2008 panel – dissented without opinion.

On 12 December 2012, plaintiff appealed the order to superior court pursuant to N.C. Gen. Stat. § 97-90. On 19 June 2013, defendants moved to dismiss plaintiff's appeal pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. On 25 June 2013, plaintiff moved to strike defendants' motion to dismiss for lack of standing.

After a 26 August 2013 hearing, the trial court entered an order dismissing plaintiff's appeal on 17 September 2013. The trial court took judicial notice of the 25 November 2008 opinion and award and the 10 December 2012 order of the Full Commission. It found in pertinent part:

> (2) that the December 10, 2012 Order from which Movant now purportedly appeals did not deny any attorneys fees, but simply clarified that the Commission

> had not awarded attorneys fees in the November 25, 2008 Order;
>
> (3) that Movant's litigated request for attorney fees was denied on November 25, 2008;
>
> (4) that Movant's current request for attendant care attorney fees per N.C. Gen. Stat. § 9-90 [sic] should be barred by § 97-90 and the doctrine of *res judicata*;
>
> (5) that the November 25, 2008, Order of the North Carolina Industrial Commission and the parties' appeal therefrom to the North Carolina Court of Appeals, represented a final judgment on the merits as to the issue of any attorney fee based on a percentage of attendant care medical benefits provided to Movant pursuant to North Carolina General Statutes § 97-25, which is the only claim at issue in this litigation[.]

The trial court, therefore, dismissed plaintiff's appeal with prejudice. Plaintiff timely appealed to this Court.

<u>Discussion</u>

Plaintiff first contends that defendants lacked standing to oppose both his motion to the Full Commission and his appeal from the 10 December 2012 decision of the Full Commission to superior court. As explained by this Court in *Diaz v. Smith*, ___ N.C. App. ___, ___, 724 S.E.2d 141, 144 (2012) (internal citations and quotation marks omitted):

> The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. Under N.C. Gen. Stat. § 1–271 (2009), "[a]ny party aggrieved" is entitled to appeal in a civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Plaintiff argues that because his motion to direct payments to plaintiff's counsel does not affect the total amount to be paid by defendants, defendants are not an "aggrieved" party. Defendants counter that they

are an “aggrieved” party because (1) “if Plaintiff’s Counsel is awarded attorney’s fees as a result of this appeal, Defendants would either be required to pay an additional 25% in the form of attorneys [sic] fees, or fund Plaintiff’s Counsel’s attorney’s fees by reducing the amount of compensation to Mrs. Adcox, thereby subjecting Defendants to liability for compensation owed to Mrs. Adcox, as mandated in the Opinion and Award” and (2) “allowing a plaintiff’s counsel to have a pecuniary interest in an authorized medical provider could create a conflict between his obligations to represent his client and a defendant’s obligation to manage medical treatment pursuant to N.C. Gen. Stat. § 97-25.”

Because of our resolution of this appeal, we need not decide whether defendants have standing in this case to challenge an award of attorneys’ fees to plaintiff’s attorney that does not affect the total amount payable by defendants. We express no opinion whether defendants’ contentions are sufficient to make them aggrieved parties for purposes of an appeal.

Plaintiff’s primary argument on appeal is that the trial court erred in finding that the Full Commission denied his request for attorneys’ fees in its 25 November 2008 opinion and award and, as a result, erred in dismissing his appeal on the grounds of res judicata. Plaintiff argues that the deputy commissioner’s award of attorneys’ fees became final when defendants did not specifically assign as error the award of attorneys’ fees in their Form 44 as required by Rule 701 of the Workers’ Compensation Rules of the North Carolina Industrial Commission. Alternatively, plaintiff argues that the Commission affirmed the award of attorneys’ fees. We review these questions of law de novo. *McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 148, 590 S.E.2d 311, 312 (2004).

Rule 701 provides:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. *Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3)*. . . .
>
> (3) *Particular grounds for appeal not set forth in the application for review shall be deemed abandoned,*

> and argument thereon shall not be heard before the Full Commission.

(Emphasis added.)

This Court has emphasized that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). "Such notice is required for the appellee to prepare a response to an appeal to the Full Commission." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 252, 652 S.E.2d 713, 717 (2007). Thus, "the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned." *Id.* at 249, 652 S.E.2d at 715.

Defendants argue that they properly appealed the issue of attorneys' fees to the Full Commission because they specifically listed Deputy Commissioner DeLuca's Award, which included the award of attorneys' fees, in the third assignment of error on their Form 44 Application for review:

> Deputy Commissioner John B. DeLuca's Award, dated March 27, 2008, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

This assignment of error is similar to the appellant's assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005), which asserted generally that several rulings of the trial court were " 'erroneous as a matter of law.' " In concluding that this assignment of error was insufficient under the 2005 version of Rule 10 of the Rules of Appellate Procedure, this Court held that the "assertion that a given finding, conclusion, or ruling was 'erroneous as a matter of law' " violated Rule 10 because it "completely fail[ed] to *identify* the issues actually briefed on appeal." *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. Instead, " '[s]uch an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment -- like a hoopskirt -- covers everything and touches nothing.' " *Id.* at 783, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)).

Similarly, here, defendant's assignment of error " 'covers everything and touches nothing.' " *Id.* (quoting *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409). Although it states a general objection to each paragraph of the award (without specifically mentioning the attorneys' fee award), it does not state the basis of any objection to the attorneys' fee award with sufficient particularity to give plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response. *See Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910.

Defendants' third assignment of error also is in stark contrast to defendants' fourth assignment of error: "Deputy Commissioner John B. DeLuca's Award dated March 27, 2008, in that it failed to award attorney fees as requested by Defendants pursuant to §97-88.1." In this assignment of error, defendants indicated specifically which particular aspect of the award they challenged. Significantly, defendants did not include a similar assignment of error for the award of attorneys' fees challenged here.

Defendants nonetheless contend that they met the particularity requirement by addressing the question of attorneys' fees in their brief to the Full Commission, citing *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff argued that, pursuant to *Roberts*, the defendant's failure to file a Form 44 constituted an abandonment of defendants' grounds for appeal to the Full Commission, and therefore the Commission erred by hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. This Court disagreed, reasoning that

> unlike the appealing plaintiff in *Roberts*, defendants in the present case complied with Rule 701(2)'s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission. Additionally, plaintiff does not argue that she did not have adequate notice of defendants' grounds for appeal. Plaintiff asserts only that defendants' failure to file a Form 44 should have been deemed an abandonment of defendants' appeal. Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error.

Id. at 368-69, 672 S.E.2d at 753-54.

In other words, failure to file a Form 44 does not automatically result in a mandatory dismissal of the appeal by the Industrial Commission -- it is within the discretion of the Commission whether to deem the grounds for appeal waived. In determining whether the Commission abused its discretion in deciding not to deem an issue on appeal waived, this Court in *Cooper* considered whether the appellant provided the appellee with adequate notice of the grounds for appeal through other means such as addressing the issue in its brief to the Full Commission.

Here, unlike in *Cooper*, the Commission did not explicitly address the issue purportedly raised by defendants on appeal in its opinion and award. Under *Cooper*, it would not have been an abuse of discretion for the Commission to address the attorneys' fee issue, but it is unclear whether the Commission considered the issue or not. Although defendants contend that the "Full Commission Award removed the appealed prior award of attendant care attorney fees and awarded attendant care compensation to be paid directly to Mrs. Adcox[,]" nothing in the Commission's Opinion and Award indicates that it was "remov[ing]" the attorneys' fee award. Defendants have cited no authority -- and we have found none – supporting their position that silence by the Commission regarding a determination by the deputy commissioner can amount to reversal.

In fact, this Court has already rejected such a contention in *Polk v. Nationwide Recyclers, Inc.*, 192 N.C. App. 211, 664 S.E.2d 619 (2008). In *Polk*, the plaintiff argued that the Full Commission failed to consider all the evidence presented because, unlike the deputy commissioner's order, the Full Commission did not make findings regarding all the issues presented on appeal. *Id.* at 218, 664 S.E.2d at 624. The Court rejected the plaintiff's argument, reasoning:

> [I]n this case, the Full Commission's opinion states outright that it "affirms the Opinion and Award of Deputy Commissioner Deluca *with modifications*." . . . That is, the Full Commission's opinion is not an order meant to stand on its own, but rather a modification of the deputy commissioner's order. As plaintiff herself states, the facts at issue were included in the deputy commissioner's order. We see no reason to require that such an order restate all the findings of fact and conclusions of law from the original order that need no modification. Considering that defendants filed an appeal containing thirty-two alleged errors, it is not surprising that the Full Commission did not address each individually.

Id. This Court assumed with regard to the omitted findings that the Commission wished to affirm the deputy commissioner's opinion and award, nothing else appearing in the opinion and award to the contrary. *Id.* at 218-19, 664 S.E.2d at 624.

Similarly, here, the Full Commission's opinion and award states that it "affirms the Opinion and Award of Deputy Commissioner DeLuca with modifications including the amount of attendant care and rate of pay for said care." As such, the Full Commission's opinion "is not an order meant to stand on its own." *Id.* at 218, 664 S.E.2d at 624. It is undisputed that the deputy commissioner awarded attorneys' fees to plaintiff's counsel, and there is no indication that the Commission intended to modify that award.

Indeed, plaintiff correctly notes that under N.C. Gen. Stat. § 97-90(c) (2013), the statute authorizing the award of attorneys' fees in this instance, any decision by the Commission to *deny* attorneys' fees must be supported by specific findings. N.C. Gen. Stat. § 97-90(c) provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

The lack of findings in the November 2008 opinion and award to justify a denial of attorneys' fees is contrary to defendants' contention and the Commission's assumption that the Commission in 2008 intended to deny the fee request.

In short, based on a review of the November 2008 opinion and award, either the Commission intended to affirm the deputy commissioner's award, or, alternatively, the Full Commission did not consider the issue -- whether through inadvertence or because it deemed the matter waived. Nothing in the opinion and award suggests and no authority exists that we can find, which would permit us to conclude that the Commission reversed the deputy commissioner's award and silently denied plaintiff's counsel the 25% attorneys' fee.

Assuming, without deciding, that defendants had standing to challenge the deputy commissioner's award of attorneys' fees, the burden

was on defendants to obtain a ruling from the Full Commission. When the Full Commission failed to explicitly reverse the deputy commissioner's award, defendants could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court. *See Hurley v. Wal-Mart Stores, Inc.*, ___ N.C. App. ___, ___, 723 S.E.2d 794, 798 (2012) (holding where Commission failed to address defendants' appeal of deputy commissioner's award of attorneys' fees to plaintiff's counsel in its opinion and award, defendants properly appealed to this Court after Commission denied their motion to reconsider).

This Court has held that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). Here, when defendants failed to appeal the Full Commission's 25 November 2008 opinion and award, defendants abandoned any contention that the ruling was erroneous, and the deputy commissioner's award of attorneys' fees became the law of the case.

Under the law of the case doctrine, defendants could not attack and the Commission could not reverse the award of attorneys' fees. *See id.* (holding that "since [defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of the case, and defendant "was barred from relitigating that issue in subsequent proceedings").

Because the November 2008 opinion and award left the deputy commissioner's award standing, plaintiff's 12 July 2012 motion to direct payment of attorneys' fees to plaintiff's counsel was not, as defendants contend, a motion to re-litigate the substantive issue whether attorneys' fees had been awarded by the Full Commission. Rather, it was simply a procedural motion regarding the way in which the awarded fees would be paid. The Commission's December 2012 order, as a result, had the effect of improperly denying plaintiff's attorneys' fees. Consequently, plaintiff was entitled to appeal the December 2012 order to superior court pursuant to N.C. Gen. Stat. § 97-90, and the superior court erred in dismissing plaintiff's appeal.

Defendants, nevertheless, contend that the Commission and the superior court did not have authority to award plaintiff's counsel fees under the rule set forth in *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003). This argument -- addressing the merits of plaintiff's request for attorneys' fees -- is not properly before this Court because

the award of attorneys' fees is the law of the case. *See Barrington v. Emp't Sec. Comm'n*, 65 N.C. App. 602, 605, 309 S.E.2d 539, 541 (1983) (declining to consider appellant's legal arguments when bound by law of the case). Defendants' arguments should have been raised in the first appeal to this Court. Nothing in this opinion expresses any view regarding defendants' arguments under *Palmer*.

We, therefore, reverse and remand to the superior court for remand to the Commission. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 opinion and award, the Commission must reconsider its ruling on that motion.

Reversed and remanded.

Judge STEELMAN concurs.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

COLLEGE ROAD ANIMAL HOSPITAL, PLLC; PHILLIP LANZI AND JAMIE LANZI, PLAINTIFFS
V.
JON KEDRICK COTTRELL AND JULIE COTTRELL, DEFENDANTS

No. COA14-29

Filed 16 September 2014

1. Loans—contribution—loan current—no liability under guaranty agreement

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs on the basis of a contribution theory. The loan at issue was current so defendants were not liable for any amount owed to Bank of America under the loan agreement as a result of their signing the guaranty agreement.

2. Loans—capacity in which loan documents signed—genuine issue of material fact

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs. There was a genuine issue of

material fact concerning the capacity in which plaintiff Dr. Lanzi and defendant Dr. Cottrell signed the loan agreement.

3. Loans—unjust enrichment—express contract—relief governed by contract

The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs on the theory of unjust enrichment. Unjust enrichment relief is not available in instances governed by an express contract. The loan agreement in this case, when read in conjunction with applicable principles of North Carolina law, fully governed the relationship between the parties concerning the extent, if any, to which they were liable for any indebtedness arising under that instrument.

Appeal by defendants from order entered 11 September 2013 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 5 June 2014.

Marshall, Williams & Gorham, LLP, by John L. Coble, for Plaintiffs.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Defendants.

ERVIN, Judge.

Defendants Jon Kedrick Cottrell and Julie Cottrell appeal from an order granting summary judgment in favor of Plaintiffs College Road Animal Hospital, Phillip Lanzi, and Jamie Lanzi, and ordering Defendants to pay 50% of all past due and future payments required under a loan obtained from Bank of America. On appeal, Defendants contend that the trial court erred by entering summary judgment in favor of Plaintiffs and, concomitantly, declining to enter summary judgment in their favor on the grounds that the Lanzis and the Cottrells were not principals under the loan and that the existence of an express contract between the parties precluded the maintenance of an action for unjust enrichment. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that summary judgment was improperly entered in favor of Plaintiffs, that summary judgment should have been entered in favor of Ms. Cottrell with respect to Plaintiffs' contribution claim, and that summary judgment should have been entered in favor of Defendants with respect to Plaintiffs' unjust enrichment claim; that the trial court's order should be reversed; and that this case should be remanded to

the New Hanover County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

In May of 2009, Dr. Cottrell purchased the 50% interest in College Road that had been previously owned by Dr. Robert Weedon. Prior to that date, Dr. Cottrell had been employed by College Road and operated its Carolina Beach location. After purchasing Dr. Weedon's interest, Dr. Cottrell was responsible for operating the Carolina Beach location while Dr. Lanzi was responsible for operating the College Road location.

On 16 September 2009, College Road obtained a $293,000 loan from Bank of America for the purpose of making capital improvements at the Carolina Beach location. According to the loan agreement, the "Borrower shall make all scheduled payments to Lender." In addition, "[e]ach Borrower and each Guarantor agree[d] that [their] obligation to make payments to [the] Lender on the Indebtedness under [the] Agreement [was] absolute and unconditional." The "dismissal, resignation or other withdrawal" from College Road's practice by "any licensed professional who is an owner or shareholder" was prohibited under the loan agreement. The list of incidents of default specified in the loan agreement included, in addition to a failure to make required payments, any failure to adhere to any of the other covenants set forth in that document.

Dr. Lanzi and Dr. Cottrell signed the loan agreement in the section designated for the signature of the borrower. In addition, the two men, along with their wives, executed the guaranty agreement. The loan agreement was modified on 11 March 2010 to increase the principal amount from $293,000 to $312,000, with final disbursement under the loan agreement having been made in December of 2010.[1]

On 17 May 2011, the Cottrells sent an email to Dr. Lanzi indicating that Dr. Cottrell was relinquishing his interest in College Road and defaulting on his agreement to purchase shares in Dr. Weedon's business. On 15 June 2011, Dr. Lanzi's attorney responded to the Cottrells' e-mail by accepting Dr. Cottrell's resignation and indicating that Dr. Lanzi did not wish to enter into an employer-employee relationship with Dr. Cottrell. On 20 July 2011, the Cottrells' attorney notified Bank of America that Dr. Cottrell was no longer affiliated with College Road and that the Cottrells

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1. LaWe Holdings, LLC, an entity in which Dr. Lanzi and Dr. Weedon were involved, became involved in this series of transactions as an additional guarantor on 28 October 2009.

had terminated their personal guarantee with respect to any further advances made to or obligations incurred by College Road.

According to Dr. Lanzi, he and Dr. Cottrell understood that the two of them would contribute half of the funds needed to repay the loan. The actual payments under the loan agreement, however, were made by College Road, with the funds needed for the making of these payments having been derived from the operation of both the College Road and Carolina Beach locations. After the termination of Dr. Cottrell's relationship with the practice, College Road continued to make the required regular monthly payments, which totaled $74,165.80 at the time of the hearing in the trial court, without any contribution from Dr. Cottrell. Bank of America has never made any demand for payment upon Dr. Cottrell.

B. Procedural History

On 29 August 2012, Plaintiffs filed a complaint against Defendants alleging claims sounding in equitable contribution and unjust enrichment. On 27 September 2012, Defendants filed an answer in which they denied the material allegations of Plaintiffs' complaint. On 5 June 2013, Plaintiffs filed a motion seeking the entry of summary judgment in their favor that was accompanied by an affidavit executed by Dr. Lanzi. On 28 August 2013, Defendants filed a motion seeking the entry of summary judgment in their favor that was accompanied by an affidavit executed by Dr. Cottrell. On 11 September 2013, the trial court entered an order granting Plaintiffs' summary judgment motion, denying Defendants' summary judgment motion, ordering Defendants to pay $37,082.90, an amount that represented half of the monthly payments that had been made to Bank of America under the loan agreement between July 2011 and May 2013, and ordering Defendants to provide 50% of the funds used to make the remaining payments required under the loan agreement. Defendants noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"Summary judgment is proper when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 25 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). During the consideration of a motion for summary judgment:

> The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, "we review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

Id. at 26, 588 S.E.2d at 25-26. We will now utilize this standard of review in analyzing the validity of Defendants' challenges to the trial court's order.

B. Substantive Legal Analysis

1. Contribution Claim

[1] The first of the two theories upon which Plaintiffs based their claim against Defendants was that of contribution.[2] "Contribution is generally defined as 'the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear.'" *Irvin v. Egerton*, 122 N.C. App. 499, 501, 470 S.E.2d 336, 337 (1996) (alteration in original) (quoting 18 C.J.S. *Contribution* § 2, at 4 (1990)). Although "[i]t is a prerequisite to a claim for contribution that the party seeking contribution 'satisfy, by payment or otherwise, more than his just proportion of the common obligation or liability,'" *id.* (quoting 18 Am. Jur. 2d *Contribution* § 9, at 16 (1985)), this Court has determined that a plaintiff is "entitled to contribution" and has "satisfied more than his just proportion of that common obligation" when the "parties ha[d] a monthly obligation" and "each month . . . the plaintiff paid more than one-half of the monthly obligation." *Id.* As a result, a plaintiff seeking contribution-based relief is simply required to prove that the obligation exists, that the parties are both required to pay the obligation, and that one obligor has paid a portion of the obligation for which the other obligor was legally responsible. *Id.*; *see also Nebel v. Nebel*, 223 N.C. 676, 686, 28 S.E.2d 207, 214 (1943) (stating that

2. In view of the fact that the trial court did not specifically delineate whether it found in favor of Plaintiffs on the basis of a contribution theory, an unjust enrichment theory, or both, we must analyze the validity of both of the theories set out in Plaintiffs' complaint in order to determine whether the trial court's order should be affirmed or reversed.

"[t]he right to sue for contribution does not depend upon a prior determination that the defendants are liable"); N.C. Gen. Stat. § 25-3-116(b) (providing that "a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law"). As a result of the fact that the trial court's order awarded relief against both Dr. Cottrell and Ms. Cottrell, we must examine their liability under a contribution theory separately.

a. Ms. Cottrell's Liability

As we have already noted, a litigant's ability to obtain relief on the basis of a contribution theory assumes that the plaintiff and the defendant are both obligated to make the underlying payment. For that reason, Plaintiffs were required to show that Ms. Cottrell was liable under the loan agreement in order to obtain relief from her based upon a contribution theory. We do not believe that Plaintiffs have made the required showing.

The only signatures appearing in the portion of the loan agreement at which the borrower or borrowers were supposed to sign were those of Dr. Lanzi and Dr. Cottrell, who were the sole owners of interests in College Road. On the other hand, a careful review of the record clearly establishes that Ms. Cottrell did not sign the loan agreement in the location designated for the borrowers and that the only location in the loan agreement at which the signatures of either Ms. Lanzi or Ms. Cottrell appear is at the conclusion of the guaranty agreement. As a result, an examination of the loan agreement reveals that Ms. Cottrell never agreed to shoulder any obligations under that document except those set out in the guaranty agreement.

"A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance." *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980). While "a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default," "[a] guarantor's duty of performance is triggered at the time of the default of another." *Id.* at 52-53, 269 S.E.2d at 122 (citations omitted). Consistently with this fundamental legal principle, the guaranty agreement contained in the loan agreement provides, in pertinent part, that the guarantors "shall immediately pay to [the] Lender the outstanding balance of all Indebtedness" "[i]f [the] Borrower fails to pay all or any part of any indebtedness when due."

According to the undisputed evidence contained in the record, the loan at issue in this case is current. For that reason, neither Ms. Lanzi nor Ms. Cottrell are currently liable for any amount owed to Bank of America under the loan agreement. Thus, Ms. Cottrell is not jointly obligated with the other parties to pay the amount owed to Bank of America under the loan agreement. As a result, the trial court erred by entering summary judgment in favor of Plaintiffs and against Ms. Cottrell on the basis of a contribution theory.

b. Guarantors' Liability

Secondly, Plaintiffs argue that Dr. Lanzi and Dr. Cottrell were primarily liable on the note given the presence of their signatures on the loan agreement in the block marked for borrowers and were, simultaneously, secondarily liable for the amount owed under the loan as evidenced by their signatures at the conclusion of the guaranty agreement. Although Plaintiffs appear to suggest that the joint obligation required for the successful assertion of a contribution claim can arise from Dr. Cottrell's status as a guarantor, we do not find this contention persuasive in light of the principle that "[a] guarantor's duty of performance is triggered at the time of the default of another," *id.* at 52, 269 S.E.2d at 122, and the fact that the guaranty agreement at issue in this case provides that the "Guarantor shall immediately pay to Lender the outstanding balance of all Indebtedness" if "Borrower fails to pay all or any part of any Indebtedness when due." As a result, given that a guaranty agreement constitutes nothing more than a "promise to pay the debt of another at maturity if not paid by the principal debtor," *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 220, 250 S.E.2d 587, 593 (1978), and the fact that "[t]he right to sue upon an absolute guaranty of payment arises immediately upon the failure of the principal debtor to pay at maturity," *id.*, the parties to the present guaranty agreement have no current obligation to make any payment to Bank of America relating to the loan agreement. As a result, to the extent that the trial court's decision to grant summary judgment in Plaintiffs' favor rested upon the understanding that Dr. Cottrell's decision to sign the guaranty agreement rendered him jointly liable on the underlying obligation created by the loan agreement, that decision constituted an error of law.[3]

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3. In their brief, Plaintiffs emphasize the fact that Dr. Cottrell's withdrawal from the practice constituted an incident of default under the loan agreement. Although Plaintiffs' assertion is clearly correct as a factual matter, the record contains no indication that Bank of America has actually declared the loan in default. In addition, the liability of the guarantors is triggered by nonpayment rather than the occurrence of any incident of default. As a result, the fact that Dr. Cottrell's withdrawal from the practice constituted an incident of default under the loan agreement has no bearing on the proper resolution of this case.

c. Individual Liability

[2] The principal argument advanced in Plaintiffs' brief in support of the trial court's order is a contention that, since Dr. Lanzi and Dr. Cottrell signed the loan agreement in their individual capacities, they are co-borrowers under the loan agreement and are jointly obligated to repay the loan. According to Defendant, however, Dr. Lanzi and Dr. Cottrell signed the loan agreement as agents of College Road instead of in their individual capacities. As a result of the fact that the record demonstrates the existence of a genuine issue of material fact concerning the capacity in which Dr. Lanzi and Dr. Cottrell signed the loan agreement, we conclude that the trial court erred by granting summary judgment in favor of Plaintiffs and against Dr. Cottrell with respect to the contribution issue and that this issue needs to be decided after a full trial on the merits.

According to N.C. Gen. Stat. § 25-3-402(b):

> (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.
>
> (2) Subject to subsection (c) of this section, if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity, or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

Although the Supreme Court has clearly stated that, "when the issue to be decided is the intent of a party, the general rule is that it is a question of fact to be determined by a jury," *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 663, 370 S.E.2d 375, 388 (1988), that rule is modified in cases involving negotiable instruments by N.C. Gen. Stat. § 25-3-402(b), which provides that the signatory to a negotiable instrument is liable to a holder in due course unless his or her signature unambiguously shows that it was made in the person's representative capacity or the represented party is not named in the instrument and that the signatory of such an instrument is liable to anyone else other than a holder in due

course unless he or she demonstrates that the original parties did not intend for the representative party to be liable on the instrument. As a result, in cases in which the party seeking to hold a signatory liable on the instrument is a person or entity other than a holder in due course,[4] "[t]he presumption is that nothing else appearing, a person who signs his or her name on the right-hand bottom corner of the face of a promissory note is a maker of that note and is primarily liable thereon." *Federal Land Bank of Columbia v. Lieben*, 86 N.C. App. 342, 346, 357 S.E.2d 700, 703 (1987). However, "this presumption may be rebutted by parol evidence that the signer of the note is a surety and that the creditor knew at the time he received the note that the signer of the note was signing as a surety." *Id.* Thus, although "one who places his unqualified signature on an instrument as maker or indorser will not be able to escape liability as such by a mere assertion that he intended to sign only as the representative of a corporation of which he is an officer or director," *Keels v. Turner*, 45 N.C. App. 213, 217, 262 S.E.2d 845, 847, *disc. review denied*, 300 N.C. 197, 269 S.E.2d 264 (1980), Dr. Cottrell is entitled to attempt to rebut the presumption that he signed the note as a maker with parol or other evidence.

As Plaintiffs correctly note, the signatures of Dr. Lanzi and Dr. Cottrell on the loan document appear in the section in which the borrower or borrowers were supposed to sign and do not unambiguously reflect that the two men signed the loan agreement in a solely representative, rather than an individual, capacity. In addition, Dr. Lanzi asserted in his affidavit that the loan agreement was executed by Dr. Cottrell and himself "with the understanding and agreement that [the parties] would be responsible for contributing one-half of the payment of the loan amount due." On the other hand, the loan agreement unambiguously named College Road as the sole borrower without providing any indication that either Dr. Lanzi or Dr. Cottrell, whose names only appear on the signature line, had executed the loan agreement in their individual capacities. Moreover, the sole borrower named in the loan modification agreement, which only Dr. Lanzi signed, was College Road. Finally, the sole borrower named in the final disbursement notification, which Dr. Lanzi signed in his capacity as a "member," was College Road. In

4. Although Plaintiff correctly notes that Bank of America appears to be a holder in due course as defined in N.C. Gen. Stat. § 25-3-402(a), that fact has no bearing on the proper resolution of this case given that Bank of America has not attempted to enforce the note and is not a party to this action. As a result of the fact that College Road, Dr. Lanzi, and Ms. Lanzi do not hold the loan agreement, they cannot, by definition, be holders in due course, rendering the provisions of N.C. Gen. Stat. § 25-3-402(b) applicable to claims asserted on behalf of holders in due course irrelevant to a proper resolution of this case.

his affidavit, Dr. Cottrell asserted that the parties signed the loan agreement and the final disbursement statement "as owners and on behalf of College Road." Finally, Plaintiff's counsel stated at the summary judgment hearing that their clients did not "contest that the borrower under the loan is the PLLC." As a result, a simple examination of the contents of the various loan and loan-related documents, the parties' affidavits, and the comments made by the parties' counsel at the summary judgment hearing suggest the existence of a genuine issue of material fact concerning the capacity in which Dr. Lanzi and Dr. Cottrell signed the loan agreement.

Our conclusion that Dr. Cottrell forecast sufficient evidence to demonstrate the existence of a genuine issue of material fact concerning the extent to which he and Dr. Lanzi signed the loan agreement in a representative or an individual capacity is bolstered by a number of other factors. For example, the undisputed record evidence establishes that College Road made all of the payments required under the loan agreement, that the amortization schedule provided by Bank of America listed College Road as the sole borrower, and that the additional guarantee provided by LaWe Holdings was secured "[f]or the purpose of inducing Bank of America . . . to make, extend and renew a loan" made on behalf of a borrower elsewhere identified as College Road. In addition, the record clearly reflects that both Dr. Lanzi and Dr. Cottrell executed a guaranty agreement intended to secure the loan. As we have already noted, "[a] guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance." *Branch Banking & Trust Co.*, 301 N.C. at 52, 269 S.E.2d at 122; *see also Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972) (stating that obligations arising out of guaranty agreements are "separate and independent of the obligation of the principal debtor"); *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 146, 187 S.E.2d 752, 756 (1972) (stating that "[d]ecisions of [the Supreme] Court [have] treat[ed] the obligation of a guarantor of payment separate and distinct from that of the maker" on the theory that the " 'contract of guaranty is [the guarantors'] own separate contract jointly and severally to pay the debts' " and that guarantors " 'are not in any sense parties to the [note].' " (final alteration in original) (quoting *Arcady Farms Milling Co. v. Wallace*, 242 N.C. 686, 689, 89 S.E.2d 413, 415 (1955)); Sykes v. Everett, 167 N.C. 600, 608, 83 S.E. 585, 590 (1914) (holding "that a surety is considered as a maker of the note [while] a guarantor is never a maker"). As this Court has previously noted, " 'where individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate

officer signs twice, once as an officer and again as an individual.' " *Keels*, 45 N.C. App. at 218, 262 S.E.2d at 847 (quoting 19 Am. Jur. 2d *Corporations* § 1343 (1965)). In light of that logic, a reasonable finder of fact could conclude that the signatures of Dr. Lanzi and Dr. Cottrell on the loan agreement were affixed in their capacity as officers of College Road and that their signatures on the guaranty agreement were affixed in their individual capacity.[5] As a result, after "review[ing] the record in the light most favorable to the non-moving party," *Broughton*, 161 N.C. App. at 26, 588 S.E.2d at 25, we hold that there is a genuine issue of material fact with respect to the issue of whether the parties, including Bank of America, intended that Dr. Lanzi and Dr. Cottrell signed the loan agreement in their representative or individual capacities and that the trial court erred to the extent that it entered summary judgment in favor of Plaintiffs with respect to the contribution issue on the basis of a determination that Dr. Cottrell signed the loan agreement in his individual, rather than a representative, capacity.[6]

2. Unjust Enrichment Claim

[3] The second claim asserted in Plaintiffs' complaint sounded in unjust enrichment. "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor," *Atlantic Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73 (1966), with the availability of an unjust enrichment remedy " 'based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another.' " *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E.2d 382, 385 (quoting *Atlantic Coast Line R.R. Co.*, 268 N.C. at 96, 150 S.E.2d at 73), *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996). On the other hand, "[t]he hallmark rule

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5. In view of the fact that the evidence concerning the intention with which Dr. Lanzi and Dr. Cottrell signed the loan agreement conflicts, we need not comment upon the absence of any evidence concerning the intentions with respect to this issue that Bank of America, which was clearly one of the "original parties," N.C. Gen. Stat. § 25-3-402(b)(2), may have had.

6. The same logic defeats Defendants' contention that the trial court erred by failing to enter summary judgment in their favor with respect to Plaintiffs' contribution claim. As a practical matter, the fact that the signatures of Dr. Lanzi and Dr. Cottrell on the loan agreement were not unambiguously made in their representative, rather than their individual, capacities coupled with the statement in Dr. Lanzi's affidavit to the effect that the parties contemplated that they would be equally responsible for repaying the loan amount would suffice to permit a trier of fact to conclude that Dr. Cottrell signed the loan agreement as a maker and was subject to individual liability for the resulting indebtedness.

of equity is that it will not apply 'in any case where the party seeking it has a full and complete remedy at law,' " *id.* (quoting *Jefferson Standard Ins. Co. v. Guilford Cnty.*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945)), which means that, "[w]here, as here, there is a contract which forms the basis for a claim, 'the contract governs the claim and the law will not imply a contract.' " *Id.* (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)); *see also Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (holding that "[o]nly in the absence of an express agreement of the parties will courts impose a [quasi-contract] or a contract implied in law in order to prevent an unjust enrichment"); *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (holding that "[i]t is a [well-established] principle that an express contract precludes an implied contract with reference to the same matter"). In light of the principle that unjust enrichment relief is not available in instances governed by an express contract, Defendants argue that the "contractual relationship between the Company and the Bank concerning the Loan to the Company, and the separate contractual relationship between the Bank and the [guarantors] on the Guaranty, are clearly defined and governed by said respective, express agreements." Defendants' argument has merit.[7]

As an initial matter, we have no hesitation in concluding that the loan agreement constitutes a "contract which forms the basis for [Plaintiffs'] claim." *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385. In addition, the loan agreement clearly governs the rights and responsibilities of all of the parties to that instrument with respect to the loan payment process. More specifically, the loan agreement provides that "[t]he liability of Borrower and each Guarantor hereunder is joint and several . . . upon an Event of Default hereunder." Although there is, as we have previously determined, a material factual dispute over the extent to which Dr. Lanzi and Dr. Cottrell are individually liable as borrowers and although the failure of payment necessary to trigger the obligation of the guarantors to make payment has clearly not yet occurred, there is no question but that the loan agreement makes each borrower jointly and severally liable[8] for the entire amount of the resulting indebtedness. Similarly, as

7. In their brief, Plaintiffs failed to respond to this aspect of Defendants' challenge to the lawfulness of the trial court's order. Instead, their brief makes clear that the unjust enrichment claim was asserted in the alternative in the event that their contribution claim did not succeed.

8. As this Court has previously stated, "[w]hen joint and several liability is imposed, 'each liable party is individually responsible for the entire obligation.' " *In re D.A.Q.*, 214 N.C. App. 535, 539, 715 S.E.2d 509, 512 (2011) (quoting *Black's Law Dictionary* 997

we have previously noted, the loan agreement provides that, in the event that the borrowers fail to make any payment required under the loan agreement, the guarantors become liable for the full amount owed. "If a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right." 38 Am. Jur. 2d *Guaranty* § 100 (2010). As a result, since the loan agreement, when read in conjunction with applicable principles of North Carolina law, fully governs the relationship between the parties concerning the extent, if any, to which they are liable for any indebtedness arising under that instrument, the trial court erred to the extent that it entered summary judgment in Plaintiffs' favor and failed to enter summary judgment in Defendants' favor with respect to the unjust enrichment claim asserted in Plaintiffs' complaint.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by granting summary judgment in favor of Plaintiffs, by failing to grant summary judgment in favor of Ms. Cottrell with respect to Plaintiffs' contribution claim, and by failing to grant summary judgment in favor of Defendants with respect to Plaintiffs' unjust enrichment claim. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the New Hanover County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

Judges ROBERT N. HUNTER, JR. concurred in this opinion prior to 6 September 2014.

Judge DAVIS concurs.

(9th ed. 2009)). Thus, in instances involving joint and several liability, "'the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and [the] plaintiff may be made whole by a full recovery from any defendant.'" *Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 572, 501 S.E.2d 72, 74 (1998) (quoting 10 James W. Moore et al., *Moore's Federal Practice* ¶ 55.25, at 55-46 (3d ed. 1997)). As a result, given that "[c]ontribution is generally defined as the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear," *Irvin*, 122 N.C. App. at 501, 470 S.E.2d at 337 (alteration in original), a person who has paid a disproportionate share of a debt is entitled to contribution from any other person who was jointly and severally liable for the payment of that debt.

FELICIA RENEE CROGAN, Plaintiff
v.
JON BRENT CROGAN, Defendant

No. COA14-214

Filed 16 September 2014

1. Statutes of Limitation and Repose—fraud—duress—undue influence—three years

The trial court did not err by applying a three-year statute of limitations to claims for fraud, duress, and undue influence. Plaintiff's claims were not counterclaims, and thus, did not involve the provisions of N.C.G.S. § 1-47(2).

2. Statutes of Limitation and Repose—breach of contract—separation agreement—contract under seal—ten years

Where plaintiff's claim for breach of a separation agreement arose pursuant to a contract under seal, the trial court erred by applying a three-year statute of limitations. N.C.G.S. § 1-47(2) provides that a ten-year statute of limitations applies to an agreement under seal.

Appeal by plaintiff from order entered 24 September 2013 by Judge Daniel F. Finch in Granville County Superior Court. Heard in the Court of Appeals 28 August 2014.

Dunlow & Wilkinson, P.A., by John M. Dunlow, for plaintiff-appellant.

Tharrington Smith, LLP, by Jill Schnabel Jackson, for defendant-appellee.

STEELMAN, Judge.

Where claims arose in tort, the trial court did not err in applying a three-year statute of limitations to claims for fraud, duress, and undue influence. Where plaintiff's claim for breach of contract arose pursuant to a contract under seal, the trial court erred in applying a three-year statute of limitations.

I. Factual and Procedural Background

Felicia Renee Crogan (plaintiff) and Jon Brent Crogan (defendant) were married on 23 March 1985. There were three children born to the marriage.

Plaintiff and defendant separated on 1 October 2004. Defendant's attorney prepared a Separation Agreement which was executed by the parties under seal and notarized on 16 November 2004. Paragraph 27 of the Separation Agreement dealt with the effect of a reconciliation of the parties upon their property settlement:

> 27. RECONCILIATION. In the event of a reconciliation and resumption of the marital relationship between the parties, the provisions hereof regarding settlement and disposition of property rights and other rights shall nevertheless continue in full force and effect without the abatement of any term or provision hereof, except as otherwise specifically provided herein or as later agreed in writing, by and between the parties. Except as otherwise provided by this Agreement or by an agreement or modification to this Agreement, performed in writing and notarized and executed by each of the parties after the date of this Agreement or the date of their reconciliation, no act on the part of either party shall serve to modify the property rights of the parties as established herein in this Agreement and the rights of the parties to the property which is transferred, set over and designated as property of either party shall remain separate property upon a reconciliation of the parties.

On 1 October 2005, the parties reconciled and resumed their marital relationship. The parties moved to West Virginia, but separated again on 13 March 2011. The parties subsequently engaged in litigation in the Family Court of Preston County, West Virginia. This litigation involved, among other things, the distribution of the parties' marital property. That court directed the parties to have the courts of this State determine the validity of the Separation Agreement.

On 17 August 2012, plaintiff filed a verified complaint, seeking a declaratory judgment as to the status of the Separation Agreement. The complaint also sought to void the Separation Agreement based upon the alleged fraud, duress, and undue influence of the defendant. Plaintiff also asserted breach of contract, alleging that defendant materially breached the provisions of paragraph 21 of the Separation Agreement:

> 21. FULL DISCLOSURE. Each party warrants, as part of the consideration for this Agreement, that each party has fully and completely disclosed all information regarding property and finances requested by the other and that no

> information of such nature has been subjected to distortion, nor in any manner been misrepresented.

Plaintiff alleged that defendant falsely represented to her that the values of their respective retirement accounts were "virtually the same," when in fact the value of plaintiff's account was $31,192.99 and the value of defendant's account was about $130,000.00.

On 10 October 2012, defendant filed an answer, asserting the affirmative defenses of ratification and the statute of limitations, as well as a counterclaim for a declaratory judgment declaring the Separation Agreement to be valid and enforceable. On 7 December 2012, plaintiff filed a reply to defendant's counterclaim.

On 10 May 2013, defendant filed a motion for summary judgment. On 24 September 2013, the trial court entered summary judgment in favor of defendant, declaring that "the Separation Agreement and Property Settlement executed by the parties on November 16, 2004, is a valid and enforceable contract."

Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Fraud, Duress, and Undue Influence

[1] In her first argument, plaintiff contends that the trial court erred in applying a three-year statute of limitations to her claims for fraud, duress, and undue influence. We disagree.

"Under North Carolina law, there is a three-year limitation for filing an action for duress, undue influence and fraud." *Dawbarn v. Dawbarn*, 175 N.C. App. 712, 717, 625 S.E.2d 186, 190 (2006) (citing N.C. Gen. Stat. § 1-52(9) (2005)). According to N.C. Gen. Stat. § 1-52(9), the statute of limitations begins to run on an action for fraud upon discovery of the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9) (2013).

The statute of limitations for plaintiff's claims for duress and undue influence began to run in 2004, when she alleges she was coerced into

signing the Separation Agreement. The statute of limitations on those claims would therefore have expired in 2007.

With regard to the claim for fraud, in her complaint, plaintiff does not allege when she discovered the fraud. However, in her deposition, plaintiff admitted that she began to manage defendant's account in "[m]aybe 2005, 2006." At that time, she would have discovered the fraud. During the hearing on summary judgment, defense counsel noted:

> She acknowledged, I believe on page 91 of the — the — of her deposition that she had the ability to look at the balance of his account at that time. So, my contention is that by the end of 2006, by her testimony, it was the latest, 2006, she had the ability to look at his Thrift Savings account. She had full access to his accounts and that the cause of action for fraud would have accrued no later than 2006 when she had full access to his retirement accounts. Which means, the three-year statute of limitations expired in 2009.

If plaintiff discovered the fraud in 2006, then the statute of limitations on that claim would have expired in 2009.

Plaintiff's complaint was filed in 2012, well after the statute of limitations on her claims for fraud, duress, and undue influence expired.

Plaintiff contends, however, that these actions arose pursuant to a document under seal. Plaintiff contends that, as a result, the ten-year statute of limitations in N.C. Gen. Stat. § 1-47 applies.

N.C. Gen. Stat. § 1-47(2) provides that a ten-year statute of limitations applies:

> Upon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Provided, however, that if action on an instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

N.C. Gen. Stat. § 1-47(2) (2013).

Plaintiff contends that her lawsuit in the instant case is effectively a counterclaim. More specifically:

> In the present case, the Plaintiff-Appellant was functioning, for all intents and purposes, as a Defendant, in that she was forced to come to the state of North Carolina to "defend" against the claim made by the Defendant-Appellee in the West Virginia litigation. Further, the Plaintiff-Appellant's claims for fraud, duress, undue influence and breach are, in essence, counterclaims asserted against the Defendant-Appellee in response to his claims asserted in the West Virginia litigation.

We find this logic baseless. We note that there is no indication in the record of whether plaintiff or defendant initiated the litigation in West Virginia; however, it is clear from the record that plaintiff initiated the instant action in North Carolina. Nothing in the record supports plaintiff's claim that she was "forced" to come to this State to "defend" against a claim by defendant; quite to the contrary, the filing of plaintiff's complaint forced action by defendant.

We acknowledge that a counterclaim for fraud pursuant to an instrument under seal is subject to a ten-year statute of limitations. *See McGuire v. Dixon*, 207 N.C. App. 330, 338, 700 S.E.2d 71, 76 (2010) (holding that the trial court erred in applying the three-year limitations period for fraud under N.C. Gen. Stat. § 1-52(9) where the ten-year statute of limitations under N.C. Gen. Stat. § 1-47(2) applied). Duress and undue influence are "forms of fraud," under N.C. Gen. Stat. § 1-52(9). *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 276-77 (1960). Under that logic, then, a counterclaim for fraud, duress, or undue influence pursuant to a document under seal should be controlled by a ten-year statute of limitations.

However, it is clear from the record before us that plaintiff's claims are not counterclaims, and thus do not involve the provisions of N.C. Gen. Stat. § 1-47(2). Thus, the three-year statute of limitations applies to plaintiff's claims for fraud, duress, and undue influence. We hold that the trial court applied the correct statute of limitations to these claims, and did not err in granting summary judgment in favor of defendant on the issues of fraud, duress, and undue influence.

This argument is without merit.

IV. Breach of Contract

[2] In her second argument, plaintiff contends that the trial court erred in applying a three-year statute of limitations to her claim for breach of contract. We agree.

The Separation Agreement, executed under seal, contained a warranty of full disclosure. The Separation Agreement further provided that, in the event of reconciliation by the parties, the Separation Agreement would remain in full force. As stated above, a ten-year statute of limitations applies to an agreement under seal. N.C. Gen. Stat. § 1-47(2) (2013).

Plaintiff alleged that defendant breached the warranty of full disclosure in the Separation Agreement by misrepresenting the balance in their respective retirement accounts. Because the Separation Agreement was executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations, is applicable to plaintiff's breach of contract claim. Since this action was commenced within ten years of the execution of the Separation Agreement, it was not barred.

We hold that the trial court erred in granting summary judgment in favor of defendant on the issue of breach of the Separation Agreement.

V. Conclusion

The trial court did not err in granting summary judgment in favor of defendant on the issues of fraud, duress, and undue influence. The trial court erred in granting summary judgment in favor of defendant on the issue of breach of the Separation Agreement. This matter is remanded to the trial court for further proceedings on the issue of breach of the Separation Agreement.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges GEER and HUNTER, Robert N., Jr. concur.

Robert N. Hunter, Jr. concurred on this opinion prior to 6 September 2014.

DAVID HYATT, Plaintiff
v.
MINI STORAGE ON THE GREEN, DAVID B. SMITH, AND NCI GROUP, INC. D/B/A DOORS AND BUILDING COMPONENTS (DBCI), Defendants

DAVID B. SMITH, Third-Party Plaintiff
v.
THE ESTATE OF JOHN ALVIN ROYALL, ROYALL COMMERCIAL CONTRACTORS, INC. and E&S STEEL, INC., Third-Party Defendants

No. COA14-215

Filed 16 September 2014

1. Contracts—rental agreement—exculpatory clause—absolved from personal injury claims—no public interest exception—no unequal bargaining power

The trial court did not err by granting summary judgment in favor of defendant Mini Storage with respect to plaintiff's personal injury claim even though plaintiff contended that the rental agreement between these parties did not absolve defendant from responsibility for providing safe storage units. The pertinent exculpatory clause in the agreement absolved defendant from personal injury claims unless defendant acted negligently, and no negligence was shown. Further, the public interest exception did not invalidate the exculpatory clause and there was no unequal bargaining power.

2. Assignments—liability—stranger to original contract

The trial court did not err by granting summary judgment in favor of defendant Smith even though plaintiff contended that the assignment of the contract between defendant Smith and defendant Mini Storage to Royall did not relieve defendant Smith of his liability under the contract. Plaintiff has not established any basis for holding defendant Smith, a stranger to the original contract, liable for plaintiff's injuries.

Appeal by plaintiff from orders entered 18 July 2013 and 21 August 2013 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 5 June 2014.

David & Associates, P.L.L.C., by Stuart Smith; Hodges & Coxe P.C., by Bradley A. Coxe, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for Defendant Mini Storage on the Green.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by P.C. Barwick, Jr., Stuart L. Stroud, and Donald K. Phillips, for Third-Party Plaintiff David B. Smith.

ERVIN, Judge.

Plaintiff David Hyatt appeals from an order entered 18 July 2013 granting summary judgment in favor of Defendant Mini Storage on the Green and from an order entered 19 August 2013 granting summary judgment in favor of Defendant and Third-Party Plaintiff David B. Smith. On appeal, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Mini Storage because it breached a duty to provide renters with safe storage units and because the rental agreement between Plaintiff and Defendant Mini Storage fails to exculpate Defendant from liability for failing to provide safe storage units. In addition, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Smith because any assignment of the contract between Defendant Smith and Defendant Mini Storage did not relieve Defendant Smith of liability and because the completed and accepted work doctrine did not apply to the work that Defendant Smith performed on the storage units. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

1. Liability of Defendant Mini Storage

Defendant Mini Storage owns a storage facility located in Hampstead. On 15 October 2007, Plaintiff rented Unit No. 816 from Defendant Mini Storage pursuant to a written agreement. The rental agreement provided, among other things, that "[l]andlord [shall not] be liable to tenant and/or tenants guest or invitees for any personal injuries sustained by tenant and/or tenants guest or invitees while on or about landlord's premises." Plaintiff admitted that he had read and signed the agreement and that he had not had any questions regarding the terms of that agreement.

On 3 July 2008, Plaintiff went to his unit to collect various personal items. After entering the unit and collecting his property, Plaintiff attempted to close the roller door to his storage unit by pulling it down. As he did so, the door became stuck. Acting on the basis of a belief that he could pull the door down past the point at which it was stuck, Plaintiff attempted to close the door with some force, at which point the

door came off of its tracks and struck Plaintiff in the head, causing him to sustain personal injuries.

2. Liability of Defendant Mr. Smith

In 2005, Defendant Mini Storage accepted a bid from Defendant Smith in connection with the construction of Building No. 8, which consisted of 35 storage units, including Unit No. 816. On 30 December 2005, Defendant Mini Storage and Defendant Smith entered into a contract pursuant to which Defendant Smith agreed to "furnish material and labor" for the project for a total cost of $92,000. Defendant Smith subsequently assigned his contract with Defendant Mini Storage to John Alvin Royall and Royall Commercial Contractors, Inc., for $10,000. Royall received the balance of the contract payments, which was $82,000, in return for completing the project.

B. Procedural History

On 4 November 2009, Plaintiff filed a complaint seeking to recover damages for negligence. On 1 July 2011, Plaintiff filed an amended complaint that asserted claims sounding in breach of contract and breach of express and implied warranty against Defendant Smith and sounding in breach of express and implied warranty against NCI Group, Inc., d/b/a Doors and Building Components. Plaintiff filed a second amended complaint on 15 July 2011 and a third amended complaint on 5 October 2011. Defendant Mini Storage and Defendant Smith filed answers denying the material allegations of Plaintiff's third amended complaint and asserting various affirmative defenses on 28 October and 3 November 2011, respectively.

On 4 June 2013, Defendant Mini Storage filed a motion for summary judgment with respect to all of Plaintiff's claims. On 7 June 2013, Defendant Smith filed a motion for summary judgment as well. Defendants' summary judgment motions came on for hearing before the trial court at the 15 July 2013 civil session of the Pender County Superior Court. On 18 July 2013, the trial court entered an order granting summary judgment in favor of Defendant Mini Storage. On 21 August 2013, the trial court entered an order granting summary judgment in favor of Defendant Smith based upon the fact that Defendant Smith had assigned his contract with Defendant Mini Storage to Royall. Plaintiff noted an appeal to this Court from the trial court's orders.[1]

1. As a result of the fact that all of the other claims that had been asserted in this case have been dismissed, the challenged trial court orders represent an appealable final judgment.

II. Substantive Legal Analysis

A. Standard of Review

" '[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.' " *Blackburn v. Carbone*, 208 N.C. App. 519, 525, 703 S.E.2d 788, 794 (2010) (quoting *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)), *disc. review denied*, 365 N.C. 194, 710 S.E.2d 52 (2011). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. We review orders granting or denying summary judgment using a *de novo* standard of review, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), under which "this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Defendant Mini Storage's Liability

[1] In his brief, Plaintiff contends that the trial court erred by granting summary judgment in favor of Defendant Mini Storage on the grounds that the rental agreement between Plaintiff and Defendant Mini Storage does not absolve Defendant Mini Storage from responsibility for providing safe storage units. More specifically, Plaintiff argues that the relevant provision in the rental agreement is not sufficiently explicit to operate as a valid exculpatory clause. Plaintiff's argument lacks merit.

According to well-established North Carolina law, contracts "which exculpate persons from liability for negligence are not favored," *Johnson v. Dunlap*, 53 N.C. App. 312, 317, 280 S.E.2d 759, 763 (1981), *cert. denied*, 305 N.C. 153, 289 S.E.2d 380 (1982), and must be strictly construed against the person seeking to escape liability. *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397 (1955). "Nonetheless, such an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson v. McClellan*, 131 N.C. App. 635, 636, 508 S.E.2d 549, 551 (1998). "This principle arises out of 'the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit[.]' " *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 428, 623 S.E.2d 785, 790 (2006) (quoting *Hall*, 242 N.C. at 709,

89 S.E.2d at 397-98). "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). As a result, given the absence of any factual dispute concerning the nature and extent of the contractual language at issue here, the ultimate question raised by Plaintiff's challenge to the trial court's decision is the extent to which Defendant Mini Storage is entitled to judgment as a matter of law based upon the language of the rental agreement.

The relevant provision in the rental agreement between Plaintiff and Defendant Mini Storage states that "[l]andlord [shall not] be liable to tenant and/or tenants guest or invitees for any personal injuries sustained by tenant and/or tenants guest or invitees while on or about landlord's premises." As Plaintiff concedes in his initial brief, the fact that this contractual language completely exempts Defendant Mini Storage from liability for any personal injuries that Plaintiff sustained as a result of Defendant Mini Storage's negligence while on Defendant Mini Storage's premises renders this provision exculpatory in nature.[2] In addition, despite Plaintiff's argument to the contrary, the exculpatory language contained in the rental agreement is clear, unambiguous, and enforceable. In attempting to persuade us that the relevant contractual language is not sufficiently explicit to exculpate Defendant Mini Storage from liability for the personal injuries that he sustained, Plaintiff directs our attention to a number of decisions. However, an examination of the decisions upon which Plaintiff relies demonstrates that the exculpatory provision contained in the agreement at issue here is more explicit than the language in any of the decisions upon which Plaintiff relies.[3] Simply put, the exculpatory clause at issue here clearly and explicitly

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2. Plaintiff clearly states in his initial brief that "the contract clause must be analyzed as an exculpatory clause." Furthermore, Plaintiff did not argue that this clause was not exculpatory at the hearing held before the trial court for the purpose of considering Defendant Mini Storage's summary judgment motion. However, Plaintiff does, for the first time, argue in his reply brief that it was not clear whether the contractual provision in question constituted an indemnity clause or an exculpatory clause. In spite of the fact that this Court "will not entertain what amounts to a new argument presented in th[e] reply brief," *Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994), we do believe, as Plaintiff conceded until the filing of his reply brief, that the contractual language at issue here constitutes an exculpatory, rather than an indemnity, clause.

3. *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190-91 (1953) (holding that a provision to the effect that "the lessees shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building herein demised, excepting in the case of . . . fire," did not operate to excuse the defendant from negligence liability); *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952) (holding that a provision indemnifying the defendant from "all

provides that Defendant Mini Storage would not be liable for personal injuries sustained on the premises. Such liability could only exist in the event that Defendant Mini Storage acted negligently. As a result, given that the exculpatory clause at issue here clearly absolved Defendant Mini Storage from personal injury claims that could only have arisen in the event that Defendant Mini Storage had been negligent, we must next determine whether any of the exceptions to the rule providing that sufficiently clear exculpatory clauses are enforceable enunciated in *Fortson* apply.

As we have already noted, an otherwise enforceable exculpatory clause will not be enforced in the event that it "violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson*, 131 N.C. App. at 636, 508 S.E.2d at 551. As an initial matter, we note that Plaintiff has not cited any statute that is inconsistent with the exculpatory provision at issue here, and we have not located any such statute in the course of our own research. For that reason, the first *Fortson* exception does not bar enforcement of the exculpatory clause at issue here.

Secondly, we must determine if the exculpatory clause at issue here "is contrary to a substantial public interest." *Id.* "[A] party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty." *Hall*, 242 N.C. at 710, 89 S.E.2d at 398. "An activity falls within the public policy exception when the activity is extensively regulated to protect the public from danger, and it would violate public policy to allow those engaged in such an activity to 'absolve themselves from the duty to use reasonable care.' " *Fortson*, 131 N.C. App. at 637, 508 S.E.2d at 551 (quoting *Alston v. Monk*, 92 N.C. App. 59, 64, 373 S.E.2d 463, 466 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420

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losses thru fire, theft & collision" did not suffice to preclude negligence liability arising from the defendant's negligence); *Atlantic Contracting and Material Company, Inc. v. Adcock*, 161 N.C. App 273, 279-80, 588 S.E.2d 36, 41 (2003) (holding that language indemnifying the defendant "against all losses, damages, injuries, claims, demands and expenses" was not sufficiently explicit to be enforceable); *City of Wilmington v. North Carolina Natural Gas Corporation*, 117 N.C. App. 244, 248, 450 S.E.2d 573, 576 (1994) (holding that the contractual language upon which the defendant relied did not explicitly absolve the defendant from responsibility for its own negligence); and *Lewis v. Dunn Leasing Corporation*, 36 N.C. App. 556, 559-60, 244 S.E.2d 706, 708-09 (1978) (holding language indemnifying the defendant from "any and all claims or liability of every kind and nature" not sufficiently specific). In each instance, the cases upon which Plaintiff relies applied to a wide range of injuries in addition to personal injuries or did not clearly indicate that negligence-based claims were excluded.

(1989)). The self-storage industry is not, unlike the industries to which the public interest exception has been deemed applicable, extensively regulated by North Carolina law. *Alston*, 92 N.C. App. at 64, 373 S.E.2d at 466-67 (invalidating a release signed by a customer who received cosmetology services in light of the extensive regulation of the cosmetology industry and the use of hazardous chemicals); *Fortson*, 131 N.C. App. at 638, 508 S.E.2d at 552 (invalidating a release executed in connection with a rider's participation in a motorcycle safety training program). On the contrary, the present case is more analogous to *Hall*, in which the Supreme Court refused to invalidate a liability waiver contained in a rental contract relating to the installation of a gas tank and pumping equipment. *Hall*, 242 N.C. at 710-11, 89 S.E.2d at 398. As a result, we conclude that the public interest exception does not invalidate the exculpatory clause at issue here.

Finally, an exculpatory contract that has been "gained through inequality of bargaining power" is unenforceable. *Fortson*, 131 N.C. App. at 636, 508 S.E.2d at 551. In applying this exception to the general rule allowing the enforcement of otherwise-enforceable exculpatory clauses, reviewing courts give "consideration to the comparable positions which the contracting parties occupy in regard to their bargaining strength, i.e., whether one of the parties has unequal bargaining power so that he must either accept what is offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere." *Hall*, 242 N.C. at 710, 89 S.E.2d at 398. In addition to admitting that he had read and understood the provisions of the rental agreement before signing it, Plaintiff acknowledged that there was another storage facility "up the road" that he considered dealing with before electing to obtain a storage unit from Defendant Mini Storage. As a result, given that Plaintiff had other options for obtaining the storage unit that he needed, we are unable to conclude that the exculpatory provision contained in the rental agreement resulted from the exercise of unequal bargaining power.[4] As a result, given that the exculpatory clause at issue here is enforceable and clearly barred Plaintiff's claim, we hold that the trial court correctly granted summary judgment in favor of Defendant Mini Storage with respect to Plaintiff's personal injury claim.

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4. Plaintiff does not attempt to argue in his brief or reply brief that any of the *Fortson* exceptions apply.

C. Defendant Smith's Liability

[2] Secondly, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendant Smith on the grounds that the assignment of the contract between Defendant Smith and Defendant Mini Storage to Royall did not relieve Defendant Smith of his liability under the contract. Plaintiff's argument lacks merit.

As a result of the fact that the work that allegedly resulted in Plaintiff's injuries was actually performed by Royall rather than Defendant Smith, Plaintiff must, in order to successfully pursue a claim against Defendant Smith, establish that Defendant Smith violated some duty that he owed to Plaintiff. In attempting to persuade us that the assignment of Defendant Smith's rights and duties under his contract with Defendant Mini Storage to Royall did not relieve Defendant Smith of liability for any injury that he might have sustained, Plaintiff directs our attention to numerous decisions that hold, in effect, that a party to a contract who completely assigns all rights and duties under the contract to another party remains liable to the original party with whom the assignor contracted. *See, e.g.*, *Rose v. Vulcan Materials Company*, 282 N.C. 643, 662, 194 S.E.2d 521, 534 (1973) (stating that "the assignor has power only to delegate and not to transfer the performance of duties as against the other party to the contract assigned"); *Atlantic & N.C.R. Co. v. Atlantic & N.C. Co.*, 147 N.C. 368, 380, 61 S.E. 185, 189 (1908) (holding that, in the absence of a novation, "the assignor would, notwithstanding the assignment, still remain liable"). A careful study of the decisions upon which Plaintiff relies demonstrates, however, that all of them address the assignor's liability to the other party to the original contract rather than to a third party like Plaintiff. As a result, none of the decisions upon which Plaintiff relies undercut the validity of the trial court's order in any way.

In addition, Plaintiff cites N.C. Gen. Stat. § 25-2-210(1), which provides that "[n]o delegation of performance relieves the party delegating of any duty to perform or any liability for breach." N.C. Gen. Stat. § 25-2-210(1). Although he acknowledges that the statutory provision upon which he relies is only applicable to contracts for the sale of goods, Plaintiff contends that the General Assembly intended for the principle enunciated in N.C. Gen. Stat. § 25-2-210(1) to apply outside the sale of goods context given the citation to *Atlantic & N.C.R. Co.* in the comments relating to that statutory provision. Once again, however, Plaintiff fails to recognize that *Atlantic & N.C.R. Co.* and "general North Carolina contract law" provide for an assignor's continued liability to the other party to the original contract rather than to a third party. As a result,

N.C. Gen. Stat. § 25-2-210(1) has no bearing on the proper resolution of this issue.

Simply put, the only arguments advanced in Plaintiff's brief in opposition to the trial court's decision to grant summary judgment in favor of Defendant Smith establish that Defendant Smith, as an assignor, remains liable to Defendant Mini Storage under the original contract. Nothing in Plaintiff's briefs provides any basis for believing that Defendant Smith should be held liable to him as a stranger to the original contract. As a result, given that Plaintiff has not established any basis for holding Defendant Smith liable for his injuries, the trial court did not err by granting summary judgment in favor of Defendant Smith.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff's challenges to the trial court's orders lack merit.[5] As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

Judge DAVIS concurs.

5. Although the parties have debated other issues in their briefs in addition to those discussed in the text of this opinion, we need not address these issues given our decision to hold that the exculpatory clause barred Plaintiff's claim against Defendant Mini Storage and that the assignment of Defendant Smith's contract with Defendant Mini Storage to Royall barred Plaintiff's claim against Defendant Smith.

IN THE MATTER OF D.C.

No. COA13-502-2

Filed 16 September 2014

1. Termination of Parental Rights—reunification efforts ceased—sufficient findings of fact—permanency planning order—termination of parental rights order—read together

The trial court did not err in a termination of parental rights case by entering a permanency planning review order changing the permanent plan for the minor child to adoption, effectively ceasing reunification efforts. The findings of fact in the termination of parental rights order in conjunction with the permanency planning order satisfied the requirements of N.C.G.S. § 7B-507(b)(1).

2. Termination of Parental Rights—termination in child's best interest—no abuse of discretion

The trial court did not abuse its discretion by concluding that the minor child's best interests were served by termination of respondent-mother's parental rights.

Appeal by respondent from orders entered 18 April 2012 and 24 January 2013 by Judge Beverly Scarlett in District Court, Chatham County. By opinion entered 15 October 2013, this Court reversed and remanded the trial court's orders. By order entered on or about 11 June 2014, the North Carolina Supreme Court remanded to this Court.

Holcomb & Cabe, LLP, by Carol J. Holcomb and Samantha H. Cabe, for appellee Chatham County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for guardian ad litem.

J. Thomas Diepenbrock, for appellant-respondent-mother.

STROUD, Judge.

This case comes to us by order of the North Carolina Supreme Court remanding this case to us for reconsideration in light of *In re L.M.T.*, ___ N.C. ___, 752 S.E.2d 453 (2013). For the following reasons, we affirm.

I. Background

We recite the background and applicable law from our prior opinion:

> On 15 March 2011, the Chatham County Department of Social Services ("DSS") filed a juvenile petition alleging that Derrick[1] was a neglected and dependent juvenile, and on 1 June 2011, the trial court adjudicated Derrick a neglected juvenile. On 18 April 2012, the trial court changed Derrick's permanent plan to adoption and ordered that "[a] Termination of Parental Rights Motion shall be filed" ["Permanency Planning Order"]. Respondent filed notice preserving her right to appeal the 18 April 2012 order. On 24 January 2013, the trial court terminated respondent-mother's parental rights due to neglect, failure to make reasonable progress, and failure to pay a reasonable portion of support ["TPR Order."]. Respondent appealed the 24 January 2013 order.
>
> On appeal, respondent contends that the trial court erred in its 18 April 2012 permanency planning order by ceasing reunification efforts without entering the necessary findings of fact required by North Carolina General Statute § 7B-507(b)(1). DSS argues that the trial court never ordered the cessation of reunification efforts and, therefore, was not required to make findings under North Carolina General Statute § 7B-507(b). . . . Moreover, the trial court here changed the permanent plan to adoption, and respondent-mother properly preserved her right to appeal the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B–507(c). This Court determined in *In re A.P.W.* that an order which directs the filing of a petition to terminate parental rights and changes the permanent plan to adoption has implicitly ordered the cessation of reunification efforts. ___ N.C. App. ___, ___, 741 S.E.2d 388, 391 ("As in *J.N.S.*, the trial court in the instant case directed DSS to file a petition to terminate parental rights. Moreover, the trial court here changed the permanent plan to adoption, and respondent-mother properly preserved her right to appeal the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B–507(c). Based on the foregoing, we hold that the trial court's 21 June 2011

1. A pseudonym will be used to protect the identity of the child involved.

> order implicitly ceased reunification efforts, and we reject DSS's argument for dismissal."), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2013).

In re D.C., ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished) (heading omitted).

II. Permanency Planning Order

[1] Respondent argues that "the trial court erred when it entered a permanency planning review order changing the permanent plan to adoption because the order effectively ceased reunification efforts without including the findings of fact required by statute[.]" (Original in all caps.)

> "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).
>
> North Carolina General Statute § 7B-507(b) provides:
>
> > In any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
> >
> > (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]
>
> N.C. Gen. Stat. § 7B-507(b)(1) (2011).

In re D.C., ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished).

The Supreme Court has directed that our reconsideration be directed by the requirements of *L.M.T.*, which states that

> [s]trict adherence to this statute [North Carolina General Statute § 7B-507(b),] ensures that the trial court fulfills the aspirations of the Juvenile Code by allowing our appellate courts to conduct a thorough review of the order.

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." The trial court's written findings must address the statute's concerns, but need not quote its exact language. On the other hand, use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

___ N.C. ___, ___, 752 S.E.2d 453, 455 (2013). The Supreme Court further clarified that the order ceasing reunification should be considered together with the termination of parental rights order in cases such as this; in other words, either order standing alone or the orders as read together can be enough to satisfy the language of North Carolina General Statute § 7B-507(b). *Id.* at ___, 752 S.E.2d at 456-57.

The guardian ad litem brief to this Court acknowledged that the Permanency Planning Order was deficient because of its failure to make the findings of fact as required by North Carolina General Statute § 7B-507(b). In our prior opinion, we agreed and reversed and remanded "to the trial court for further proceedings." *In re D.C.*, ___ N.C. App. ___, 752 S.E.2d 257 (No. COA13-502) (Oct. 15, 2013) (unpublished) (citation and quotation marks omitted). Now that we reconsider the Permanency Planning Order in light of our Supreme Court's directives in *L.M.T.*, the Permanency Planning Order standing alone remains deficient, but we must reconsider it in conjunction with the TPR Order.

The 18 April 2012 Permanency Planning Order that ceased reunification made general findings regarding respondent's lack of complete compliance with her drug treatment program. The trial court also made numerous positive findings of fact regarding respondent's completion of parent-child therapy, her strong bond with Derrick, her attendance of her individual therapy sessions including progress with her goals, her enrollment in college, her maintenance of weekly visits and regular phone calls with Derrick wherein her interactions were "positive and appropriate[,]" and her claimed attendance to substance abuse treatment. In this regard, as far as we can tell from the trial court's orders, this situation was different from that presented by *L.M.T.*, in which even the permanency planning order alone showed that the respondent continued to

have a drug problem that had worsened over time, lived in an environment involving serious domestic violence, and had also received an eviction notice from her current home. *Id.* at ___, 752 S.E.2d at 455-56. The trial court found in the "cease reunification order" in *L.M.T.* that

> the Respondent Mother was sinking deeper and deeper into an abyss of domestic violence and drug abuse all the while covering it up and refusing to acknowledge the fact of its existence in order that the Court, the Department, the Guardian ad Litem and others surrounding her could assist her and help the juveniles. The deception of the Court during this process is bad enough, but the Respondent Mother has completely let her children down.

Id. at ___, 752 S.E.2d at 455-56 (emphasis added).

In *L.M.T.*, the Supreme Court determined that the "cease reunification order" alone was sufficient to satisfy the requirements of North Carolina General Statute § 7B-507(b), but went on to address the termination of parental rights order as well. *Id.* at ___, 752 S.E.2d at 455-58. Specifically, the Supreme Court stated:

> *Even if the cease reunification order standing alone had been insufficient, that would not end the appellate court's inquiry.* Parents may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B–1001(a)(5)(a), which provides that
>
> a. The Court of Appeals shall review [an] order [entered under section 7B–507] to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
>   1. A motion or petition to terminate the parent's rights is heard and granted.
>
>   2. The order terminating parental rights is appealed in a proper and timely manner.
>
>   3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.
>
> *Id.* § 7B–1001(a)(5) (2011). In other words, if a termination of parental rights order is entered, the appeal of the

> cease reunification order is combined with the appeal of the termination order.

Id. at ___, 752 S.E.2d at 456.

As noted above, the Permanency Planning Order is insufficient, standing alone, to satisfy the requirements of North Carolina General Statute § 7B-507(b)(1). Accordingly, as directed by *L.M.T.*, we turn to the TPR Order to see if the findings of fact in that order in conjunction with the Permanency Planning Order which ordered a permanent plan of adoption would satisfy the requirements of North Carolina General Statute § 7B-507(b)(1). *See id.* at ___ 752 S.E.2d at 456-57. In the TPR Order, the trial court made additional detailed findings of fact regarding respondent's drug abuse and failures of treatment, going back to February of 2010 and continuing up to the time of the hearing on termination of parental rights. It is apparent, reading the Permanency Planning Order and TPR Order together, that respondent continued in her pattern of attempts at recovery from her substance abuse problems and relapsing into abuse. Respondent does not challenge the sufficiency of the evidence to support the findings of fact in either order. Based upon all of the findings, considering the two orders together, "the order[s] embrace[] the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *Id.* at ___, 752 S.E.2d at 456-57 (citation and quotation marks omitted).

In addition, we note that the Permanency Planning Order did not order DSS to cease its reunification efforts with respondent, despite changing the permanent plan to adoption; thus, respondent had the benefit of continued access to the services and assistance of DSS in attempting to correct the conditions which led to the child's removal even though the permanent plan had been changed to adoption. In this situation, the deficiencies of the Permanency Planning Order did not impair respondent's ability to improve her situation prior to the hearing on termination of parental rights. As such, this argument is overruled.

III. TPR Order

[2] Respondent also contends that the trial court "abused its discretion by concluding that the best interest of the minor child would be served by termination of the respondent-mother's parental rights." (Original in all caps.) Respondent does not challenge the grounds for termination but solely whether the trial court properly considered whether termination of her parental rights was in Derrick's best interests. We review the

trial court's determination of what is in the best interests of the child for abuse of discretion. *Id.* at ___, 752 S.E.2d at 457.

North Carolina General Statute § 7B-1110(a) provides,

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2013). Defendant contends that the trial court failed to properly consider and make findings of fact regarding factors 3, 4, and 5 in North Carolina General Statute § 7B-1110(a).

As to "[w]hether the termination of parental rights will aid in the accomplishment of the permanent plan[,]" *id.*, for Derrick the trial court found:

> b. Termination of Respondent's parental rights is necessary to implement the permanent plan of adoption.
>
> c. Termination of Parental Rights is the only barrier to the adoption of the child.

As to "[t]he bond between the juvenile and the parent[,]" while the trial court may not have used the exact word "bond" it did find that Derrick "is approximately five and one-half (5 ½) years old and has been in foster care for over two years[,]" indicating that Derrick could not have had a

strong bond with respondent as he would barely, if at all, have remembered her as his primary guardian. The trial court further found that Derrick "was happy to see his siblings and Mr. Johnson[, prospective adoptive father,] and did not want to leave when the visit ended" indicating that Derrick's primary bond is with the prospective adoptive family and not respondent. As to "[t]he quality of the relationship between the juvenile and the proposed adoptive parent[,]" *id.*, the trial court found that the prospective adoptive parents "are willing to adopt [Derrick] and have him as a part of their large and loving family." As the trial court considered the appropriate factors, we conclude that the trial court did not abuse its discretion in determining termination of respondent's parental rights was in Derrick's best interests. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm both the Permanency Planning Order and the TPR Order.

AFFIRMED.

Judges McGEE and BRYANT concur.

IN THE MATTER OF THE APPEAL OF INTERSTATE OUTDOOR INCORPORATED FROM THE DECISION OF THE JOHNSTON COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATION OF CERTAIN BUSINESS PERSONAL PROPERTY FOR TAX YEAR 2012

No. COA14-223

Filed 16 September 2014

Taxation—ad valorem taxes—billboards—valuation method not arbitrary or illegal

The Property Tax Commission did not err by affirming ad valorem tax assessments for 2011 and 2012 made by Johnston County regarding sixty-nine billboards that Interstate Outdoor Incorporated (Interstate) owned. Interstate failed to produce substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

Appeal by Interstate Outdoor Incorporated from Final Decisions entered on or about 19 September 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 August 2014.

Spence & Spence, P.A., by Robert A. Spence, for appellant Interstate Outdoor Incorporated.

David F. Mills, P.A., by David F. Mills, for appellee County of Johnston.

STROUD, Judge.

Interstate Outdoor, Inc. ("Interstate") appeals from two final decisions of the Property Tax Commission. It argues that the Commission erroneously affirmed *ad valorem* tax assessments for 2011 and 2012 made by Johnston County regarding 69 billboards it owns. We affirm the Commission's decisions because Interstate failed to produce substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

I. Background

Interstate is a corporation that owns and rents out billboards in 40 counties in North Carolina, including approximately 80 billboards in Johnston County. Interstate appealed Johnston County Tax Administration's valuation of 60 billboards it owned in Johnston County for tax years 2011 and 2012, as well as nine new billboards it bought in 2012. For tax year 2011, the county valued Interstate's property at $2,547,577. Interstate asserts its property was actually worth $1,923,746. For tax year 2012, the county valued Interstate's property at $2,786,200. Interstate asserted that its property was actually worth $1,790,691. To value the billboards, Johnston County relied on the Billboard Structures Valuation Guide published by the North Carolina Department of Revenue, which is updated annually.

On appeal to the Property Tax Commission, Interstate argued that the county had significantly overestimated the value of its property and introduced what it considered the proper estimate for each billboard. To do so, it asked one of its normal billboard contractors for ten quotes on different types of billboards. It then used one of the ten quotes for each of the billboards of contested value. Additionally, Interstate highlighted that the 2011 and 2012 tax values were approximately eighteen percent higher than those for 2010. In 2010, Interstate had appealed the valuation of its billboards. The parties reached a negotiated settlement, which valued its property at $1,923,746. Interstate argued that the value should remain the same for the 2011 and 2012 tax years.

The Property Tax Commission found that Interstate failed to show that the quotes it used "included all the costs that make the property ready for its intended uses," or a substantial connection between the quotes and the actual costs of constructing the billboards at issue. It therefore affirmed Johnston County's valuation for both tax years, with one dissent. Interstate timely appealed to this Court.

II. Standard of Review

In reviewing the decision of the Property Tax Commission,

> the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105–345.2(b) (2011). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105–345.2(c).

> The court may not consider the evidence which in and of itself justifies the Commission's decision without also taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn. . . . Therefore, under N.C. Gen. Stat. § 105–345.2(b), questions of law receive de novo review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test.

In re Blue Ridge Housing of Bakersville LLC, ___ N.C. App. ___, ___, 738 S.E.2d 802, 807 (citations, quotation marks, ellipses, and brackets omitted), *app. dismissed and rev. allowed*, ___ N.C. ___, 747 S.E.2d 526 (2013), *disc. rev. improvidently allowed*, ___ N.C. ___, 753 S.E.2d 152 (2014). "If the court finds substantial evidence to support the Commission's decision, the Commission's decision may not be overturned." *Matter of Moses H. Cone Memorial Hosp.*, 113 N.C. App. 562, 571, 439 S.E.2d 778, 783 (1994), *aff'd in part*, 340 N.C. 93, 455 S.E.2d 431 (1995).

III. Analysis

Although Interstate frames its arguments on appeal as four distinct issues, in reality, it raises but one. In essence, it argues that the County used an illegal and arbitrary method of valuation because it followed the Department of Revenue schedules for the valuation of billboards without taking into account local conditions in Johnston County.

> A county's *ad valorem* tax assessment is presumptively correct. However, the taxpayer may rebut this presumption by presenting competent, material, and substantial evidence that tends to show that (1) either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably* high.
>
> Once the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values. The critical inquiry in such instances is whether the County's appraisal methodology is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value. To determine the appropriate appraisal methodology under the given circumstances, the Commission must hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.

In re Parkdale Mills, ___ N.C. App. ___, ___, 741 S.E.2d 416, 419-20 (2013).

Thus, we must first consider whether there is substantial evidence in the record, considering it as a whole, to support the Commission's conclusion that Interstate failed to carry its burden of showing that Johnston County used an arbitrary or illegal method of valuation.

N.C. Gen. Stat. § 105-291(g) (2011) authorizes the Department of Revenue to "develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation." The Local Government Division of the Department of Revenue created a Billboard Structures Valuation Guide ("Billboard Guide") for tax years 2011 and 2012. Johnston County used the guide to appraise Interstate's billboards for the relevant tax years.

The Billboard Guide recommended applying a replacement cost approach to valuation because of the difficulty of acquiring the information necessary to accurately value billboards using either the income or sales comparison approaches.[1] The schedule was created based on data "extracted from material costs, labor, and other integral components of billboard construction." George Hermane, the personal property manager for Johnston County Tax Administration, testified that use of a sales or income approach would not be possible because the necessary information is not normally available. As a result, the Billboard Guide suggests that "[t]he valuation of each sign . . . be determined by calculating the replacement cost new (RCN) and then deducting depreciation based on an effective age depreciation schedule."

The Billboard Guide divides billboards into four general categories: (1) wood structures, (2) steel "A-Frame" structures, (3) multi-mast structures, and (4) monopole structures. It then further divides the various classes of billboards into subclasses based on the size, height, and number of panels and design. The Billboard Guide also established special guidelines for electronic displays, tri-fold, and tri-vision billboards. Each one of these categories is assigned an RCN value. There is also a schedule of depreciation which takes into account the age of the billboard.

"The use of schedules of values and rules of application not only makes the valuation of a substantial number of [pieces] of property feasible, but also ensures objective and consistent countywide property valuations and corollary equity in property tax liability." *In re Allred*,

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1. Replacement cost is a valid method of appraising personal property under N.C. Gen. Stat. § 105-317.1(a)(1) (2011).

351 N.C. 1, 10, 519 S.E.2d 52, 58 (1999). Nevertheless, use of a schedule alone "does not prove that the valuation and assessment of the subject property was itself not arbitrary." *In re Lane Company-Hickory Chair Div.*, 153 N.C. App. 119, 125, 571 S.E.2d 224, 228 (2002).

Here, Interstate argues the use of the Billboard Guide in Johnston County is arbitrary and illegal because it fails to take into account the wind load and soil conditions in the area, which could affect construction costs. But "the fact that independent valuations of each [piece of personalty] might be more accurate than a mass appraisal does not make the county's method arbitrary. Considerations of practicality must enter into the choice of method." *Appeal of Wagstaff*, 42 N.C. App. 47, 49, 255 S.E.2d 754, 756 (1979). As our Supreme Court noted in *McLean Trucking*, "[t]he task of examining and appraising each of the thousands of [pieces of personalty in a given class] would be almost impossible." *In re McLean Trucking Co.*, 281 N.C. 375, 387-88, 189 S.E.2d 194, 202 (1972) (citation, quotation marks, and brackets omitted), *app. dismissed and cert. denied*, 409 U.S. 1099, 34 L.Ed. 2d 681 (1973).

"To avoid this, the County is justified in using some recognized dependable and uniform method of valuing them." *Id.*; *see also Appeal of Bosley*, 29 N.C. App. 468, 471-72, 224 S.E.2d 686, 688 (noting that "[t]he difficulty of estimating the value of household property makes it impossible to appraise each item of such property precisely at actual market value"), *disc. rev. denied*, 290 N.C. 551, 226 S.E.2d 509 (1976). "A uniform and dependable method of property appraisal which gives effect to the various factors that influence the market value of property and results in equitable taxation does not violate the appraisal provisions of the Machinery Act." *Bosley*, 29 N.C. App. at 472, 224 S.E.2d at 688. Indeed, N.C. Gen. Stat. § 105-317.1(a) specifically permits an appraiser of personal property to appraise either "each item" or a "lot of similar items." Interstate is not the only owner of billboards in Johnston County and it alone owns more than 80 billboards in various locations across the county. The impracticality of assessing each and every billboard based on the precise soil conditions at its base and wind load is a valid consideration for the county. *See Wagstaff*, 42 N.C. App. at 49, 255 S.E.2d at 756.

Interstate presented various invoices for what it considered "similar" signs in an attempt to demonstrate the application of the Billboard Guide did not result in the true value of the billboards. But these quotes were not for the particular signs at issue. Interstate requested 10 estimates to use for all of the signs. It then used the estimates to argue that what it considered similar signs should be valued at the amount quoted.

The estimates produced by Interstate often used dimensions that did not match the actual billboards. Interstate used quotes for smaller billboards to provide estimates for larger billboards, some significantly so. For instance, Interstate estimated the replacement costs for one 12'x 40' sign that is 65' tall using a quote for a billboard 10'6" by 40' and 40' tall.

Moreover, we note that Interstate's prices are based on estimates provided by one of its regular suppliers. Mr. Hermane explained that in "outdoor advertising . . . the structures are sold in bulk transfers and often through other agreements that would throw off the valuation."

> The appraisal of property for taxation cannot be made to depend upon the number of units of similar properties owned by the taxpayer or upon the varying abilities of the several taxpayers to negotiate for favorable terms in buying or selling such units. To hold otherwise would depart from the principle of equality of appraisal which is fundamental in the Machinery Act.

In re McLean Trucking Co., 281 N.C. at 387, 189 S.E.2d at 202. Thus, there was substantial reason to doubt that the quotes reflected the true value of the billboards.

Additionally, Interstate argues that it should have been evident to the Commission that the 2011 and 2012 appraisals were arbitrary and illegal because they were so much higher than the 2010 appraisal. But the 2010 appraisal was a compromise reached between the parties for that tax year. Interstate cites no case holding that a settlement concerning a prior tax year is substantial evidence that the appraisal should remain the same into the future.

Given these facts, it was not illegal or arbitrary for Johnston County to appraise Interstate's billboards in bulk. The method followed by Johnston County took into account the relevant properties of the billboards, such as their size, design, and age. Interstate has failed to show that the method prescribed by the Billboard Guide produces a value significantly higher than the true value. Therefore, we affirm the Property Tax Commission's Final Decisions as to both the 2011 and 2012 tax years.

IV. Conclusion

We affirm the Commission's final decisions regarding both the 2011 and 2012 tax years because Interstate failed to present substantial evidence that the valuation method used by Johnston County was arbitrary or illegal.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

KAYLA J. INMAN
v.
CITY OF WHITEVILLE, A MUNICIPALITY INCORPORATED UNDER THE LAWS OF THE STATE OF NORTH CAROLINA

NO. COA14-94

Filed 16 September 2014

Negligence—public duty doctrine—investigation of motor vehicle accident—no duty to individual

The trial court did not err by dismissing plaintiff's negligence claim against the City of Whiteville based on the public duty doctrine. The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. This case fell within the scope of the public duty doctrine and plaintiff did not allege the applicability of either the special relationship or the special duty exceptions to the public duty doctrine.

Appeal by plaintiff from order entered 2 August 2013 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 5 June 2014.

Lee & Lee, Attorneys, by Junius B. Lee, III, for plaintiff-appellant.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, and Williamson Walton & Scott, LLP, by Carlton F. Williamson, for defendant-appellee.

DAVIS, Judge.

Kayla J. Inman ("Plaintiff") appeals from the trial court's order dismissing her complaint against the City of Whiteville ("the City") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, she contends that the trial court erred in dismissing her complaint based on the public duty doctrine. After careful review, we affirm the trial court's order.

Factual Background

We have summarized the pertinent facts below using the statements contained in Plaintiff's complaint, which we treat as true when reviewing an order dismissing a complaint pursuant to Rule 12(b)(6). *See Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

On 12 September 2011, Plaintiff was involved in a motor vehicle accident near the intersection of South Madison Street and East Hayes Street in Whiteville, North Carolina. Plaintiff was "run off the road" by another motorist, and Plaintiff and her passenger suffered significant injuries arising from the accident. Officer Donnie Hedwin ("Officer Hedwin") of the Whiteville Police Department was called to the scene to investigate the accident. Officer Hedwin spoke with the other motorist but did not ascertain his identity or include his name in the accident report. When questioned about this omission, Officer Hedwin and his supervisor, Sergeant Mark McGee, both stated that the accident had not been investigated further because there had been no physical contact between the two vehicles.

On 30 April 2012, Plaintiff filed a complaint against the City in Columbus County Superior Court alleging that Officer Hedwin and Sergeant McGee, who were agents of the City acting in the course and scope of their employment, were negligent in their investigation of the accident, primarily because they failed to ascertain the identity of the other motorist. Plaintiff asserted that "[b]ased upon the failure of the officers to properly and completely investigate, the identity of the party responsible for this accident has not been determined" and that "[b]ut for the negligent acts of [the City], by and through its employees, the plaintiff could have and would have maintained an action against the unknown driver of the second vehicle for her damages."

On 7 August 2012, the City filed an answer and motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The City's motion to dismiss came on for hearing on 15 July 2013, and the trial court entered an order dismissing Plaintiff's complaint on 2 August 2013. Plaintiff filed a timely notice of appeal to this Court.

Analysis

> When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the

> allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6).

Horne v. Cumberland Cty. Hosp. Sys., Inc., ___ N.C. App. ___, ___, 746 S.E.2d 13, 16 (2013) (internal citations and quotation marks omitted).

In order to successfully assert a claim for negligence, a plaintiff must allege that the defendant owed a legal duty to her. *See Derwort v. Polk Cty.*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 381 (1998) ("It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff." (citation and quotation marks omitted)). "[I]n the absence of any such duty owed [to] the injured party by the defendant, there can be no liability [and] when the public duty doctrine applies, the government entity, as the defendant, owes no legal duty to the plaintiff." *Scott v. City of Charlotte*, 203 N.C. App. 460, 464, 691 S.E.2d 747, 750-51 (citations, quotation marks, brackets, and emphasis omitted), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (2010).

The public duty doctrine, adopted by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), provides that "when a governmental entity owes a duty to the general public . . . individual plaintiffs may not enforce the duty in tort." *Strickland v. Univ. of N.C. at Wilmington*, 213 N.C. App. 506, 508, 712 S.E.2d 888, 890 (2011) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 720 S.E.2d 677 (2012). Application of this doctrine has traditionally arisen in cases in which a plaintiff asserts a negligence claim alleging that a law enforcement officer breached his duty to protect a victim from a third party's criminal act and that this failure caused the victim's injury or death. *Id.* at 508-09, 712 S.E.2d at 890.

In such scenarios, the municipality is generally insulated from liability because in providing police protection, "[the] municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Accordingly, "while the law

enforcement agency owes a 'duty to protect' the public at large, individual members of the public as plaintiffs generally may not enforce that duty in tort." *Strickland*, 213 N.C. App. at 509, 712 S.E.2d at 890.

The Supreme Court has, however, recognized two specific exceptions to the public duty doctrine:

> (1) where there is a special relationship between the injured party and the police, for example a state's witness or informant who has aided law enforcement officers; and
>
> (2) when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (citation and quotation marks omitted).

Our Supreme Court has made clear that with regard to local governments, the public duty doctrine only extends to actions taken in the exercise of their general duty to protect the public. *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) ("While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public." (internal citations omitted)); *see also Wood v. Guilford Cty.*, 355 N.C. 161, 169, 558 S.E.2d 490, 496 (2002) (explaining that public duty doctrine "retains limited vitality, as applied to local government, within the context of government's duty to protect the public generally, which is necessarily limited by the resources of the local community" (internal citations, quotation marks, and brackets omitted)). The public duty doctrine "acknowledges the limited resources of law enforcement and works against judicial imposition of an overwhelming burden of liability." *Little v. Atkinson*, 136 N.C. App. 430, 432, 524 S.E.2d 378, 380, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

This Court has applied the public duty doctrine to limit the liability of municipalities and their law enforcement agencies in circumstances beyond the "classic example of . . . a negligence claim alleging a law enforcement agency's failure to protect a person from a third party's criminal act." *Strickland*, 213 N.C. App. at 508, 712 S.E.2d at 890. Indeed,

we have applied the doctrine where — as here — the allegations of negligence stem from a law enforcement officer's handling of a motor vehicle accident. For example, in *Lassiter v. Cohn*, 168 N.C. App. 310, 607 S.E.2d 688, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005), we concluded that the public duty doctrine shielded the City of Durham and one of its police officers from liability in an action arising out of the officer's allegedly negligent management and control of a multi-vehicle accident scene. We reasoned that imposing liability upon the city and its officer, who was "fulfilling her general duties owed when responding to the many and synergistic elements of a traffic accident. . . . is exactly that which the public duty doctrine seeks to alleviate." *Id.* at 318, 607 S.E.2d at 693.

In *Scott*, we held that the public duty doctrine barred the plaintiff's negligence claim against the City of Charlotte where officers of the Charlotte-Mecklenburg Police Department had pulled over an individual, David Scott ("Mr. Scott"), on suspicion of impaired driving, determined that he was "physically impaired in some respect," been informed that Mr. Scott had suffered a stroke during the past year, and failed to call for medical assistance. *Scott*, 203 N.C. App. at 464, 691 S.E.2d at 750. Mr. Scott later collapsed in the parking lot as he was waiting for the plaintiff, his wife, to pick him up and died the following day. *Id.* at 462-63, 691 S.E.2d at 749-50.

The plaintiff filed a complaint against the City of Charlotte alleging that the officers were negligent in failing to summon medical assistance for Mr. Scott. *Id.* at 463, 691 S.E.2d at 750. We concluded that the City of Charlotte was entitled to summary judgment in its favor based on the public duty doctrine because the officers "were engaged in their general law enforcement duty to protect the public from an erratic driver who they believed could be intoxicated" when they made the discretionary decision not to call for medical assistance, thereby indirectly harming Mr. Scott. *Id.* at 468, 691 S.E.2d at 752.

In both *Lassiter* and *Scott*, this Court recognized that the plaintiffs' claims arose from circumstances in which the local governments at issue, through their law enforcement officers, were engaged in their general duty of protecting the public and that, consequently, they were shielded from liability by the public duty doctrine. *See id.* at 467, 691 S.E.2d at 752 ("*Braswell* and its progeny have not wavered from the general principle that when a police officer, acting to protect the general public, indirectly causes harm to an individual, the municipality that employs him or her is protected from liability.").

Here, Plaintiff's negligence claim is premised on the manner in which a motor vehicle accident was investigated by law enforcement officers. Specifically, Plaintiff has alleged that Officer Hedwin and his supervisor "failed in their obligation and duty to perform competent law enforcement services in that they failed to determine both the responsible party [for] this [accident] and the facts indicating his responsibility." The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. *See Lassiter*, 168 N.C. App. at 320, 607 S.E.2d at 694 (describing officer's interview with parties involved in car accident as "general investigatory dut[y]"); *see also* N.C. Gen. Stat. § 20-166.1 (2013) (requiring police department of city or town to investigate "a reportable accident" and "make a written report of the accident within 24 hours of the accident"). As such, the circumstances at issue in this case fall within the scope of the public duty doctrine.

In attempting to avoid the application of the public duty doctrine, Plaintiff relies heavily on our decision in *Strickland*. However, *Strickland* is clearly distinguishable from the present case.

In *Strickland*, the plaintiff's son ("the decedent") was mistakenly shot and killed by a member of the New Hanover County Emergency Response Team (the "ERT") during an attempt to serve a warrant for the decedent's arrest. The University of North Carolina at Wilmington Police Department ("UNC-W Police Department") was investigating the decedent for an assault and theft on the university's campus and had requested the ERT's assistance in serving the arrest warrant on him. *Strickland*, 213 N.C. App. at 506-07, 712 S.E.2d at 889. The shooting occurred when an ERT member mistook for a gunshot the sound of a battering ram striking the door of the decedent's residence and fired his weapon into the residence. *Id.* The plaintiff filed a wrongful death suit against the University of North Carolina at Wilmington ("UNC-W") and the UNC-W Police Department, alleging that officers of the UNC-W Police Department "negligently provided false, misleading, and irrelevant information to . . . ERT members" in order to secure their assistance in executing the warrant. *Id.* at 507, 712 S.E.2d at 889. The plaintiff further alleged that this false information, which included statements that the decedent was involved in gang activity and known to be armed and dangerous, "proximately caused [the decedent's] death by leading ERT members to believe that they were entering into . . . a severely dangerous environment including heavily armed suspects with histories of intentional physical violence causing injuries to persons." *Id.*

In concluding that the public duty doctrine did not insulate UNC-W and its police department from liability, we explained that the duty of a law enforcement officer "not to negligently provide false and misleading information . . . during a criminal investigation" did not "resemble the types of duties to the general public for which the public duty doctrine normally precludes liability." *Id.* at 511-12, 712 S.E.2d at 892. In particular, we emphasized that

> [i]n all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or of the effects of such a force. *See, e.g.*, *Myers*, 360 N.C. 460, 628 S.E.2d 761 (negligent control of a forest fire not started by fire fighting agency); *Wood v. Guilford Cty.*, 355 N.C. 161, 558 S.E.2d 490 (2002) (failure to prevent third party's criminal act on county property); *Stone*, 347 N.C. 473, 495 S.E.2d 711 (failure to ensure plant worker's ability to escape plant fire not started by inspection agency); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (negligent inspection of amusement ride prior to ride's malfunction, which was not caused by the inspection); *Braswell*, 330 N.C. 363, 410 S.E.2d 897 (failure to prevent a third party's criminal act). In this case, however, the alleged breach is not a negligent action with respect to some external injurious force. Rather, the UNC-W police department's act of negligently providing misleading and inaccurate information *was itself the injurious force.*

Id. at 512, 712 S.E.2d at 892 (emphasis added and footnote omitted).

Here, unlike in *Strickland* in which "UNC-W police officers' negligent provision of inaccurate information *brought about* the ERT member's decision to fire his weapon through [the decedent's] front door," *id.* at 514, 712 S.E.2d at 893, Officer Hedwin's alleged negligence in failing to ascertain the other motorist's identity did not bring about the physical injuries, medical bills, lost wages, and pain and suffering alleged in Plaintiff's complaint. Instead, Plaintiff is alleging that Officer Hedwin negligently failed to properly investigate an accident caused by "an external injurious force" — namely, the third-party motorist who ran her vehicle off the road. Accordingly, as in *Lassiter*, the public duty doctrine shields the City from liability arising from Officer Hedwin's investigation of the accident. *See Lassiter*, 168 N.C. App. at 321, 607 S.E.2d at 695 (concluding that officer's management of accident scene "fell completely within Durham's immunization of performing a public duty").

Finally, because Plaintiff has not alleged the applicability of either the special relationship exception or the special duty exception to the public duty doctrine, we decline to address the potential applicability of these exceptions. *See Myers v. McGrady*, 360 N.C. 460, 468-69, 628 S.E.2d 761, 767 (2006) (declining to address exceptions to public duty doctrine where plaintiffs did not raise them); *Rev O, Inc. v. Woo*, ___ N.C. App. ___, ___, 725 S.E.2d 45, 52 (2012) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." (citation and quotation marks omitted)). As such, Plaintiff's negligence claim against the City is barred by the public duty doctrine, and the trial court therefore properly granted the City's motion to dismiss.

Conclusion

For the reasons stated above, the trial court's 2 August 2013 order is affirmed.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

Judge HUNTER, JR. concurred in this opinion prior to 6 September 2014.

STEPHEN C. NICHOLSON, Individually and as Administrator of the Estate of Geraldine Anne Nicholson, Plaintiff
v.
ARLEEN KAYE THOM, M.D., Defendant

No. COA13-1053

Filed 16 September 2014

1. Appeal and Error—mootness—production of medical records—not introduced—used during questioning

In a negligence action against a surgeon who had suffered a back and arm injury, defendant's appeal from a trial court order allowing the production of her medical and pharmaceutical records was not moot even though the subpoenaed documents were never entered into evidence. The result of the production of defendant's records was the extensive use of those documents during plaintiff's

questioning of defendant, which remained in controversy between the parties.

2. Appeal and Error—standard of review—use of material protected by physician-patient privilege—abuse of discretion

In a negligence action against a surgeon who had suffered a back and arm injury, the standard of review for issues involving the production and use of the surgeon's medical records was abuse of discretion. The parties did not dispute the protection of the records by the physician-patient privilege, which would have meant de novo review, but contested the trial court's decisions concerning the production and use of those documents during the questioning of defendant. Challenging a trial court's decision that the administration of justice requires the disclosure of information protected by the physician-patient privilege requires a showing of abuse of discretion.

3. Discovery—motion to quash—subpoenas duces tecum—not improper discovery

Subpoenas duces tecum for the medical records of a surgeon were not issued for an improper fishing expedition where the documents produced were not introduced at trial in a negligence action against the surgeon. The trial court had determined in a pre-trial hearing that the records would not be admitted, plaintiff's attorneys did not have the opportunity to inspect the documents before the trial's court's determination that some should be produced, and the trial court's decision that some of the requested records were sufficiently relevant to require production to plaintiff but not admission as substantive evidence was neither arbitrary nor manifestly unsupported by reason.

4. Discovery—subpoenas duces tecum—defendant's medical records—HIPPA violations

To the extent plaintiff's subpoenas duces tecum for the medical records of a surgeon in a negligence action did not comply with the HIPPA regulations, those violations should be charged against the covered entities that provided those records, not against plaintiff.

5. Appeal and Error—settlement of record—presumption of correctness

In an appeal that involved the discovery of a surgeon's medical records, the trial court was presumed to have correctly produced documents to plaintiff where the settlement of the record left no way to determine whether the documents in defendant's supplement

to the record were the same documents that the trial court turned over to plaintiff at trial.

6. Evidence—medical negligence—physician's use of pain killers—relevant and not prejudicial

The trial court did not abuse its discretion on relevance or prejudice issues in a medical negligence case where it allowed a line of questions about a surgeon's use of prescription drugs after an injury, with her medical records used as a basis for the questions. Plaintiff's questions elicited relevant testimony concerning defendant surgeon's use of pain medicines and their side effects.

7. Medical Malpractice—surgeon's medications—side effects—expert testimony—not needed

Expert testimony was not required in a medical negligence action to establish the side effects of drugs taken by defendant surgeon after an injury and during the general time period when this surgery occurred. A sponge was left in decedent's abdominal cavity after the surgery; when the standard of care is established pursuant to res ipsa loquitur, as here, expert testimony is not necessary to establish the relevant standard of care.

8. Evidence—hearsay—information told to counsel by pharmacist—not used to prove the truth of the matter

In a negligence action against a surgeon who took medications after an injury, plaintiff's reference when questioning defendant to information plaintiff's counsel had obtained from the local pharmacist about side effects did not constitute inadmissible hearsay. Plaintiff's questions were not asked to establish the truth of the warnings obtained from the pharmacist but to elicit defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery.

9. Medical Malpractice—standard of care—expert testimony—not required—sponge left inside body

In a negligence action against a surgeon, expert testimony about the standard of care was not necessary when plaintiff asked the surgeon whether she had a "legal duty" to advise the decedent regarding defendant's use of medications prior to the surgery. In this case, an inference of a lack of due care was raised because a sponge was left in the decedent's body; furthermore, the cited portions of the transcript did not indicate that counsel for plaintiff ever used the phrase "legal duty" when examining defendant.

10. Evidence—collateral source rule—voluntary forgiveness of debt by hospital—rule not applicable

The collateral source rule was not applicable in a medical malpractice action and the trial court erred by failing to admit evidence of the hospital system's write-offs. The bills were forgiven by the hospital of its own accord as a business loss; the paying party was not independent and not collateral to the matter. It was noted that this action was begun in 2008, before the effective date of N.C.G.S. § 8C-1, Rule 414, which abrogated the collateral source rule.

11. Damages and Remedies—instructions—permanent injury—improper for deceased victim

It was noted that the trial court's instruction on permanent injury in a medical malpractice action was erroneous in light of the fact that the decedent was not alive at the time of the trial and plaintiff (her estate) did not bring suit for wrongful death. The purpose of the permanent injury instruction is to compensate the plaintiff for additional future harm such as impaired earning capacity or pain.

Appeal by Defendant from Judgment entered 16 October 2012 and Order entered 19 December 2012 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 19 February 2014.

Comerford & Britt, L.L.P., by John A. Chilson and Clifford Britt, and Musselwhite, Musselwhite, Branch & Grantham, by James W. Musselwhite, for Plaintiff.

Yates McLamb and Weyher, L.L.P., by Dan McLamb and Andrew C. Buckner, for Defendant.[1]

STEPHENS, Judge.

Background

This case arises from claims of negligence and loss of consortium brought on 21 May 2008 by Plaintiff Stephen C. Nicholson, administrator of the estate of his wife Geraldine Anne Nicholson ("the decedent"). Prior to 28 June 2005, at the age of fifty-four, the decedent began experiencing heavy rectal bleeding. It was later discovered that she had a cancerous tumor in her rectum. Plaintiff's claims stem from a surgical procedure performed by Defendant Arleen Kaye Thom, M.D., to remove the tumor.

1. Different counsel represented Defendant at trial.

The surgery was performed at Cape Fear Valley Medical Center ("Cape Fear") on 28 June 2005. At the time of the surgery, Defendant was a general surgeon with special training and experience in performing cancer surgery. In order to remove the tumor, Defendant made a large abdominal incision to expose the decedent's bowels, a separate incision to completely remove the rectum and anus, and inserted a colostomy bag to allow stool to pass through the abdominal wall.

The decedent's post-surgical treatment included chemotherapy and radiation therapy. Over the next few weeks, as the treatment was beginning, the decedent started to get unusually sick. She had problems with nausea and diarrhea that led to abnormalities with her body chemistry. She got weaker and was readmitted to Cape Fear for weakness, inability to eat, diarrhea, and problems with electrolytes. On 31 August 2005, two months and twenty-six days after the surgery, an X ray revealed a retained surgical sponge in the right lower quadrant of the decedent's abdomen.

One week later, on 7 September 2005, an additional operation was performed to remove the sponge. The middle part of the decedent's abdomen was reopened, and the sponge was removed. According to expert testimony offered on Plaintiff's behalf, the surgery revealed that "there was a perforation of the bowel [and] the [retained sponge] was contaminated with intestinal contents. There was an abscess[2] around [the sponge and] dense adhesions[3] all the way around." As a result, the surgeon removed a section of the decedent's bowel, spent forty-five minutes dividing the scar tissue that was nearby, and ultimately removed the sponge. The surgeon did not close the skin around the abdominal wall because of "the amount of infection that was present."[4]

After the September surgery, the decedent received additional care for the open wound. She also underwent multiple additional surgeries between September 2005 and February 2006. The first of these additional surgeries was an attempt to close the abdominal wound resulting from the previous surgery. This surgery failed, and another surgery was required to complete that procedure. The decedent also needed a third operation, according to Plaintiff's expert, "because she developed

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2. The expert testified that an abscess is "the combination of bacteria together with the body's inflammatory cells."

3. An adhesion is "scar tissue."

4. Specifically, the surgeon "was able to close the inner layer [of the abdominal wound, but] he was not able to close the subcutaneous fat and the skin . . . ."

progressive blockage of her intestines from the scar tissue that was related to the sca[r]ring from the sponge." A fourth operation was later required to repair leakage resulting from the third surgery. Lastly, the decedent required surgery to address an infection of the skin. Plaintiff's expert testified that all of these surgeries were necessary as a result of the retained sponge.

The expert also testified that the decedent was not able to complete her chemotherapy and radiation therapy as a result. The decedent's cancer returned in July of 2006 and metastasized to her brain. From the date of her admission to Cape Fear on 31 August 2005 to the date of her death in 2006, the decedent changed hospitals, "but she never left a hospital bed." She died in 2006 as a result of the cancer.

In his complaint, Plaintiff alleged that Defendant negligently failed to remove the surgical sponge from the decedent's abdomen and, in failing to do so, caused much of "the damage[] sustained by the dece[dent] prior to her death[.]" Specifically, Plaintiff contended that Defendant's actions directly and proximately damaged the decedent in the form of medical bills, pain and suffering, scarring and disfigurement, "multiple additional medical impairments," "multiple additional surgical procedures," 401 days of life spent in the hospital, and an inability to complete recommended cancer treatments leading to a "shortened life expectancy." Plaintiff also brought a cause of action for loss of consortium, asserting that Defendant's alleged negligence caused "a loss and disruption of the marital relationship" he had enjoyed with the decedent, including "the loss and disruption of her marital services, society, affection, companionship and/or sexual relations." Plaintiff did not bring a cause of action for wrongful death. Defendant denied the material allegations of Plaintiff's complaint by answer filed 30 July 2008.

During discovery Plaintiff learned that Defendant had been "disabled" since the middle of August 2005. As a result, Plaintiff served a second request for production of documents on 8 January 2010, seeking a copy of Defendant's application for disability benefits, correspondence regarding that claim, and a copy of all of Defendant's medical records "that relate or pertain to [a disability] in her left arm that she sustained on or about" 17 August 2005. Plaintiff served a third[5] set of interrogatories on Defendant that same day, seeking the "full details" of the 17 August 2005 injury to Defendant's arm. Defendant objected to

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5. In his brief, Plaintiff appears to refer to these interrogatories as his "[s]econd [s]et of [i]nterrogatories." The supplemental record indicates, however, that the interrogatories at issue were Plaintiff's "third set," not his second.

these discovery requests on 10 February 2010. One week later Plaintiff filed a motion to compel Defendant to respond to the challenged discovery requests. In an affidavit filed with the trial court, one of Defendant's attorneys averred that he believed the requested documents were protected under the physician-patient privilege. The trial court, Judge Ola M. Lewis presiding, granted Plaintiff's motion to compel by order entered 7 April 2010, with the limitation that the requested documents would be disclosed only to Plaintiff's counsel. Defendant appealed that order to this Court.

Following Defendant's appeal, the trial court entered an order staying discovery until the matter could be reviewed on appeal. Defendant also filed a motion to stay proceedings of the trial court, and that motion was granted on 15 April 2010. Despite the interlocutory nature of Defendant's appeal, we reviewed the trial court's order granting Plaintiff's motion to compel as affecting a substantial right and affirmed the decision of the trial court. *Nicholson v. Thom*, 214 N.C. App. 561, 714 S.E.2d 868 (2011) (unpublished opinion), *available at* 2011 WL 3570122, at *2, *8 [hereinafter *Nicholson I*], *disc. review denied*, __ N.C. __, 724 S.E.2d 509 (2012). In so holding, we noted that the requested documents were protected by the physician-patient privilege, but pointed out that the trial court is authorized to order the production of documents protected by the physician-patient privilege, in its discretion, when, in the opinion of the judge, they are necessary to serve the proper administration of justice. *Id.* at *4–*5. Because of "the potential relevance of the information contained in the disputed records," we concluded that the trial court did not abuse its discretion by granting Plaintiff's motion to compel. *Id.* at *8. As a consequence, Defendant produced copies of the requested records on 29 March 2012.[6]

On 14 May 2012, after reviewing the documents, Plaintiff served a third request for production of documents on Defendant. Specifically, Plaintiff sought access to "all of" Defendant's medical and pharmaceutical records pertaining to: (1) "her cervical spine, cervical disc disease, cervical radiculopathy, cervical stenosis, disc bulge, and laminectomy surgery," including magnetic resonance imaging scans; (2) "her diagnosis, treatment, and monitoring of sacroiliitis"; (3) "her diagnosis and treatment of depression and/or post-traumatic stress disorder"; (4) "her

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6. Plaintiff alleges in his brief that, despite this order, Defendant failed to respond to his "[s]econd" set of interrogatories. As we noted in footnote 5, it is unclear whether Plaintiff is actually referring to his third set of interrogatories, the subject of the litigation at issue on appeal, or whether he is referring to a separate, second set of interrogatories, which are not included in the record on appeal.

diagnosis and treatment of Parsonage-Turner Syndrome"; and (5) "the brachial plexus neuropathy in her left arm that she sustained on . . . [17 August 2005]." Plaintiff also requested a copy of Defendant's records "from Advanced PT Solutions, UNC Chapel Hill (neurosurgery), Dr. Viren Desai, Dr. Pendleton, Dr. Robertson, Dr. Johnson, Dr. Stratus, Dr. Gluck, Dr. Bettendorf, Home Instead, Kohll's/RxMPSS Pharmacy, CapeFearDiscountDrug, and Walmart Pharmacy." Defendant objected on grounds that the documents were privileged, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence, and Plaintiff again moved to compel production.

On 7 August 2012, the trial court, Judge James Gregory Bell presiding, allowed Plaintiff's motion to compel. The court concluded that the requested discovery was "relevant and reasonably calculated to lead to the discovery of admissible evidence," "reasonably tailored to address questions raised by the recent production of Defendant's medical and disability records, . . . not overly burdensome, and its probative value outweigh[ed] any potential prejudice to . . . Defendant." The court also concluded that the requested medical records were protected under the physician-patient privilege, but that they "should be produced because the interests of justice outweigh the protected privilege." Defendant appealed that order to this Court on 13 August 2012.[7]

Four days later, on 17 August 2012, Plaintiff served a subpoena and subpoenas *duces tecum* on counsel for Defendant, seeking to have Defendant appear on 21 August 2012, testify, and produce the following documents: (1) "all records requested by Plaintiff in his 3rd [r]equest for [p]roduction of documents which were ordered to be produced by . . . Judge Bell on August 7, 2012" and (2) "[t]he original or certified copy of Cape Fear['s] entire chart for [Defendant]." Defendant filed objections and motions to quash on 21 August 2012.[8]

Between August 29 and 31 of 2012, Plaintiff issued fifty-four subpoenas *duces tecum* to various persons, pharmacies, and corporations,

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7. The record does not indicate that the trial court entered an order staying the proceedings below or that Defendant sought such a stay pending review by this Court. Nonetheless, there is no evidence that Defendant produced the requested discovery. Rather, the parties proceeded toward trial. Following the trial, Plaintiff moved to dismiss the appeal as moot, and this Court granted that motion.

8. On 31 August 2012, Plaintiff also served a subpoena *duces tecum* on Cape Fear, again seeking production of Defendant's "entire chart." Cape Fear filed a motion to quash, and the trial court denied that motion on 1 October 2012. Defendant appealed that order to this Court on 30 October 2012, but eventually withdrew that appeal.

requiring them to produce either Defendant's "entire chart" or her medical and pharmaceutical records from between January and September of 2005. Counsel for Defendant was served with copies of those subpoenas on 12 September 2012. On 18 September 2012, Defendant filed an objection and motion to quash these subpoenas or, in the alternative, for entry of a protective order.

The matter came on for trial beginning 1 October 2012 in Robeson County Superior Court, Judge Mary Ann Tally presiding. Following an *in camera* review of the subpoenaed documents, the trial court denied Defendant's motion and allowed certain of the documents to be produced to Plaintiff. The documents were not admitted into evidence, but were referenced extensively by counsel for Plaintiff in his questioning of Defendant.[9] Plaintiff's counsel also questioned Defendant about descriptions of Defendant's medical condition from sealed affidavits submitted to the trial court in March of 2010. The affidavits, which concerned the state of Defendant's health at that time, had been submitted by two of Defendant's health care providers in support of her request to refrain from attending the trial, which at that time was scheduled to occur in 2010.

Other evidence admitted at trial described the course of the decedent's cancer treatment. In addition, Plaintiff introduced a summary of the decedent's medical bills, totaling $1,219,660.36, approximately $860,000 of which was considered a "write-off[]" by the Cumberland County Hospital System and had not been paid by any source.

At the conclusion of the trial, the jury returned verdicts awarding $5,050,000 to the estate and $750,000 to Plaintiff, individually, for a total award of $5,800,000. The trial court reduced that amount by $1,150,000 pursuant to Plaintiff's settlement with "other defendants in another case" and entered judgment against Defendant on 16 October 2012 for a total amount of $4,650,000.[10] On 19 October and 21 November 2012, respectively, Defendant filed motions for "Amendment of Judgment (Remittitur) or New Trial" pursuant to Rule 59(a) and "Relief from Judgment" pursuant to Rule 60(b). The trial court denied those motions by order filed on 19 December 2012. Defendant appealed that order and

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9. Counsel for Defendant lodged a continuing objection to this line of questioning at the beginning of Defendant's testimony.

10. The trial court's 16 October 2012 judgment does not indicate the name of the other defendants. Other sections of the record on appeal and portions of the trial transcript, however, indicate that the other defendants included the Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center.

the trial court's judgment entered upon the jury's verdict to this Court on 15 January 2013.

Discussion

On appeal, Defendant argues that the trial court erred by: (1) denying her motion to quash the subpoenas *duces tecum* or, alternatively, for entry of a protective order; (2) providing her medical records to counsel for Plaintiff; (3) allowing counsel for Plaintiff to question her concerning her health and her medical records for the purpose of suggesting that she was impaired during the surgery she performed on the decedent; (4) allowing counsel for Plaintiff to question her and other witnesses about the propriety of advising the decedent of the medications Defendant was taking at the time of the operation; (5) allowing counsel for Plaintiff to introduce evidence of medical bills "which were not actually incurred or paid by [Plaintiff] . . . or any other entity"; (6) instructing the jury on permanent injury; and (7) denying Defendant's motion for amendment of judgment (remittitur) or new trial. As discussed below, we find no error in part, but remand for a new trial on damages.

I. Defendant's Medical and Pharmacy Records

A. Mootness

[1] As a preliminary matter, we address Plaintiff's argument that Defendant's appeal from the trial court's order denying her motion to quash and allowing the production of her medical and pharmaceutical records is moot because the subpoenaed documents were never entered into evidence. We disagree.

In North Carolina, an issue is moot

> [w]henever[] during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[. In those circumstances,] the case should be dismissed [as moot], for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Hamilton, __ N.C. App. __, __, 725 S.E.2d 393, 396 (2012) (citation omitted).

In this case Defendant requests that this Court determine the validity of the trial court's rulings because she contests the *result* stemming from the production of her records to Plaintiff — the extensive use of those documents by Plaintiff during questioning of Defendant. This

issue remains in controversy between the parties and, therefore, would not require this Court to merely determine an abstract proposition of law. Therefore, the issue of the validity of the trial court's ruling on the production and use of Defendant's medical and pharmaceutical records is not moot. Accordingly, Plaintiff's argument is overruled, and we proceed with a review of Defendant's arguments on the merits.

B. Standard of Review

[2] "When the propriety of a subpoena *duces tecum* is challenged, it is . . . addressed to the sound discretion of the court in which the action is pending." *Vaughn v. Broadfoot*, 267 N.C. 691, 697, 149 S.E.2d 37, 42 (1966). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's ruling] was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

With regard to the production and use of contested medical records, a trial court's determination regarding the applicability of the physician-patient privilege is a legal question, which is reviewed *de novo* on appeal. *See Nicholson I*, 2011 WL 3570122 at *3. However,

> [t]he decision as to whether disclosure of information protected by the physician-patient privilege is required to serve the proper administration of justice is one made in the discretion of the trial judge, and the appellant must show an abuse of discretion in order to successfully challenge the ruling.

Id. at *8. Here, the parties do not dispute the fact that Defendant's medical records are protected by the physician-patient privilege. Rather, Defendant contests the validity of the trial court's decisions to produce those documents to Plaintiff and allow Plaintiff to use the documents during questioning of Defendant. Accordingly, the standard of review for each of these issues is abuse of discretion.[11]

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11. Defendant argues in her brief that the standard of review in this context is *de novo*. At oral argument, however, counsel for Defendant conceded that the proper standard of review is abuse of discretion.

C. Subpoenas Duces Tecum

[3] Defendant contends that the trial court abused its discretion in overruling her objection and denying her motion to quash Plaintiff's subpoenas *duces tecum* or, in the alternative, for entry of a protective order because the subpoenas were improperly used for purposes of discovery and their issuance violated the Health Insurance Portability and Accountability Act ("HIPAA"). In response, Plaintiff contends the subpoenas were not issued for the purpose of discovery and Defendant was properly given notice of their issuance and an opportunity to object. We find no error.

i. The Purpose of the Subpoenas Duces Tecum

> The subpoena *duces tecum* . . . is the process by which a court requires the production at the trial of documents, papers, or chattels material to the issue. . . .
>
> . . . .
>
> Anything in the nature of a mere fishing expedition is not to be encouraged. A party is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence.[12]
>
> The law recognizes the right of a witness subpoenaed *duces tecum* to refuse to produce documents which are not material to the issue or which are of a privileged character. Nevertheless, whether a witness has a reasonable excuse for failing to respond to a subpoena *duces tecum* is to be judged by the court and not by the witness. Though he may have [a] valid excuse for not showing . . . the document in evidence, yet he is bound to produce it, which is a matter for the judgment of the court and not the witness.
>
> . . . . [On a motion to quash] a subpoena *duces tecum* . . . , the court . . . examine[s] the issues raised by the pleadings and, in the light of that examination, . . . determine[s] the apparent relevancy of the documents or the right of the witness to withhold production upon other grounds. An adverse ruling upon [the] movant's motion to quash . . . gives counsel [for the respondent] no right to inspect the

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12. To the extent this paragraph might be read to allow fishing expeditions under certain circumstances, we note this Court's clarification that such ventures are prohibited in their entirety. *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986).

> books, documents, or chattels ordered to be produced at the trial, nor does it determine the admissibility of [those] items at the trial. The subpoena merely requires the witness to bring them in so that the court, after inspection, may determine their materiality and competency, or so that the witness, by reference to the books or papers, can answer any questions pertinent to the inquiry.

Vaughn, 267 N.C. at 695–97, 149 S.E.2d at 40–42 (citations, internal quotation marks, parentheses, and an ellipsis omitted).

Defendant contends that Plaintiff's subpoenas *duces tecum* were improper because they "were not issued to secure evidence for presentation for trial, as proven by the fact that none of the documents were offered into evidence." Rather, Defendant contends, "they were simply an improper form of discovery." We disagree.

The subpoenaed documents were not offered into evidence during the trial because the trial court determined in a pre trial, *in camera* hearing that they could not be admitted into evidence. This fact was already established by the time the trial began and has no bearing on whether the subpoenas were issued for purposes of engaging in an improper fishing expedition. Indeed, as Plaintiff notes in his brief, his attorneys were never given an opportunity to inspect the subpoenaed documents prior to their production. They were sealed, sent directly to the courthouse, and ultimately inspected by the trial court, which determined that some of the documents should be produced to Plaintiff's counsel for use during the trial, and some should not. Plaintiff was never allowed to fish through the documents to gather evidence and, thus, was not engaging in discovery. Moreover, in light of our opinion in *Nicholson I*, we believe the trial court's decision that some of the requested records were sufficiently relevant to require production to Plaintiff, but not so relevant as to be admitted as substantive evidence, was neither arbitrary nor manifestly unsupported by reason. *See* 2011 WL 3570122 at *8 ("In view of the potential relevance of the information contained in the disputed records, we are unable to conclude that the trial court abused its discretion by ordering Defendant to produce the requested materials in the interest of justice."). Accordingly, Defendant's argument is overruled.

ii. HIPAA

[4] In the alternative, Defendant contends that Plaintiff's subpoenas *duces tecum* violated HIPAA because they were not accompanied by a court order showing that "reasonable efforts have been made to ensure that [Defendant was] . . . given notice of the request and an opportunity

to object or that efforts have been made to obtain a protective order prohibiting the use of the records for any use other than the proceeding," citing 45 C.F.R. § 164.512(e)(1)(ii). Defendant contends that the alleged violation was prejudicial because her objections would have been heard prior to the issuance of the subpoenas "[h]ad . . . Plaintiff[] sought the order [as] required by HIPAA." Therefore, Defendant alleges, "[t]he trial judge . . . [denied] defense counsel any opportunity to review [the subpoenaed documents] and assert appropriate objections prior to their production." We are unpersuaded.

Section 164.512 of Subchapter C of Title 45, Subtitle A, of the Code of Federal Regulations provides in pertinent part that, under HIPAA:

> A covered entity may use or disclose protected health information without the written authorization of the individual . . . or the opportunity for the individual to agree or object . . . subject to the applicable requirements of this section. . . .
>
> . . . .
>
> (e) *Standard: Disclosures for judicial and administrative proceedings* — (1) *Permitted disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> . . .
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order . . . .

45 C.F.R. 164.512 (2013). Section 160.102 of Subchapter C also states that:

> (a) Except as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to the following entities:
>
> (1) A health plan.
>
> (2) A health care clearinghouse.
>
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

45 C.F.R. 160.102 (2013).

To the extent Plaintiff's subpoenas did not comply with the regulations cited above,[13] such violation should be charged against the *covered entities* that provided those records, not against Plaintiff. Section 160.102 clearly states that Subchapter C of HIPAA applies to health plans, health care clearinghouses, and certain health care providers. Plaintiff is none of these things. Assuming without deciding that the subpoenaed entities in this case qualify as "covered entities," it was their obligation to refrain from producing the requested documentation when they received Plaintiff's subpoenas if they determined that the subpoenas did not comply with HIPAA. Because Plaintiff is not a "covered entity" within the meaning of section 160.512, he cannot be held liable under Subchapter C of HIPAA for the subpoenaed entities' production of the requested documents. Therefore, the requirements cited by Defendant have no bearing on whether Plaintiff's subpoenas *duces tecum* were properly issued. Accordingly, Defendant's argument is overruled.

D. Providing Defendant's Records to Plaintiff

[5] Defendant next argues that the trial court erred by providing Plaintiff with medical and pharmaceutical records that did not comply with its own order. Specifically, Defendant alleges that the trial court provided Plaintiff with records created after 28 June 2005, despite its explicit statement at trial that documents generated after that date should not be produced to Plaintiff. In response, Plaintiff asserts that "the documents provided to this Court . . . [by Defendant][14] were not properly preserved for appeal" because Defendant did not take the opportunity to preserve a copy of the documents at trial and the documents merely

13. We offer no opinion as to whether they did.

14. These documents were not included in the record on appeal. Rather, they were submitted to this Court, under seal, pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure. Plaintiff was not served with a copy.

constitute those documents that Defendant "*believes* may have been provided to Plaintiff's trial counsel at trial." (Emphasis in original). Alternatively, Plaintiff asserts that the documents provided to counsel caused Defendant no harm because Plaintiff already knew about her use of pain medications. We find no error.

Rule 11(c) of the North Carolina Rules of Appellate Procedure provides that, when settling the record on appeal,

> [i]f any party to the appeal contends that materials proposed for inclusion in the record or for filing . . . were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.
>
> . . . .
>
> The judge shall send written notice to counsel for all parties setting a place and time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. . . .
>
> If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled at the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

N.C.R. App. P. 11(c).

Citing Rule 11(c), Defendant has provided this Court with a number of documents that she believes were produced to Plaintiff during the trial. In an attached letter to the trial judge, Defendant requested confirmation that the documents submitted to this Court represent those produced to Plaintiff. Plaintiff's attorneys were provided with a copy of the letter, but not with a copy of the proposed documents. There is no indication in the record before this Court that the accuracy of the documents provided by Defendant was ever verified by the trial judge or that further action was taken to settle the record on appeal with regard to this question.

As described above, Rule 11(c) operates to settle the record on appeal in accordance with the objections of the appellee when no judicial settlement is timely sought at the expiration of the requisite time period. *Id.*; *see also Johnson v. Nash Comm. Coll.*, 203 N.C. App. 572, 692 S.E.2d 890 (2010) (unpublished opinion), *available at* 2010 WL 1542534 ("When the [appellee] objected to [the appellant's] proposed record on appeal . . . , [the appellant] filed a statement that he was not requesting judicial settlement. The record on appeal was, therefore, deemed settled in accordance with the [appellee's] objections by operation of Rule 11(c) . . . .").[15] Rule 11(c) makes no provision, however, for the requirements for settling the record on appeal when the appellant is admittedly unsure about the nature of the proposed supplement to the record, requests judicial settlement, does not serve the proposed documentation on the appellee, and judicial settlement never occurs. In that circumstance, we must default to the broader requirements of Rule 9(a).

Rule 9(a) states in pertinent part that "review is solely upon the record on appeal." N.C.R. App. P. 9(a).

> This Court has held that where certain exhibits presented to the trial court were not included in the record on appeal, those exhibits could not be considered on review to this Court. To raise the issue of the sufficiency of the evidence to support that finding on appeal, [the] defendant must preserve the record for appeal. Where the record is silent[,] we will presume the trial court acted correctly.

State v. Reaves, 132 N.C. App. 615, 619–20, 513 S.E.2d 562, 565 (citations and internal quotation marks omitted), *disc. review denied*, 350

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15. *Johnson* is an unpublished opinion and, therefore, has no precedential value. N.C.R. App. P. 30(e). Nevertheless, case law on Rule 11(c) is scant, and our opinion in *Johnson* provides a helpful example of the practical application of this rule.

N.C. 846, 539 S.E.2d 4 (1999). When the record is "not completely silent," but fails to include the information necessary for appellate review, "we presume the correctness of the trial court's decision." *See id.* at 620, 513 S.E.2d at 565 (presuming the correctness of the trial court's decision to order the defendant to produce a report, which the defendant argued was protected work product, when the record on appeal included references to the content of the report, but did not include the report itself).

Regarding the documents produced to Plaintiff in this case, the trial court ruled as follows:

> THE COURT: . . . .
>
> . . . .
>
> I have reviewed the medical records and information of [Defendant] that was provided pursuant to the subpoenas. And after reviewing that information, I find that it's in the interest of justice and outweighs the privilege for certain information to be turned over to Plaintiff's counsel. The information is contained in this material that I have in my hand.
>
> For the record, basically, what I have done is delineated information concerning [Defendant] that may have some bearing on issues in this case using the date of June 28, 2005, as the cutoff date. I am withholding and upholding the privilege with regard to any medical information that has to do with dates and times after June 28, 2005.

On appeal, we have no way to ascertain whether the documents submitted in Defendant's supplement to the record are the same documents that the trial court turned over to Plaintiff at trial. Defendant avers that she believes they are, but there is no evidence that the trial court ever settled this matter. Therefore, we must presume that the trial court correctly produced documents to Plaintiff in accordance with the court's order. *See id.* at 619–20, 513 S.E.2d at 565. Accordingly, Defendant's argument is overruled.

E. Plaintiff's Questions Regarding Defendant's Records

[6] Defendant next argues that the trial court erred in allowing counsel for Plaintiff to question her (1) concerning the information contained in Defendant's medical records that the trial court ordered produced to counsel for Plaintiff, as well as the sealed affidavits provided by Defendant, and (2) with regard to Defendant's alleged "legal duty" to

advise the decedent that Defendant was taking medications at the time of the operation. Defendant contends that certain of those questions were irrelevant, highly prejudicial, improper without the support of medical expert testimony, and inadmissible hearsay. We find no error.

i. Legal Background and Standards of Review

Rule 401 of the North Carolina Rules of Evidence establishes that evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). All relevant evidence is admissible unless otherwise provided by rule or law. N.C. Gen. Stat. § 8C-1, Rule 402. "Evidence which is not relevant is not admissible." *Id.* "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . , such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and internal quotation marks omitted).

Rule 403 of the North Carolina Rules of Evidence provides that relevant evidence may nonetheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needles presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. We review a trial court's decision regarding whether to exclude evidence under Rule 403 for abuse of discretion. *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 200 (2011).

Rule 611 of the North Carolina Rules of Evidence provides the following direction with regard to the manner and order of questioning and the presentation of evidence at trial:

> (a) *Control by court.* — The court shall exercise reasonable control . . . so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) *Scope of cross-examination.* — A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.
>
> (c) *Leading questions.* — Leading questions should not be used on direct examination of a witness except as may

> be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

N.C. Gen. Stat. § 8C-1, Rule 611. This Court has determined that the trial court's rulings regarding questioning by an attorney on direct examination and cross-examination under Rule 611 is reviewed for abuse of discretion. *State v. Thompson*, 22 N.C. App. 178, 180, 205 S.E.2d 772, 774 (1974) (holding that the trial court did not abuse its discretion in allowing the prosecutor to ask his own witness leading questions relating to matters not giving rise to the charge); *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006) ("The trial court is vested with broad discretion in controlling the scope of cross-examination[,] and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.").

We also note that, when considering alleged evidentiary errors in civil cases, "[n]o error . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (2013). An error affects a substantial right of the appellant when it prejudiced her and, thus, when "it is likely that a different result would have ensued had the error not been committed." *In re Chasse*, 116 N.C. App. 52, 60, 446 S.E.2d 855, 859 (1994) (citation omitted).

ii. On the Issue of Impairment During Surgery

Defendant argues that the trial court erred in allowing counsel for Plaintiff to question her about information contained in Defendant's medical and pharmaceutical records as well as the sealed affidavits she provided to the trial court in 2010 because such information was not relevant and was "highly prejudicial" in nature. Specifically, Defendant contends that this line of questioning "inevitably tainted the entire trial" and that Plaintiff exceeded the bounds of permissible examination by asking about side effects discussed in affidavits submitted by Defendant's health care providers in 2010. Lastly, Defendant asserts that the trial court erred by permitting this testimony because a party must present "medical expert testimony" whenever cross-examining another party regarding "the potential side effects of medications being taken by that party." We are unpersuaded.

As a preliminary matter, we note that Defendant was called and questioned by counsel for Plaintiff as a part of Plaintiff's case in chief. The questioning Defendant refers to as impermissible occurred entirely on direct and redirect examination of Defendant, an adverse party. Therefore, pursuant to Rule 611, leading questions were permissible. N.C. Gen. Stat. § 8C-1, Rule 611(c). In addition, it is helpful to understand that this case was tried under a theory of negligence as established by the doctrine of *res ipsa loquitur*.

> Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges . . . , are introduced into the patient's body during surgical operations and left there.
>
> . . . .
>
> . . . [T]he well-settled law in this jurisdiction is and has been that a surgeon is under a duty to remove all harmful and unnecessary foreign objects at the completion of the operation. Thus the presence of a foreign object raises an inference of a lack of due care. When a surgeon relies upon nurses or other attendants for accuracy in the removal of sponges from the body of his patient, he does so at his peril. . . .
>
> . . . .
>
> . . . The application of *res ipsa loquitur* allows the issue of whether [the] defendant has complied with the statutory standard to be submitted to the jury for its determination. Although the application of the doctrine requires the submission of the issue to the jury, *the burden remains upon the plaintiff to satisfy the jury that the defendant has failed to comply with the statutory standard*. [The d]efendant's evidence that he complied with the statutory standard does not remove the case from the jury's determination. As the trier of the facts, the jury remains free to accept or reject the testimony of [the] defendant's witnesses.

Tice v. Hall, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567–68 (1984) (citations and internal quotation marks omitted; emphasis and certain italics added). Therefore, the testimony of Defendant, elicited on direct examination by Plaintiff's counsel, is relevant and admissible to the extent that it makes the existence of any fact that is of consequence

to the jury's determination more or less likely to be true and is not otherwise inadmissible.

On direct examination of Defendant, counsel for Plaintiff questioned her extensively about whether she had taken narcotic and non-narcotic pain medications leading up to and during the surgery. Defendant responded that she was taking narcotic pain medications leading up to the surgery, but that she only took non-narcotic pain medications during the surgery. Defendant also stated that side effects from the narcotic pain medications were not present at the time of the surgery.

Plaintiff questioned Defendant further about information contained in sealed affidavits that Defendant provided to the trial court in 2010. Counsel for Plaintiff did not reference the affiants or their affidavits, but used the information contained therein to question Defendant about side effects that she experienced after the surgery when taking the same narcotic medications[16] that she admitted to taking before the surgery. Though Defendant acknowledged that she took the same narcotic medications before and after the surgery, she only admitted to experiencing side effects *after* the surgery.

The questions asked by counsel for Plaintiff sought to elicit and did elicit relevant testimony. Whether Defendant was using pain medication in the period of time leading up to and during the surgery addresses whether she may have breached her duty of care during the surgery. As Defendant admitted, the side effects from some of her medications "might" have had an effect on a doctor's capabilities. Moreover, the extent to which those same medications may have caused Defendant to experience confusion and impairment of cognitive function at a later point in time is relevant to whether those admittedly appreciable side effects occurred prior to and during the surgery. Defendant's responses to Plaintiff's questions dealt with these issues. As a result, her testimony had some tendency to make consequential facts more or less likely to be true and, therefore, was relevant. In addition, given our opinion in *Nicholson I*, which concluded that certain of Defendant's medical records could be relevant, and considering Plaintiff's burden of establishing not only that the sponge was left in the decedent's body, but of satisfying the jury that Defendant failed to comply with her duty of care in allowing the sponge to be left in the decedent's body, we conclude that it was not an abuse of discretion for the trial court to decline to exclude

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16. Defendant was prescribed an increased amount of one of those medications during this time.

this line of questioning under Rule 403. Accordingly, Defendant's argument is overruled to the extent that it relates to relevance and prejudice.

[7] Defendant argues further, however, that Plaintiff's questions regarding the side effects of the medications were inappropriate because (1) the questions were not supported by expert testimony as to the side effects, and (2) Plaintiff's reference to the side effects as coming from a "prescription warning that I obtained from a local pharmacist" was inadmissible hearsay. Again, we are unpersuaded.

Defendant's argument is based on the following questioning of Defendant by counsel for Plaintiff:

> Q. You said earlier as far as the Cymbalta[,] that you were taking that at the time you performed surgery on [the decedent], correct?
>
> A. I believe so.
>
> Q. Again, this is another prescription warning that I obtained from a local pharmacist.
>
> A. Uh-huh.
>
> Q. I want to read this and ask if you are familiar with this warning as it relates to the medication especially with you being a physician.
>
> A. Uh-huh.
>
> Q. This drug . . . may . . . make you dizzy or drowsy. Do not drive, use machinery, or do any activity that requires alertness.
>
> Do you agree or disagree with the warning that goes with that medication?
>
> A. I agree. If you have — if you're taking this medication and you have any dizziness or drowsiness as a side effect of that medication, then you should refrain from driving. But not everybody reacts to the medications the same way, and not everybody has the same side effects. But certainly, if you have those side effects, you should warn — you should heed those warnings. I do not have those side effects.
>
> Q. Well, the warning says that the medication can affect your alertness. Now, number one, do you need to be alert in a long and complicated surgical procedure?

> A. Yes, you do.
>
> Q. In your opinion — even though you are aware of these warnings you take the medication. In your opinion, does it affect your alertness?
>
> A. The Cymbalta?
>
> Q. Yes.
>
> A. No.
>
> Q. Has it ever affected your alertness?
>
> A. No.
>
> Q. Has it ever made you drowsy?
>
> A. No.
>
> Q. So you've not had any problem with the warnings that they give?
>
> A. Correct.
>
> Q. That doesn't mean that you can't have those problems. I mean, certainly, you can; is that correct?
>
> . . . .
>
> A. Usually, if you're going to have those side effects, you experience them early on when you're given the prescription.

Defendant first argues that the above questioning was improper because it was not supported by expert testimony as required by *Smith v. Axelbank*, __ N.C. App. __, 730 S.E.2d 840 (2012) and *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), *vacated in part and appeal dismissed on other grounds*, 356 N.C. 415, 572 S.E.2d 101 (2002). We disagree.

The plaintiff in *Axelbank*, after experiencing deleterious side effects from a drug prescribed by her doctor, brought suit for medical malpractice or, alternatively, for negligence under a theory of *res ipsa loquitur*. __ N.C. App. at __, 730 S.E.2d at 842. Her complaint did not include certification by a medical expert pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. *Id.*

> Rule 9(j) states that a complaint alleging medical malpractice shall be dismissed unless a plaintiff asserts in her

> complaint that her medical care has been reviewed by a person who is willing to testify that the medical care did not comply with the applicable standard of care, and that this person must be reasonably expected to qualify as an expert witness under . . . Rule 702 or must be a person the plaintiff will seek to have qualified as an expert . . . . Alternatively, a plaintiff must allege facts establishing negligence under the doctrine of *res ipsa loquitur*.

Id. On appeal, we held that the trial court properly dismissed the plaintiff's complaint for failure to state a claim because she did not include certification under Rule 9(j) and she failed to allege facts establishing negligence under the doctrine of *res ipsa loquitur*. __ N.C. App. at __, 730 S.E.2d at 842–43 ("Here, a layperson would not be able to determine that [the] plaintiff's injury was caused by [the drug] or be able to determine that [the doctor] was negligent in prescribing the medication to [the] plaintiff without the benefit of expert testimony.").

In *Assimos*, the plaintiff brought suit against her doctor for medical malpractice under a theory of *res ipsa loquitur* due to side effects she experienced as a result of the doctor's alleged "failure to adequately[,] properly[,] and fully inform her of the risks known to be associated with the administration of [a] drug . . . given to [her] during her treatment." 146 N.C. App. at 340, 553 S.E.2d at 65. The plaintiff's complaint did not include a Rule 9(j) certification. *Id.* at 342, 553 S.E.2d at 66. Relevant to the issues we are considering in this case, we held that the trial court did not err in dismissing the plaintiff's medical malpractice action for failure to state a claim of negligence under the doctrine of *res ipsa loquitur*. *Id.* at 343, 553 S.E.2d at 67. We noted that the side effects of the drug were not within the jury's common knowledge, and, therefore, expert testimony was necessary to establish the relevant standard of care. *Id.*

Axelbank and *Assimos* address a plaintiff's obligation to include medical expert certification with her complaint when the doctrine of *res ipsa loquitur* does not apply to establish an inference of negligence. Here, however, the parties are not at the pleading stage, and the applicability of the doctrine of *res ipsa loquitur* is not at issue. Our Supreme Court has already made clear that there is a defined standard of care in cases involving foreign objects left in the body and that the legal doctrine of *res ipsa loquitur* is applicable on the issue of breach of that standard of care. *Tice*, 310 N.C. at 592–94, 313 S.E.2d at 567–68. The questions regarding the side effects from Defendant's medications were asked to confirm the inference that Defendant was negligent while performing the surgery. Indeed, when the standard of care is established

pursuant to the doctrine of *res ipsa loquitur*, as here, our opinions in *Axelbank* and *Assimos* indicate that expert testimony is *not necessary* to establish the relevant standard of care. Accordingly, Defendant's argument is overruled as it relates to whether expert testimony was required to establish the side effects of the drugs taken by Defendant.

[8] Defendant also argues that the challenged questioning was improper because Plaintiff's reference to the warning Plaintiff's counsel obtained from the local pharmacist constitutes inadmissible hearsay with regard to the side effects of the medications she was taking. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801. Subject to a number of well-defined exceptions, hearsay is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802. In this case, Plaintiff's questions were not asked to establish the truth of the warnings obtained from the pharmacist nor to prove the particular side effects of the medications Defendant was taking. Rather, they were asked to elicit Defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery. Therefore, this line of questions did not constitute inadmissible hearsay. Accordingly, Defendant's argument is overruled.

iii. On the Issue of Defendant's Alleged Duty to Advise

[9] Defendant next argues that the trial court erred by allowing counsel for Plaintiff to ask Defendant whether she had a "legal duty" to advise the decedent regarding Defendant's use of medications prior to the surgery. Citing this Court's opinion in *Atkins v. Mortenson*, 183 N.C. App. 625, 644 S.E.2d 625 (2007), Defendant contends that such questioning should have been supported by expert testimony establishing the relevant standard of care. We disagree.

In *Atkins*, we affirmed the trial court's award of summary judgment to the defendant doctor in the plaintiff's medical malpractice action for failure of the doctor to recognize symptoms of illness and recommend appropriate treatment. *Id.* at 630, 644 S.E.2d at 628. In so holding we pointed out that, in medical malpractice cases, the standard of care "generally involves specialized knowledge" and, therefore, expert testimony is necessary to show a breach of the standard. *Id.* at 630, 644 S.E.2d at 629. *Atkins* does not, however, stand for the proposition that an attorney is obligated in a *res ipsa loquitur* case, in order to support direct examination of the defendant physician, to offer expert testimony regarding the standard of care for that physician's disclosure to her patient of information regarding the physician's use of medications.

Rather, it addresses whether the plaintiff in that particular case was able to forecast sufficient evidence to withstand summary judgment.

Here, unlike *Atkins*, an inference of a lack of due care was raised because a foreign object — the sponge — was left in the decedent's body. *See Tice*, 310 N.C. at 594, 313 S.E.2d at 568. Therefore, as discussed above, expert testimony was not necessary as "the presence of a foreign object raises an inference of a lack of due care" sufficient to submit the case to the jury for determination of whether Defendant breached her duty. *See id.* at 593, 313 S.E.2d at 567. Furthermore, the cited portions of the transcript do not indicate that counsel for Plaintiff ever used the phrase "legal duty" when examining Defendant. Rather, counsel asked Defendant, for example, whether she felt "it necessary to tell any of [her] patients or to inform any of [her] patients [about her use of medications] so they [would] have an opportunity to decide for themselves whether or not they want[ed her] doing the surgery."[17] Under the circumstances of this case, *Atkins* is unavailing. Accordingly, Defendant's argument is overruled.

II. Evidence of the Decedent's Medical Bills

[10] Defendant also argues that the trial court erred in allowing Plaintiff to present evidence of the decedent's medical bills — totaling $1,219,660.36[18] — because approximately $860,000 of that total was "written off" by the Cumberland County Hospital System and never paid by any party. "By allowing Plaintiff[] to contend [that the decedent's] medical expenses totaled [over $1,000,000.00], rather than the true amount her estate was obligated to pay," Defendant argues, "the court [erroneously] permitted Plaintiff[] to substantially inflate the value of [his] claim in the minds of the jurors." Alternatively, Defendant contends that, if the introduction of these bills was proper, she should have been allowed to introduce evidence of the fact that a substantial portion of the bills was written off by the hospital. Plaintiff responds that the medical bills were admissible, but the write-offs were not, pursuant to the collateral source rule. We conclude that the collateral source rule is not

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17. Counsel for Plaintiff later asked one of Defendant's expert witnesses whether "there is . . . [a] legal or ethical obligation on the part of the doctor, or in this case a surgeon, to inform [her] patient prior to surgery that the physician is taking pain medication [including narcotics]," but that question is not challenged on appeal.

18. In her brief, Defendant cites Plaintiff's Exhibit 3 for the fact that the medical bills totaled "$1,019,467.11." The copy of Plaintiff's Exhibit 3 submitted to this Court, however, states that the medical bills actually amounted to $1,219,660.36. Accordingly, we use the latter figure.

applicable here and, as a result, hold that the trial court erred by failing to admit evidence of the hospital system's write-offs.

For cases filed before 1 October 2011, the admissibility of evidence of medical expenses is governed by the common law collateral source rule.[19] According to that rule,

> evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to [the] defendant generally is not admissible. These benefits include payments from both public and private sources. This rule gives force to the public policy which prohibits a tortfeasor from reducing [its] own liability for damages by the amount of compensation the injured party receives from an independent source. Evidence of collateral source payments violate the rule whether admitted in the defendant's case-in-chief or on cross[-]examination of the plaintiff's witness. The erroneous admission of collateral source evidence often must result in a new trial.

Badgett v. Davis, 104 N.C. App. 760, 763, 411 S.E.2d 200, 202 (1991) (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 248 (1992).

> The purpose of the collateral source rule is to exclude evidence of payments made to the plaintiff by sources other than the defendant when the evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff. . . . The rule is punitive in nature[] and is intended to prevent the tortfeasor from a windfall when a portion of the plaintiff's damages have been paid by a collateral source.

Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 638–39, 627 S.E.2d 249, 257 (2006) (citations, internal quotation marks, and certain brackets omitted). In the context of medical malpractice, our Supreme Court has indicated that a source collateral to the defendant can include "a beneficial society, the plaintiff's family or employer, or an insurance company." *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987) (citation

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19. In 2011, the collateral source rule was abrogated by Rule 414 of the North Carolina Rules of Evidence with regard to evidence of past medical expenses. N.C. Gen. Stat. § 8C-1, Rule 414. Rule 414 is not applicable in this case, however, because Plaintiff's action was commenced in 2008, before the effective date of this new rule. *See* 2011 N.C. Sess. Law 283, sec. 4.2 (stating that Rule 414 applies to actions commenced on or after 1 October 2011).

and internal quotation marks omitted). When payment comes from such a source, "an injured plaintiff is entitled to recovery for reasonable medical, hospital, or nursing services rendered [her], whether these are rendered . . . gratuitously or paid for by [her] employer." *Id.* (citations, internal quotation marks, and ellipsis omitted). "In summary, the collateral source rule excludes evidence of payments made to the plaintiff by sources *other than the defendant* when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." *Badgett*, 104 N.C. App. at 764, 411 S.E.2d at 203.

Plaintiff relies on our opinion in *Badgett* to support his argument that the collateral source rule is applicable in this case. We disagree. In *Badgett*, the plaintiff sued his doctor in negligence for knowingly prescribing a drug to which the plaintiff was allergic. *Id.* at 761, 411 S.E.2d at 201. The plaintiff became ill and was treated at a hospital. *Id.* At trial, the court admitted evidence of the plaintiff's total hospital and doctor's bills, evidence that a portion of the bills had been paid by Medicare, and evidence that, "according to the hospital's contract with Medicare, the unpaid balance was written off and could not thereafter be collected from the plaintiff." *Id.* at 762, 411 S.E.2d at 201–02. On appeal, we held that the admission of the Medicare payments and contractual write-offs, which we referred to as "gratuitous government benefits," was prejudicial and in violation of the rule. *Id.* at 764, 411 S.E.2d at 203.

In this case, unlike *Badgett*, the hospital bills were not paid by an independent third party. There is no evidence in the record that Medicare, Medicaid, some other insurance company, a beneficial society, Plaintiff's family, or Plaintiff's employer paid a portion of the decedent's medical bills and/or procured the write-offs. Rather, the bills appear to have been forgiven by the hospital of its own accord as a business loss. In an affidavit obtained by Defendant and not admitted into evidence,[20] the hospital's custodian of records characterized the unpaid medical bills as " '[r]isk [m]anagement' write-offs," which "were not paid by any source (including the patient or insurance company)." In addition, the evidence in the record indicates that the hospital was also a defendant in a separate suit brought by Plaintiff arising out of the same facts. The hospital ultimately settled that lawsuit, and the amount of that settlement was applied to reduce Plaintiff's verdict in this case.

We can find no cases in this jurisdiction directly addressing the situation in which a defendant doctor in a medical malpractice case

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20. Defendant submitted the affidavit to the trial court as an offer of proof, however.

attempts to introduce evidence that a hospital, which has settled with the plaintiff in a separate action arising from the same facts, reduced the plaintiff's medical bills pursuant to "risk management" practices and not pursuant to a contract with a government entity like Medicare or with some other insurance company. Moreover, we have been unable to find any cases from other jurisdictions dealing with this particular, narrow factual scenario. Nevertheless, a number of courts have held, like *Badgett*, that the costs written off by a contract between a non-tortfeasor hospital and a government-funded assistance program like Medicare are not admissible under the collateral source rule. *See, e.g.*, *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255 (D.N.M. 2006) (holding thatthe collateral source rule applied to contractual Medicare write-offs made by the injured plaintiff's health care provider). When the hospital is a separate tortfeasor and writes off medical expenses pursuant to an agreement with a third party, however, other courts have concluded that the collateral source rule is not applicable. *See, e.g.*, *Rose v. Via Christi Health Sys., Inc. / St. Francis Campus*, 279 Kan. 523, 529, 113 P.3d 241, 246 (2005) ("Under the facts of this case, the source of the $154,000 of medical services not reimbursed by Medicare was [the hospital], the tortfeasor, not an independent source."); *Williamson v. St. Francis Med. Ctr., Inc.*, 559 So.2d 929, 934 (La. App. 2 Cir. 1990) (holding that the collateral source rule did not apply to allow the plaintiffs to recover medical bills cancelled by the hospital pursuant to an agreement with Medicare because "the hospital, to whom the bill was owed, was also a tort[]feasor" and, therefore, the benefit to the plaintiffs resulted from the hospital's own "procuration or contribution").

Here, the record does not indicate that the decedent's medical bills were written off pursuant to an agreement with an independent party. Rather, they were discharged by the hospital, also an alleged tortfeasor, which ultimately settled with Plaintiff. Unlike *Badgett*, the paying party in this case was not independent and not collateral to this matter. The payment was made by a separate, alleged tortfeasor and not pursuant to an agreement with a separate, collateral source. Therefore, we hold that the collateral source rule is not applicable to bar evidence of the hospital bills that were written off by the Cumberland County Hospital System. Accordingly, Plaintiff was entitled to introduce evidence of the decedent's medical bills, but Defendant was also entitled to introduce evidence that some of those bills were written off by the hospital. As a result, we hold that the trial court erred in denying Defendant's motion to introduce evidence of the write-offs and, therefore, abused its discretion in denying her Rule 60(b) motion for a new trial as it relates to the issue

of damages.[21] *See generally Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) ("[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court[,] and appellate review is limited to determining whether the court abused its discretion.").

III. Instruction on Permanent Injury

[11] Though we have already determined that Defendant is entitled to a new trial on damages, we address Defendant's argument that the trial court erred by instructing the jury on "permanent injury" in the interests of judicial economy and for the purpose of avoiding further appeal regarding the propriety of the trial court's jury instructions on damages. Defendant contends that the trial court erred by instructing on permanent injury because the purpose of the permanent injury jury instruction "is to guide the jury in how it should determine the value of *future damages* [to the injured party] at the time of trial" and the decedent was not alive at that time. (Emphasis added). In response, Plaintiff asserts that the instruction was proper because it was "abundantly clear" from the evidence that Plaintiff was only seeking damages for the decedent's personal injuries and his own loss of consortium, not for the decedent's life expectancy. We agree with Defendant.

As a preliminary matter, we note that Plaintiff brought no action for wrongful death. Therefore, the trial court's permanent injury instruction was only relevant to Plaintiff's actions seeking personal injury damages. In that context, the trial court instructed on permanent injury, in near word-for-word compliance with our pattern jury instructions, as follows:

> Damages for personal injury also include fair compensation for permanent injury incurred by the plaintiff as a proximate result of the negligence of the defendant. An injury is permanent when any of its effects continued throughout the plaintiff's life. These effects may include medical expenses, pain and suffering, scarring and disfigurement, partial loss of use of part of the body incurred or experienced by the plaintiff over her life expectancy.
>
> Once again, however, the plaintiff is not entitled to recover twice for the same element of damages; therefore, you should not include any amount you've already allowed for medical expenses, pain and suffering, and scarring

21. For the reasons discussed in the foregoing sections, we hold that the trial court did not otherwise abuse its discretion in failing to grant Plaintiffs' motions for remittitur and for a new trial.

> or disfigurement or partial loss of use of part of the body because of permanent injury.
>
> Life expectancy is the period of time the plaintiff may reasonably have been expected to live.

After its definition of life expectancy, the trial court moved on to a discussion of negligence. The trial court omitted the following additional language from our pattern jury instructions:

> [The life expectancy tables are in evidence.] [The court has taken judicial notice of the life expectancy tables.] They show that for someone of the plaintiff's present age, (*state present age*), *his* life expectancy is (*state expectancy*) years.
>
> In determining the plaintiff's life expectancy, you will consider not only these tables, but also all other evidence as to *his* health, *his* constitution and *his* habits.

N.C.P.I. — Civil 810.14 (June 2012) (emphasis in original).

Beyond the alternative sentences set off in brackets, our pattern jury instructions do not indicate that the omitted text is optional. Though the charge conference does not disclose the court's rationale for omitting this text, the likely reason is that the decedent was not alive at the time of trial. It is entirely nonsensical to admit life expectancy tables and thereafter instruct the jury on the decedent's *life expectancy* when she is no longer living and no claim for wrongful death is being brought. The omitted language reveals, therefore, that the permanent injury jury instruction, in the context of Plaintiff's actions for personal injury damages, is not intended to cover past damages. Past damages can be addressed, as they were in this case, by instructions on other forms of damages. The purpose of the permanent injury instruction, however, is to compensate the plaintiff for *additional* future harm that she is expected to experience because of a permanent injury that she suffered as a proximate result of the defendant's conduct. *See generally* David A. Logan & Wayne A. Logan, North Carolina Torts 182 (1996) ("Plaintiffs are entitled to recover for the *future damages* associated with permanent injuries.") (emphasis added); William S. Haynes, North Carolina Tort Law 907–08 (1989) ("The term 'permanent injuries,' may be defined as those injuries that are reasonably certain to be followed by permanent impairment to earn money, or producing permanent and irremediable pain. . . . Damages for permanent disability are, therefore, addressed in the elements of damage referred to as loss of future earning

capacity or future pain and suffering, as opposed to being recoverable in and of themselves. It logically follows that where permanent injuries exist the proper element of damages into which such injuries fall are a permanent impairment or diminution of the plaintiff's earning ability or power."). In light of the fact that the decedent was not alive at the time of the trial and Plaintiff did not bring suit for wrongful death, we conclude that the trial court's instruction on permanent injury was erroneous.

Conclusion

For the foregoing reasons, we find no error in the trial of this case on the negligence issues. We remand for a new trial on damages.

NO ERROR in part; NEW TRIAL on damages.

Judges BRYANT and DILLON concur.

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC, Plaintiffs
v.
SHERIFF OF ONSLOW COUNTY, NORTH CAROLINA, ED BROWN, in his official capacity; and DISTRICT ATTORNEY FOR THE FOURTH PROSECUTORIAL DISTRICT OF THE STATE OF NORTH CAROLINA, ERNIE LEE, in his official capacity, Defendants

No. COA14-85

Filed 5 September 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—substantial right

The Court of Appeals had jurisdiction to determine defendant's interlocutory appeal of motions to dismiss because defendant's defense of sovereign immunity affected a substantial right warranting immediate review.

2. Immunity—sovereign immunity—jurisdiction proper

The trial court properly exercised jurisdiction in a case involving allegedly illegal video sweepstakes machines as sovereign immunity did not bar plaintiffs' claim for injunctive relief.

3. Appeal and Error—interlocutory orders and appeals—substantial right to enforce laws

Portions of a preliminary injunction order in a case involving allegedly illegal video sweepstakes machines affected defendant's

substantial right to enforce the laws of North Carolina. The Court of Appeals exercised jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the order. The Court of Appeals declined to hear defendant's challenge to the remaining portions of the trial court's order as they did not affect a substantial right.

4. Declaratory Judgments—justiciable actual controversy—jurisdiction proper

The trial court's exercise of jurisdiction over a declaratory judgment claim in a case involving allegedly illegal video sweepstakes machines was proper. A justiciable actual controversy, as required by the Declaratory Judgment Act, existed.

Judge ERVIN dissenting.

Appeal by defendant from orders entered on 4 November 2013 by Judge Jack Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 8 May 2014.

Onslow County Attorney, by Lesley F. Moxley; and Turrentine Law Firm, PLLC, by S.C. Kitchen, for Defendant-Appellant.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry; and Hyler & Lopez, P.A., by Stephen P. Agan and George B. Hyler, Jr., for Plaintiffs-Appellees.

HUNTER, JR., Robert N., Judge.

Onslow County Sheriff Ed Brown ("Sheriff Brown") appeals from orders entered on 4 November 2013 denying his motions to dismiss under Rule 12 as well as granting a preliminary injunction in favor of plaintiffs Sandhill Amusements, LLC ("Sandhill") and Gift Surplus, LLC ("Gift Surplus") (collectively "Plaintiffs").[1]

We agree with Sheriff Brown that this Court has jurisdiction to determine his interlocutory appeal of the motions to dismiss because

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1. Gift Surplus is a Georgia corporation licensed to do business in North Carolina. Gift Surplus licenses the kiosks at issue in this case. Gift Surplus's kiosks are "sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business." Sandhill Amusement, Inc. ("Sandhill"), distributes the kiosks in Onslow County and surrounding areas.

his defense of sovereign immunity affects a substantial right warranting immediate review. We vacate certain portions of the preliminary injunction that affect a substantial right and dismiss Sheriff Brown's appeal from the remaining portions of that order. On the merits of the motions to dismiss, we affirm the trial court.

I. Facts & Procedural History

On 2 July 2013, Alcohol Law Enforcement ("ALE") Special Agent Kenny Simma ("Agent Simma"), Assistant Supervisor Keith Quick ("Agent Quick"), and Onslow County Sheriff's Office Sergeant John Matthews ("Sgt. Mathews"), in response to complaints that certain video gaming machines (hereinafter "kiosks") were providing money payouts, visited a business in the Rhodestown area of Onslow County. The business that Sgt. Matthews and the ALE agents visited was located in a building with blacked-out windows lacking any exterior sign displaying the name of the business. Sgt. Matthews and the ALE agents peered inside through a crack in the tint and knocked on the door. A male unlocked and opened the door and allowed Sgt. Matthews and the ALE agents inside. Agent Simma said that inside

> [t]he only things in the business was [sic] a counter with two Megatouch video poker machines on the counter, a pool table, I think a jukebox. I can't remember if it was three or four of these specific devices we're referring to, and a claw machine that -- like you see at Walmart, you put a quarter in and try to pick up a stuffed animal, and a pool table.

Later the business's proprietor arrived and showed Sgt. Matthews and the ALE agents how the machines worked.

The kiosks each include a 19" touch-screen display, an audio speaker, a control panel with "print ticket and play buttons," a receipt printer, and a currency acceptor. The kiosks allow patrons the opportunity to purchase gift certificates that may be used at Gift Surplus's online store, www.gift-surplus.com. When a patron inserts currency into the kiosk, a receipt is printed with equivalent credits ($1 is equivalent to 100 sweepstakes entries). The receipts printed also contain a "quick response code," which users may scan to enter a weekly drawing on the Gift Surplus website. Patrons may also use the kiosk to request a free entry request code, which allows for 100 free sweepstakes entries.

The kiosks contain five game themes: "Silver Bar Spin," "Truck Stop," "Lucky Shamrock 2," "Magic Tricks," and "Candy Money." Nick Farley

("Mr. Farley"), an expert in gaming machines and software, described these game as follows:

> Each of the aforementioned game themes offer several play levels which the participant may choose. A single finite pool is allocated to each play level for each game theme. Game play for these themes may be accomplished one of two ways:
>
> (1) By pressing the "REVEAL" button an entry is drawn from the corresponding theme/play level finite pool. The potential value is shown to the participant, and they are prompted to "Press SKIP or ANIMATE." Pressing either button will reveal a reel outcome. If the entry had no winning prize, a non-winning reel combination is displayed and either the play ends (if the "SKIP" button was pressed), or the participant is given the chance to nudge one of the three reels either up or down to another non-winning outcome (if the "ANIMATE" button was pressed). If the entry has a winning prize, a non-winning reel outcome is displayed and the participant must make a decision to nudge one of the three reels either up or down to align a winning combination corresponding to the prize value previous shown.
>
> (2) Alternatively, a participant may initiate the play by pressing the "ANIMATE" or "PLAY" button. A game initiated by pressing either the "ANIMATE" or "PLAY" button will not show the potential win value, but rather simply display a non-winning reel outcome which the player must then make a decision to nudge one of the three reels either up or down to align a winning combination.
>
> Regardless of the method the player uses to initiate play, the potential prize-value is determined by the entry revealed. Whether the potential prize is awarded is dependent upon the participant successfully nudging the correct reel in the correct direction to obtain a winning combination of symbols. Should a player fail to nudge the correct reel in the correct direction to obtain a winning combination, the potential prize is forfeited.

Agent Simma later told his supervisor about his visit and expressed his opinion that the kiosks were illegal video sweepstakes machines. The ALE agents later returned and took photographs and videos of the

kiosks. Agent Simma then sent the videos to Deputy Director Mark Senter at ALE headquarters, who also felt that the kiosks in Rhodestown violated the statutes regulating video sweepstakes machines. After receiving the ALE agents' report, District Attorney Ernie Lee and Sheriff Brown composed a letter to Richard W. Frye ("Mr. Frye"), President of Sandhill (hereinafter "innocent owner letter"). The letter informed Mr. Frye that the kiosks would be seized as evidence and that the person/persons in possession would be criminally charged. Mr. Frye testified that Sandhill removed kiosks from two Onslow County locations and opted not to place kiosks in five other Onslow County locations after receiving the innocent owner letter.

On 27 September 2013, Sandhill and Gift Surplus filed a joint Complaint and Motion for Preliminary Injunctive Relief against Sheriff Brown in his official capacity. The complaint alleged that Plaintiffs were suffering irreparable injury from the loss of revenues and profits resulting from the innocent owner letter issued by Sheriff Brown stating that the Plaintiffs' kiosks were illegal. Plaintiffs alleged that, since Sheriff Brown issued this letter, existing retail outlets that used Plaintiffs' products have removed the kiosks, refused to install the kiosks, or gave Plaintiffs notice that they intended to remove the kiosks. Plaintiffs also attached the affidavit and report of Mr. Farley, who opined that the kiosks operated based on skill and dexterity, rather than mere chance.

Plaintiffs' complaint sought the issuance of (i) preliminary and permanent injunctions prohibiting Defendants from removing the kiosks from any establishment in North Carolina and from issuing warnings and citations to such facilities; (ii) preliminary and permanent injunctions prohibiting Defendants from forcing or coercing a North Carolina retailer to remove Plaintiffs' kiosks; (iii) a preliminary injunction prohibiting Defendants from making or issuing statements outside of the litigation stating that the kiosks were illegal; and (iv) a declaratory judgment after a full hearing that declared the kiosks and Plaintiffs' marketing system are "not prohibited gambling, lottery or gaming products."

On 9 October 2013, Sheriff Brown filed motions to dismiss for lack of subject matter jurisdiction under N.C. R. Civ. P. 12(b)(1), lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2), failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6), and failure to bring suit on behalf of the real party in interest under N.C. Gen. Stat. § 1-57 (2013).

On 11 October 2013, the trial court held a hearing concerning Sheriff Brown's motion to dismiss and Plaintiffs' motion for injunctive relief. On

4 November 2013, Judge Jenkins entered an order relying in part on the expert witness's opinions that denied Sheriff Brown's motion to dismiss and granted Plaintiffs' motion for a preliminary injunction. In its orders, the trial court held that there was a likelihood that the Plaintiffs would prevail in that:

> (a) *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
>
> (b) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
>
> (c) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

The trial court also held that the suit was not barred by the doctrine of sovereign immunity and that Defendant had failed to show that Plaintiffs' claim should be dismissed under Rule 12(b)(1), Rule 12(b)(2), Rule 12(b)(6), or N.C. Gen. Stat. § 1-57. Accordingly, the trial court denied Defendant's motion to dismiss and granted Plaintiffs' request for the issuance of a preliminary injunction. Under the preliminary injunction, Sheriff Brown was:

> a. Restrained and enjoined from using North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and,
>
> b. Restrained and enjoined from compelling or attempting to compel, coerce[,] or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and,
>
> c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation[,]

> or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.

The trial court limited the applicability of the preliminary injunction to "those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks. . . ." Sheriff Brown filed timely written notice of appeal on 13 November 2013.

II. Appellate Jurisdiction

A judicial order is either interlocutory or the final determination of the rights of the parties. N.C. R. Civ. P. 54(a). In *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), our Supreme Court succinctly explained the difference between the two types of orders:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Id. at 361–62, 57 S.E.2d at 381 (citations omitted); *see also Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty*, ___ N.C. App ___, ___, 756 S.E.2d 833, 835 (2014) (citations omitted). Final judgments are appealable under N.C. Gen. Stat. § 7A-27 (2013). "Interlocutory orders may be appealed only where there has been a final determination of at least one claim" and the trial court certifies under N.C. R. Civ. P. 54(b) that "there is no just reason to delay the appeal" or, alternatively, if "delaying the appeal would prejudice a substantial right." *White v. Carver*, 175 N.C. App. 136, 139, 622 S.E.2d 718, 720 (2005) (citations, alterations, and quotation marks omitted) ("The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts."); *see also* N.C. Gen. Stat. § 1-277 (2013).

Sheriff Brown's appeal from the order denying the motions to dismiss and granting the preliminary injunction is interlocutory since the trial court's orders did not dispose of the case. Additionally, there was no Rule 54(b) certification by the trial court. Accordingly, we consider whether Sheriff Brown's asserted defense of sovereign immunity affects a substantial right.

Whether an interlocutory order affects a substantial right "is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002). The appellant bears the burden of establishing that a substantial right will be affected unless he is allowed an immediate appeal. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citations omitted). "Our Supreme Court has defined 'substantial right' as a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Royal Oak*, ___ N.C. App. at ___, 756 S.E.2d at 835.

"Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). To prove that a substantial right is affected, an appellant must first prove that the right itself is substantial. *Id.* Second, an appellant "must demonstrate *why* the order affects a substantial right. . . ." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Sheriff Brown asserts that the rejection of his defense of sovereign immunity affects a substantial right. Sheriff Brown also argues that the trial court's issuance of the preliminary injunction enjoins him from enforcing criminal laws and also affects a substantial right. We address each in turn.

A. Motions to Dismiss

[1] Sheriff Brown contends that the denial of his 12(b)(1), (2), and (6) motions to dismiss based on sovereign immunity affects a substantial right. We agree.

"The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). "The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011).

This Court has "repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556,

558–59, 512 S.E.2d 783, 785 (1999). "[W]hen [a] motion is made on the grounds of sovereign and qualified immunity,. . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994).

Here, we consider the denial of a motion to dismiss based on sovereign immunity and, accordingly, we must review whether Sheriff Brown is entitled to that defense. *Atl. Coast Conference v. Univ. of Maryland*, ___ N.C. App. ___, ___, 751 S.E.2d 612, 617 (2013) ("Defendants' underlying interest in asserting sovereign immunity is substantial . . . [.]"); *Richmond Cnty. Bd. of Educ. v. Cowell*, ___ N.C. App. ___, ___, 739 S.E.2d 566, 568 (2013), *review denied*, ___ N.C. ___, 747 S.E.2d 553 (2013).

However, we note that "'a motion to dismiss based on sovereign immunity is a jurisdictional issue [and] whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.'" *Atl. Coast Conference*, ___ N.C. App. at ___, 751 S.E.2d at 617 (quoting *M Series Rebuild, LLC v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257 (2012) (alterations omitted)). "[B]ecause our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled." *Id.* As in *Atl. Coast Conference*, "we leave the type of jurisdictional challenge presented by a sovereign immunity claim for resolution by a future court" and accept jurisdiction of Sheriff Brown's appeal pursuant to the authority conferred by N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d). *Id.* Accordingly, we now address whether sovereign immunity barred Plaintiffs' action for declaratory judgment.

i. Standard of Review

The standard of review for the denial of a motion to dismiss on the basis of sovereign immunity is *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013).

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779 (2014) "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted).

ii. Merits of Sovereign Immunity Defense

[2] "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity."[2] *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Further

> when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign immunity. . . .[I]f plaintiff's complaint demonstrates that she has sued the defendants only in an official capacity, rather than as individuals, defendants would be potentially shielded from plaintiff's cause of action by governmental immunity.

Whitaker v. Clark, 109 N.C. App. 379, 381–82, 427 S.E.2d 142, 143–44 (1993) (citations omitted). Ultimately

> [t]he crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer, 347 N.C. at 110, 489 S.E.2d at 887 (quotation marks and citations omitted).

"The doctrine of sovereign immunity bars actions against public officials sued in their official capacities. Sheriffs and deputy sheriffs are

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2. Sheriff Brown does not argue that Plaintiffs failed to assert waiver of sovereign immunity in his brief. When considering a motion to dismiss based on a defense of sovereign immunity, the complaint must allege a waiver, without which the complaint fails to state a cause of action. *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002). However, Sheriff Brown does not raise this issue on appeal nor does waiver appear to be addressed by either party or considered by the trial court. Accordingly we do not address this issue on appeal. *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 47–48, 627 S.E.2d 482, 484–85 (2006).

considered public officials for purposes of sovereign immunity. Thus, sovereign immunity bars plaintiff's claims against defendants in their official capacities." *Phillips v. Gray*, 163 N.C. App. 52, 56–57, 592 S.E.2d 229, 232 (2004) (citations omitted).

Plaintiffs sued Sheriff Brown in his official capacity in accordance with *White*. 366 N.C. at 364, 736 S.E.2d at 169. Additionally, Plaintiffs seek "an injunction requiring the defendant to take an action involving the exercise of a governmental power," which means that "the defendant is named in an official capacity." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887. From the foregoing, it appears that Plaintiffs' claim should be dismissed, since sovereign immunity would typically bar claims against Sheriff Brown in his official capacity.

However, this Court's opinion in *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346 (2005), controls this case. *Am. Treasures* concerned a seller of long-distance pre-paid phone cards that included a free promotional scratch-off game piece. *Id.* at 172–73, 617 S.E.2d at 348. The plaintiff sold these cards through convenience stores and, eventually, ALE agents began "threatening to take action against the convenience stores' licenses to sell beer and alcoholic beverages . . . on the grounds that the sale of plaintiff's phone cards was illegal." *Id.* at 173–74, 617 S.E.2d at 348. The plaintiff brought an action for declaratory judgment and injunctive relief against the State. *Id.* at 174, 617 S.E.2d at 348.

In *Am. Treasures*, this Court discussed *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940). *Am. Treasures*, 173 N.C. App. at 175, 617 S.E.2d at 349–50. Specifically:

> In *McCormick*, law enforcement officers interfered with an owner's possession of certain slot machines on the grounds that such machines were illegal. *Id.*, 217 N.C. at 24, 6 S.E.2d at 871. The trial court declined to restrain the interference on the grounds that the officers were engaged in the enforcement of criminal law and refused to hear evidence or find facts regarding the legality of the machines. *Id.* Citing the above principles, our Supreme Court reversed, holding that *equity may nevertheless be invoked as an exception to those principles and may operate to "interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons." Id.*, 217 N.C. at 29, 6 S.E.2d at 874.

Id. at 175, 617 S.E.2d at 349 (emphasis added). This Court in *Am. Treasures* also discussed *Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989):

> Moreover, this Court has previously reviewed a trial court's consideration of a prayer for declaratory and injunctive relief concerning the applicability of North Carolina's bingo statutes to a charitable sales promotion without indicating the existence of any jurisdictional bar. *Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Am. Treasures, 173 N.C. App. at 175–76, 617 S.E.2d at 349–50. Ultimately this Court relied on the two cases in holding that:

> the trial court's exercise of jurisdiction under the facts of the instant case was proper. First, we find *McCormick* and *Animal Protection Society* are *sufficiently similar to the facts of the instant case and are controlling on the issue of the trial court's jurisdiction. Second, the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores.*
>
> . . .
>
> *Accordingly, without seeking a declaratory judgment, plaintiff would be unable to effectively protect its property rights.* Defendants' jurisdictional argument is overruled.

Id. at 176, 617 S.E.2d at 350 (emphasis added).

Here, as in *Am. Treasures*, Plaintiffs face restrictions on their property rights resulting from Sheriff Brown's transmission of the innocent owner letter, which effectively barred any future sale and current placement of their kiosks. Additionally, as in *Am. Treasures*, sovereign immunity acts as a bar to Plaintiffs' ability to seek redress through monetary damages. Without such redress, Plaintiffs have no viable option for protecting their property rights during this litigation.

Accordingly, as (i) the facts at present are sufficiently similar to the controlling cases in this area and (ii) the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that the trial court properly exercised jurisdiction and that sovereign immunity did not bar Plaintiffs' claim for injunctive relief. We next address whether Sheriff

Brown's challenge to the trial court's decision to issue a preliminary injunction is interlocutory.

B. Preliminary Injunction

> The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and internal quotation marks omitted); *see also Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002); *Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) ("For a 'defendant to have a right of appeal from a mandatory preliminary injunction, 'substantial rights' of the appellant must be adversely affected.' " (quoting *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983)).

[3] A substantial right is affected when the trial court's order prohibits the State from enforcing the law. *Beason v. State Dep't of the Sec'y of State*, ___ N.C. App. ___, ___, 743 S.E.2d 41, 44–45 (2013) ("[T]he trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner's motion to dismiss."); *Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 864 (2012), *writ allowed, review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013) and *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013) and *aff'd*, ___ N.C. App. ___, 749 S.E.2d 278 (2013).

Sheriff Brown argues that his ability to enforce the law is impeded by the trial court's grant of a preliminary injunction, and points our attention to *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, ___ N.C. App. ___, 749 S.E.2d 469 (2013), which stated that "[w]hen an agent of the State that is charged with enforcing statutes chooses to appeal rulings

limiting the enforcement of those statutes, the right to enforce the statute is substantial and the rulings are immediately appealable." *Id.* at ___, 749 S.E.2d at 471.

Rockford ultimately held that, because the defendant was not a state agency or agent of the State charged with enforcing the statutes, a substantial right was not affected. *Id.* at ___, 749 S.E.2d at 472. This Court relied on *Johnston and Gilbert v. N.C. State Bar*, 363 N.C. 70, 76–77, 678 S.E.2d 602, 606 (2009) for this proposition. This Court in *Johnston* held

> that the State has a substantial right to enforce the criminal laws of North Carolina and that this right is affected by a ruling declaring a statute, duly enacted by the General Assembly, to be unconstitutional. The State has also demonstrated that the deprivation of that substantial right will potentially work injury if not addressed before appeal from a final judgment. The trial court's judgment prohibits the State from prosecuting plaintiff for possession of a firearm. Further, it casts doubt upon every prosecution by the State throughout North Carolina under Article 54A of Chapter 14 of the General Statutes.

Johnston, ___ N.C. App. at ___, 735 S.E.2d at 864.

Here, the trial court's grant of preliminary injunction violated the substantial right of Sheriff Brown in its sixth conclusion of law:

> 6. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

In essence, this conclusion of law determines that these particular kiosks fit within the statutory framework and does so unnecessarily at the preliminary injunction stage. In *Beason*, this Court held that "[t]he substantial basis of this appeal involves *the trial court's order concluding that the alleged violations respondent fined petitioner for were not actually violations*." *Beason*, ___ N.C. App. at ___, 743 S.E.2d at 45 (emphasis added). Here, the trial court does the same thing, since it declares that Plaintiffs were operating a "lawful sweepstakes" and, thus, finds that the Sheriff threatened to prosecute actions that were not actually violative of the statutes. This broad wording in the sixth conclusion of law goes much further than the equitable consideration of "likely to prevail on the merits." Instead, this conclusion of law makes a declaration concerning the lawfulness of these kiosks and would "cast doubt upon every prosecution by the State throughout North Carolina . . . ." *Johnston*, ___ N.C. App. at ___, 735 S.E.2d at 864.

Similarly, in the decretal section of the order, the trial court ordered that "[t]he Preliminary Injunction . . . is specifically enforceable in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site." The trial court's use of "validly" within the preliminary injunction, similar to its use of "lawful" in its sixth conclusion of law, exceeds the scope of a preliminary injunction, as use of the term "valid" may imply within the preliminary injunction that Plaintiff's kiosks are "legally sufficient" within the applicable statutes. Black's Law Dictionary 1690 (9th ed. 2009). Such a conclusion would also cast doubt on prosecutions undertaken by Sheriff Brown and impede his ability to enforce the law.

As these portions of the preliminary injunction go beyond maintaining the status quo by declaring that Plaintiffs' conduct was *lawful* or *valid*, these portions affect Sheriff Brown's substantial right to enforce the laws of North Carolina. Thus, we exercise jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the preliminary injunction.

The remainder of the preliminary injunction does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits. Sheriff Brown was prohibited from enforcing certain statutes listed in the decretal section of the order (N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4). Additionally, the preliminary injunction was limited in its scope: the bar against enforcement extends only to "those Onslow County places which are . . . operating four or less Gift Surplus System v1-01.1/Gift Surplus computer kiosks at one location or on one site." The order also has no effect "on any individuals or entities who are not a party hereto, or on the parties hereto upon the trial or ultimate disposition of this matter." Simply, Sheriff Brown was not enjoined from enforcing the criminal laws of North Carolina by the remainder of the trial court's preliminary injunction; Sheriff Brown was enjoined from enforcing certain criminal laws *against parties to the litigation* until the resolution of this case.[3]

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3. This Court has found that enforcing the statutes against an *individual* affects a substantial right warranting immediate review, but has done so with permanent injunctions or final orders concerning enforcement of a particular statute or regulation. *See, e.g.*, *Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605 ("Although we express no opinion as to the merits of defendant's *Gilbert III* complaint, we note that the trial court order from which defendant appeals includes a *permanent injunction* enjoining defendant from prosecuting *Gilbert III*." (emphasis added)); *Beason*, ___ N.C. App. at ___, 743 S.E.2d at 44–45 (considering an order that decided some of the petitioner's claims and made definite statements that the petitioner's actions were not violations of certain lobbying laws that respondent was responsible for enforcing).

The remainder of the preliminary injunction preserves the status quo and "all parties remain free to fully litigate the merits of the case in the correct procedural context before the trial court . . . ." *CB & I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 550, 579 S.E.2d 502, 505 (2003). The remainder of the preliminary injunction does not affect a substantial right. As the remainder does not affect a substantial right, we do not have jurisdiction to consider this interlocutory appeal, so the remainder of Sheriff Brown's appeal is dismissed.

We next turn to the justiciability argument advanced by Sheriff Brown in opposition to Plaintiffs' request for a declaratory judgment.

C. Justiciability of Declaratory Judgment Claim

[4] The North Carolina Declaratory Judgment Act provides that

> Any person interested . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2013). Further, N.C. Gen. Stat. § 1-253 (2013) provides trial courts with the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."

Our Supreme Court has "required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing" in declaratory judgment actions. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986). Without an "actual controversy between the parties," jurisdiction does not attach under the Declaratory Judgment Act. *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 44, 621 S.E.2d 19, 29 (2005). An "actual controversy" must be more than a "mere difference of opinion between the parties" and this Court lacks the authority to render an advisory opinion that "the parties might, so to speak, put on ice to be used if and when occasion might arise." *Id.* (citations and quotation marks omitted). However,

> [a]lthough a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and

> settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Goldston, 361 N.C. at 33, 637 S.E.2d at 881 (citations, quotation marks, and alterations omitted); *see also Wake Cares*, *Inc.*, *et al. v. Wake Cnty. Bd. of Educ.*, 190 N.C. App. 1, 12, 660 S.E.2d 217, 224 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (holding that an actual controversy existed where plaintiffs, who were not charged with or threatened to be charged with a crime, were affected by several statutes and where a declaratory judgment "would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing"). Ultimately, plaintiffs in declaratory judgment actions are "not required to sustain actual losses in order to make a test case[,]" since that " 'requirement would thwart the remedial purpose of the Declaratory Judgment Act.' " *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994), *superseded by statute on other grounds as stated in Mehaffey v. Burger King*, ___ N.C. ___, ___, 749 S.E.2d 252, 256 (2013) (quoting *Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971)).

Plaintiffs seek to determine whether the software and kiosks they operate comply with N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 (2013), which regulate electronic sweepstakes machines. Plaintiffs do not seek to determine the criminal culpability of their potential customers, and the courts retain the ability to grant a declaratory judgment when a "questioned statute relates to penal matters." *Jernigan v. State*, 279 N.C. 556, 561, 184 S.E.2d 259, 263–64 (1971). Simply put, "[w]hen a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights." *Id.* at 561, 184 S.E.2d at 264; *see also Calcutt v. McGeachy*, 213 N.C. 1, 2, 195 S.E. 49, 49 (1938) (allowing jurisdiction for a declaratory judgment action to test the constitutionality of a criminal statute "prohibiting the manufacture, sale, possession, and use of gambling devices").

The record tends to show a conflict between Sheriff Brown's interpretation and Plaintiff's interpretation of the relevant statutes. Sheriff Brown sent an innocent owner letter declaring that the machines were illegal, while Plaintiffs countered with expert testimony asserting that the machines complied with the State's recent statutory changes. A declaratory judgment would help clarify the "legal relations at issue" and would remove uncertainty from Plaintiffs' continuing business interests.

Sheriff Brown argues that "there is no actual controversy existing at the time of the hearing[.]" This argument is premised on (a) Sheriff Brown having seized kiosks at a Rhodestown location rather than where Sandhill's owner believed the machines actually were, which was in the Town of Holly Ridge, and (b) Sheriff Brown having removed the kiosks from the Rhodestown location prior to the hearing on the motion to dismiss. Sheriff Brown cites *Fabrikant* for the proposition that the actual controversy must exist "at the time of the filing of the pleading and at the time of hearing." *Fabrikant*, 174 N.C. App. at 44, 621 S.E.2d at 29.

However, Sheriff Brown's office, through the transmission of the innocent owner letter, expressed doubts about the legality of "several video gaming machines associated with the web-site known as www.gift-Surplus.com." The hearing itself centered on the conflict concerning whether the kiosks at issue were illegal and the uncertainty concerning the legality of these kiosks ultimately impacts Plaintiffs' ability to operate a business going forward. Additionally, Plaintiffs alleged in their complaint that, since Sheriff Brown issued the innocent owner letter, existing retail outlets that used Plaintiffs' products had removed the kiosks or chosen not to use the kiosks due to the uncertainty surrounding their legality. From the foregoing, it is clear that a justiciable actual controversy, as required by the Declaratory Judgment Act, exists. Accordingly, the trial court's exercise of jurisdiction over the declaratory judgment claim was proper.

Because we (a) hold that Sheriff Brown is not entitled to the defense of sovereign immunity on the Rule 12 motions, (b) dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction in part and strike portions of the preliminary injunction in part, and (c) find an actual case or controversy existed, we do not address Sheriff Brown's remaining arguments on appeal.

III. Conclusion

In conclusion, (i) we hold that the trial court's denial of Sheriff Brown's motion to dismiss affected a substantial right; (ii) we affirm the trial court's order denying Sheriff Brown's motion to dismiss; (iii) we exercise limited jurisdiction to vacate portions of the preliminary injunction which exceed the scope of a preliminary injunction; and (iv) we dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction as interlocutory and not affecting a substantial right.

AFFIRMED in part, VACATED in part, and DISMISSED in part.

Judge ELMORE concurs.

ERVIN, Judge, dissenting.

Although I agree with my colleagues concerning the proper resolution of Defendant's challenge to the denial of his motion to dismiss based upon governmental immunity and justiciabiity grounds, I am unable to agree with their determination that a portion of Defendant's appeal from the issuance of the preliminary injunction did not affect a substantial right and is not subject to immediate appellate review in its entirety. In addition, after evaluating the validity of Defendant's challenge to the preliminary injunction on the merits, I believe that the trial court erred by issuing the preliminary injunction and that the portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities should be reversed in its entirety. As a result, I concur in the Court's opinion in part and dissent from the Court's opinion in part.

Appealability

As a general proposition, "there is no right of immediate appeal from interlocutory orders and judgments," *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)), such as the one at issue here. However, immediate appellate review of interlocutory orders is available "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay" pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), or when "the [interlocutory] order affects a substantial right under" N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(b)(3). *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), and *Oestreicher v. American Nat'l Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976)). In view of the fact that the trial court did not include, and could not properly have included, a certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), in its order, the only basis upon which this Court might have jurisdiction over Plaintiff's appeal from that portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities is in the event that that portion of the trial court's order affects a substantial right.

"The 'substantial right' test for appealability is more easily stated than applied." *Bailey v. Goode*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). An interlocutory order "affects a substantial right" for purposes of N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat.

§ 27(b)(3) in the event that it "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citing *Waters*, 294 N.C. at 207, 240 S.E.2d at 343). "Essentially a two-part test has developed--the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. A "substantial right" is " 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [litigant] is entitled to have preserved and protected by law: a material right.' " *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805 (quoting *Webster's Third New International Dictionary* 2280 (1971)). "Whether an interlocutory ruling affects a substantial right requires consideration of 'the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *N.C. Dep't. of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters*, 294 N.C. at 208, 240 S.E.2d at 343)).

In the decretal paragraphs contained in its order, the trial court stated, in pertinent part, that:

> 2. That Plaintiffs' Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:
>
> a. Restrained and enjoined from using [N.C. Gen. Stat. §§] 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1[]* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and
>
> b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and
>
> c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal

> administrative offenses or violations by reason of such party's display, sale, operation, or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.
>
> 3. The Preliminary Injunction set out in [Paragraph No. 2] above is specifically enforceable only in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site.

In other words, the clear import of the preliminary injunction provisions contained in the trial court's order was to prevent Defendant and his agents from taking any steps to enforce the provisions of N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 against the display, sale, operation, promotion of the equipment, computer programs, and websites in sites located in Onslow County at which no more than four kiosks were present. As a result, every provision of the preliminary injunction had the effect of prohibiting Defendant from enforcing certain statutory provisions as he understood them against Plaintiffs' equipment and activities as the activities in question occurred at locations in Onslow County at which no more than four kiosks were present.

As I read the relevant decisions, this Court has recognized that the entry of a preliminary injunction precluding a state or local agency from enforcing the law affects a substantial right and is immediately appealable. *Rockford-Cohen Group, LLC v. N.C. Dep't. of Ins.*, __ N.C. App. __, __, 749 S.E.2d 469, 471 (2013) (stating that, "[w]hen an agency of the State that is charged with enforcing statutes chooses to appeal rulings limiting the enforcement of those statutes, the right to enforce the statute is substantial, and the rulings are immediately appealable") (citing *Johnston v. State*, __ N.C. App. __, __, 735 S.E.2d 859, 864 (2012) (allowing an immediate appeal from an interlocutory order declaring that a statute, as applied to the plaintiff, was unconstitutional since that decision had the effect of permanently "enjoin[ing] the State from prosecuting plaintiff for violations of the" relevant statutory provisions), *disc. review concerning additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013), *aff'd*, __ N.C. App. __, 749 S.E.2d 278 (2013), and *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009) (allowing an immediate appeal from an interlocutory order that "enjoin[ed] defendant from

prosecuting" a related proceeding); *see also Beason v. N.C. Dep't. of Sec'y. of State*, __ N.C. App. __, __, 743 S.E.2d 41, 44-45 (2013) (stating that, "since respondent is charged with investigating violations of and enforcing" certain provisions of the lobbying laws, since "respondent's right to carry out these duties is substantial," and since "respondent's ability to carry out its duties requires that it be able to act timely on allegations it believes constitute violations," the respondent's appeal from an interlocutory order enjoining the enforcement of those lobbying laws against the petitioner was subject to immediate appellate review). I find no basis for departing from this well-established line of precedent, as the Court's opinion appears to do, in this case. As a result, given that the preliminary injunction issued by the trial court prohibits Defendants from taking action to enforce the relevant gaming machine statutes as he understands them, I would hold that this Court has jurisdiction over Defendant's appeal from the issuance of the preliminary injunction and proceed to address the validity of Defendant's challenge to that portion of the trial court's order on the merits.

In its opinion, the Court concludes that a portion of the trial court's preliminary injunction affects a substantial right and should be invalidated and that a portion does not affect a substantial right and should remain undisturbed. More specifically, the Court concludes that the sixth conclusion of law contained in the trial court's order should be vacated and that "validly" should be stricken from the third decretal paragraph on the grounds that these portions "go beyond maintaining the status quo." In reaching this conclusion, the Court relies on the Supreme Court's statement in *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and quotation marks omitted), to the effect that "[t]he purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits" and concludes that, because the relevant portions of the preliminary injunction order do more than serve the purpose of maintaining the status quo, they "affect Sheriff Brown's substantial right to enforce the laws of North Carolina" and should be invalidated on appeal. On the other hand, the Court appears to hold that the remainder of the preliminary injunction is so limited in scope and effect that it does not affect a substantial right and is not subject to immediate appellate review. I do not believe that the Court's approach to the resolution of this issue has any support in our "substantial right" jurisprudence as explained in decisions such as *Gilbert*, *Johnston*, and *Beason*.

As an initial matter, the Court's analysis seems to indicate that the extent to which Defendant was entitled to appeal from the issuance of

the preliminary injunction hinges upon the validity of the injunction itself.[1] In other words, the Court seems to conclude that Defendant is entitled to immediate appellate review of the preliminary injunction to the extent, and only to the extent, that the trial court exceeded its authority in issuing the injunction in the first place. I see no basis in our "substantial right" jurisprudence for equating a litigant's ability to appeal from an interlocutory order with the litigant's ability to prevail on the merits in the event that such an appeal was to be entertained. Instead, the extent to which this Court has jurisdiction to entertain an immediate appeal from an interlocutory order and the extent to which the trial court erred by entering the interlocutory order in question constitute two completely different issues that have little or no relation to each other in the preliminary injunction context.

Secondly, the Court's appealability analysis appears to hinge on the assumption that we have jurisdiction over Defendant's appeal from the trial court's order to the extent, and only to the extent, that the trial court's order disturbed the status quo. More specifically, the Court states that the portion of the preliminary injunction that it does not believe to be subject to appellate review on an interlocutory basis "does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits." Aside from the fact that the extent to which a particular order maintains or disturbs the status quo is not the sum total of the test employed for evaluating the merits of a trial court's decision to issue a preliminary injunction, I am unable to find any support in our "substantial right" jurisprudence for the use of such a standard. Simply put, I am not aware of any decision that finds or declines to find the existence of a "substantial right" sufficient to support the maintenance of an appeal from an interlocutory order based upon the extent to which the underlying order preserves or disturbs the status quo. For that reason, I do not believe that the Court's reference to the impact of the underlying preliminary injunction on the status quo has any bearing on Defendant's right to immediate appellate review of the preliminary injunction.

1. This aspect of the Court's analysis is similar to the argument advanced in Plaintiff Sandhill Amusements' brief, which suggests that the preliminary injunction does not affect a substantial right on the theory that, since Plaintiffs' equipment and activities do not violate the applicable gambling statutes, Defendant has not been enjoined from properly enforcing the law. However, as is discussed in more detail in the text, the extent to which the substance of a party's position on the merits is correct and the extent to which that party has a right to seek immediate appellate review from an interlocutory order are two separate, and essentially unrelated, questions.

Finally, the Court appears to conclude that *Gilbert*, *Johnston*, and *Beason* only authorize interlocutory appeals from orders that permanently, rather than preliminarily, enjoin state or local agencies or officials from enforcing the law against specific litigants.[2] However, the Court's interpretation of these cases is inconsistent with our statement of the applicable legal principle in *Rockford-Cohen*, a case that involved a challenge to the issuance of a preliminary injunction; has no support in their underlying logic, which assumes that an order precluding a state or local official from enforcing the law affects a substantial right without in any way suggesting the existence of a temporal limitation on the applicability of that principle; and ultimately rests upon stray references to the permanence of the injunctions at issue in those cases that had no apparent impact upon the reasoning actually employed in holding that the orders challenged in those case were immediately appealable.[3] As a result, since the preliminary injunction at issue in this case prohibits a state or local official from enforcing the law against Plaintiffs, since

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2. As we have already noted, the Court suggests that the fact that the preliminary injunction merely affects Defendant's ability to enforce a limited number of statutory provisions against a limited number of persons in a limited geographic area militates in favor of a finding that a portion of the preliminary injunction does not affect a substantial right and appears to read *Gilbert* as distinguishing between injunctions that affect a defendant's ability to enforce the laws generally and injunctions that affect a defendant's ability to enforce the laws against specific litigants. A similar argument resting on the scope of the preliminary injunction is advanced in the briefs submitted by Plaintiff Gift Surplus and Plaintiff Sandhill Amusements. However, since the orders at issue in *Gilbert*, *Beason*, and *Johnston* all precluded the relevant agency or official from enforcing specific statutory provisions against specific litigants in specific contexts, it is clear that such scope-related arguments have no support in our "substantial right" jurisprudence and that the Court's emphasis upon these factors in declining to review a portion of the preliminary injunction rests upon our misapprehension of our "substantial right" jurisprudence.

3. To be sure, *Gilbert* notes that the order from which the defendant appealed permanently enjoined it from prosecuting a separate proceeding. *Id.* at 75, 678 S.E.2d at 605. Similarly, the orders at issue in *Beason*, __ N.C. App. at __, 743 S.E.2d at 44-45, and *Johnston*, __ N.C. App. at __, 735 S.E.2d at 864, involve permanent orders rather than preliminary injunctions. However, nothing in the opinions in question in any way suggests that the fact that the injunctions or orders at issue in those cases were permanent rather than preliminary had any bearing on the Court's appealability analysis. Instead, the Court simply held that an injunction or order that precluded a state or local official from enforcing the laws affected a substantial right and was immediately appealable without in any way suggesting that a different principle would apply to preliminary, as compared to permanent, injunctions or orders. As a result, while the Court has correctly identified a factual distinction between the relevant cases and this case, the logic upon which the Court based those decisions applies equally to permanent and preliminary injunctions or orders and nothing in the opinions in those cases in any way suggests that the outcome would have been different in the event that the bar to further enforcement had been preliminary rather than permanent in nature.

our decisions clearly allow immediate appellate review of such orders, and since the logic upon which the Court relies in reaching a different conclusion rests upon a misapprehension of our prior decisions concerning appealability issues, I would hold that this Court has jurisdiction over the entirety of Defendant's challenge to the preliminary injunction and will now, in light of that conclusion, address Defendant's challenge to the issuance of the preliminary injunction on the merits.

Validity of the Preliminary Injunction

"[A preliminary injunction] will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, 308 N.C. at 402, 302 at 754, 760 (citation omitted). Although appellate courts review orders granting or denying preliminary injunctions using a *de novo* standard of review, we have also noted that "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003) (citation omitted). For purposes of this case, the ultimate issue raised by Defendant's challenge to the validity of the preliminary injunction is whether Plaintiffs have shown a likelihood of success on the merits and whether they are likely to sustain an irreparable injury in the event that they are deprived of injunctive relief prior to the completion of a trial on the merits.[4]

According to N.C. Gen. Stat. § 14-306.4(b), "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." An "electronic machine or device" for purposes of N.C. Gen. Stat. § 14-306.4(b) is a piece of equipment "that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information

4. In view of the fact that Defendant has not argued that Plaintiffs have shown the existence of the necessary irreparable injury, we will focus our discussion in the text on the extent to which Plaintiffs have shown that they are likely to succeed on the merits at trial.

on a screen or other mechanism." N.C. Gen. Stat. § 14-306.4(a)(1). Similarly, an "entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," including "[a] video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player" and "[a]ny . . . video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." N.C. Gen. Stat. § 14-306.4(a)(3). Finally, a "sweepstakes" is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." N.C. Gen. Stat. § 14-306.4(a)(5). As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14-306.4(b) is in the event that the game or simulated game involved is "dependent on skill or dexterity."

In its order, the trial court found as a fact that:

> 19. Nick Farley . . . testified on behalf of the Plaintiffs. He was proffered and accepted as an expert witness in the field of gaming and software.[5]
>
> 20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v1-01-1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received into evidence).

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5. At this point, the trial court stated in Footnote No. 5 to its order that: "Nick Farley is the owner of Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing, based in Salon, Ohio. This is one of three firms in the country that provides technical consulting services for compliance of gaming machines with state and federal regulations. Eclipse Compliance Testing consults with and has been hired by law enforcement, tribal and government regulatory agencies in 245 jurisdictions, as well as by regulated device manufacturers, regarding device classification and regulatory compliance. The firm has been involved solely in the business of compliance and testing from 2000 to present. Mr. Farley has testified as an expert witness in these matters in federal, state and tribal courts both as a witness for the government and for the defense."

> 21. In Farley's uncontroverted opinion as evidenced by his report and testimony, the computer software program that operates the distribution of Gift Surplus sweepstakes entries and the video games used to reveal winning sweepstakes entries on the Gift Surplus Kiosk is a sweepstakes which operates in compliance with the generally accepted guidelines for operating sweepstakes in North Carolina and many other jurisdictions in the United States.
>
> 22. Farley testified that, based on his expertise honed through years of experience and his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words "skill" and "dexterity" as used by the industry in North Carolina and many other jurisdictions.[6]
>
> 23. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v1-01-1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.[7]

Based upon these and other findings, the trial court concluded as a matter of law that:

> 6. The *Gift Surplus System v1-01-1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

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6. At this point, in Footnote No. 6 to its order, the trial court stated that: "In preparation for his testimony, Nick Farley was provided by counsel the definition of 'skill or dexterity' in statutes in the United States. As noted in his testimony, Farley's testimony was based partially upon the statutory definitions used around the country."

7. At this point, in Footnote No. 7 to its order, the trial court stated that: "Farley's report found that a participant's decision can be viewed as a strategic choice or tactic which will evolve into confidence with practice and experience. Participants familiar with revealing sweepstakes entries through the game theme will develop an aptitude or ability to quickly recognize the correct reel and the correct skill moves to reveal a prize winning sweepstakes entry. Experienced participants will demonstrate fluency in the execution of the learned past of recognizing and selecting the correct reel and making the correct skill move to reveal a potential winning outcome. Further, if the participant takes no action to effectuate the outcome of the game, the participant will not be able to realize any potential prize associated with the sweepstakes entry because these systems will never display a winning sequence on the first sweepstakes entry presented. Therefore, the kiosk games, per Farley, are dependent on skill or dexterity and not the element of chance."

. . . .

8. There is a likelihood that the Plaintiffs will prevail in that:

a. *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.

b. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.

c. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

As a result, the trial court determined that Defendant should be enjoined from taking any action against Plaintiffs' equipment and activities based upon a determination that the extent to which a person received a prize for participating in the sweepstakes hinged upon that person's skill or dexterity.

The trial court's conclusion that Plaintiffs' equipment and activities involved a game whose outcome depended on skill or dexterity rested upon acceptance of Mr. Farley's testimony to the effect that the outcome of the games played utilizing Plaintiffs' equipment depended on the player's skill or dexterity. Although the term "skill or dexterity" as used in N.C. Gen. Stat. § 14-306.4 has not been statutorily defined, the meaning of the term in question, as used in Article 37 of Chapter 14 of the General Statues, a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14-306.4, has been addressed by this Court. In light of that fact, the trial court should have determined whether Plaintiffs' equipment and activities facilitated a game of "skill and dexterity" or a game of chance based upon the meaning of that term as used in North Carolina gambling-related cases rather than on the basis of the meaning of that term as used in other jurisdictions and in the gaming industry, which is the approach that the trial court found to have been adopted in Mr. Farley's testimony. Thus, in order to determine whether the trial court correctly found that Plaintiffs' equipment and

activities were lawful, we must first ascertain the difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line Plaintiffs' equipment and activities fall on.

In *Collins Coin Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 408, 451 S.E.2d 306, 308 (1994), *disc. rev. denied*, 340 N.C. 110, 456 S.E.2d 312 (1995), we stated that:

> A game of chance is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). "A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." *Id.* at 535, 192 S.E.2d at 615-16 (citation omitted). In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:
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> It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.
>
> *Id.* at 38, 76 S.E.2d at 316-317.

In light of this understanding of the meaning of the relevant statutory language, this Court considered whether a video poker game was one of skill or of chance, *id.* at 406, 451 S.E.2d at 307, and determined that the game in question was one of chance rather than one of skill because, at least in part, almost all of the skill-related elements in an in-person poker game, including the use of psychological factors such as bluffing to prevail over an opponent, were absent from video poker. *Id.* at 408, 451 S.E.2d at 308. In addition, we stated that:

> although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot

> determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.

Id. at 409, 451 S.E.2d at 308 (internal citation omitted). As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. § 14-306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill.

As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits.[8] In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays.[9] Finally, the extent to which the opportunity arises for the "nudging" activity upon which the trial court's order relies in support of its determination that the equipment in question facilitated a game of "skill or dexterity" appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs' equipment and activities depended on skill or dexterity, the only basis for this assertion was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. In light of these inherent limitations on a player's ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment

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8. As Mr. Farley indicated, "[s]hould the random distribution of entries cause the payout rate to exceed a predetermined limit, prizes selected for distribution which exceed $200 will be returned to the pool and another prize will be selected to be revealed."

9. Mr. Farley admitted on cross-examination that a number of screens will offer a "zero value prize" so that the participant cannot win anything of value regardless of his or her actions in the game and that "[w]hich entry is going to come out of the pool is determined by chance."

at issue simply does not appear to be able to "determine or influence the result over the long haul." *Id.* at 409, 451 S.E.2d at 309 (citation omitted). As a result, for all of these reasons, I am compelled by the undisputed evidence to "conclude that the element of chance dominates the element of skill in the operation" of Plaintiffs' machines, *id.*, a fact that demonstrates that Plaintiff is not likely to succeed on the merits at trial and that the trial court erred by preliminarily enjoining Defendant from enforcing the strictures of N.C. Gen. Stat. § 14-304.6(b) against Plaintiffs. Thus, I believe that the trial court's order should be reversed to the extent that it preliminarily enjoins Defendant from enforcing the provisions of N.C. Gen. Stat. § 14-306.4 against Plaintiffs.[10]

Conclusion

Thus, while I agree with my colleagues that we have jurisdiction over Defendant's challenge to the denial of his dismissal motion and that the trial court properly rejected Defendant's governmental immunity and justiciability challenges to Plaintiffs' complaint, I am unable to agree with their decision that only a portion of the trial court's preliminary injunction order is subject to immediate appellate review and would further conclude, after examining the merits of Defendant's challenge to the preliminary injunction, that, since Plaintiffs did not demonstrate a likelihood of success on the merits at trial, that portion of the trial court's order preliminarily enjoining Defendant from enforcing various statutory provisions against Plaintiffs should be reversed. As a result, I would affirm the trial court's refusal to dismiss Plaintiffs' complaint, reverse the trial court's decision to issue a preliminary injunction against Defendant, and remand this case to the Onslow County Superior Court for further proceedings not inconsistent with this opinion and dissent from the Court's decision to the extent that it reaches a contrary result.

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10. As a result of the fact that our resolution of the "skill or dexterity" issue for purposes of N.C. Gen. Stat. § 14-306.4 applies equally to the other statutes that Defendant was enjoined from enforcing against Plaintiffs, we need not separately analyze the validity of the preliminary injunction under these additional statutory provisions.

LOIS A. SAULS, Plaintiff
v.
ROLAND GARY SAULS, Defendant

No. COA14-41

Filed 16 September 2014

1. Divorce—equitable distribution—cash and checks on date of separation—sufficient supporting evidence

The trial court did not err in an equitable distribution case by finding as fact that the parties had $350,000 in cash and checks as of the date of separation. The record contained competent evidence to support the trial court's finding regarding the value of the cash and checks.

2. Divorce—equitable distribution—cash and checks—presently owned on date of separation

The Court of Appeals found no merit in defendant's argument in an equitable distribution case that because cash and checks that had been kept in a safe during the parties' marriage were not found in the safe upon their divorce, the trial court could not find that they were "presently owned" by the parties on the date of separation. The trial court found that defendant had removed from the marital home $350,000 in cash and checks, which were marital funds, and the record was devoid of any evidence that the cash or checks were ever owned by someone other than plaintiff or defendant.

3. Divorce—equitable distribution—in-kind distribution—presumption not rebutted

The trial court did not err in an equitable distribution case by ordering an in-kind distribution of $178,667.49 without first considering whether defendant had sufficient liquid assets to satisfy such an award. Defendant did not rebut the presumption that an in-kind distribution of the cash and checks would be equitable and the trial court was not required to consider the distributive award factors enumerated under N.C.G.S. § 50-20(c).

Appeal by defendant from orders entered 15 February 2013 and 11 July 2013 by Judge Darrell B. Cayton, Jr. in Beaufort County District Court. Heard in the Court of Appeals 13 August 2014.

Attorney Jonathan McGirt, for plaintiff.

Attorney W. Gregory Duke, for defendant.

ELMORE, Judge.

Defendant timely appeals from: 1.) an equitable distribution order entered 15 February 2013 ordering defendant to pay plaintiff an in-kind distribution of $178,667.49 in cash and check proceeds and 2.) an order entered 11 July 2013 denying defendant's motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. After careful consideration, we affirm.

I. Facts

Lois A. Sauls (plaintiff) and Roland Gary Sauls (defendant) married each other on 6 October 1963. Over the years, defendant accumulated large sums of cash, which he kept inside a safe in the parties' former marital residence. Although plaintiff knew where the combination to the safe was hidden, she did not access the safe unless directed to do so by defendant. In September 2005, the parties temporarily separated. Around this time, plaintiff attempted to access the safe on her own but the combination and keys had been removed from their usual hiding place. Defendant was the only other person who knew where the combination and keys were hidden.

The parties reconciled in January 2006. At that time, defendant had four checks, each for $10,000, issued and made payable to plaintiff. On two separate occasions, defendant drove plaintiff to the bank, sent her inside to endorse and cash one of the checks, and then plaintiff gave defendant the cash proceeds, which he "needed . . . for the business." Plaintiff testified that she never cashed the two remaining checks and defendant always kept the checks in his possession. However, defendant claimed plaintiff cashed the remaining two checks in the same way as she did the first two and that plaintiff had just "forgot some things."

The parties finally separated on 13 August 2006. On 13 December 2006, plaintiff filed a complaint asserting claims for post-separation support, alimony, divorce from bed and board, equitable distribution, and attorneys' fees. Defendant filed an answer and a counterclaim for equitable distribution. In spring 2008, the safe was opened by a locksmith in the presence of the parties and their attorneys. There was no cash in the safe.

On 30 January 2009, the parties divorced. Plaintiff subsequently dismissed the complaint against defendant with the exception of her claim

for equitable distribution, which was heard in Beaufort County District Court on 29 May 2012. The trial court found that defendant had removed from the marital residence $330,000 in cash and $20,000 in certified checks, which were marital assets. The trial court entered an order for equitable distribution and, in part, ordered that defendant pay plaintiff $178,667.49 as an in-kind distribution of cash and certified checks that defendant took from the former martial estate.

II. Analysis

a.) Findings of Fact

[1] First, defendant argues that the trial court erred in finding as fact that the parties had $350,000 in cash and checks as of the date of separation. We disagree.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

It is the duty of the trial judge "to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). "It is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*, ___ N.C. App. ___, ___, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

The record contains competent evidence to support the trial court's finding regarding the value of the cash and checks. Most notably, under "Schedule F" of the pre-trial order ("Property about which there is a disagreement as to classification, with each party's contentions as to the value and distribution."), neither party disputed the value of the items listed as "$330,000 cash" and "2 Certified Checks in Wife's Name." Defendant only contended that the cash should be split in half because it was marital property, and that he did not know the location of the checks.

Additionally, although plaintiff never counted how much money was in the safe, she testified that defendant told her the amount was "three-thirty." Defendant testified that, in the safe, he had "ten plus" envelopes each with "thirty or forty thousand dollars in an envelope at one time." Defendant also stated that the last time he counted the cash was late in the summer of 2006, just before the parties separated, and the safe contained $330,000.

Moreover, plaintiff testified that she only cashed two of the four $10,000 checks. Although the parties offered conflicting testimony as to whether defendant had the two remaining checks, the trial court found more credible plaintiff's testimony that she never cashed the remaining checks and that defendant had them in his possession. Thus, the trial court did not err in finding as fact that the parties had $350,000 in cash and checks as of the date of separation.

b.) "Presently Owned"

[2] Next, although defendant offers no legal authority for his argument, he maintains that because the cash and checks were not found in the safe, the trial court could not find that they were "presently owned" by the parties on the date of separation. We disagree.

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Marital property is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2013). "The spouse claiming that the property is separate bears the burden of proof, as under N.C. Gen. Stat. § 50-20(b)(1), it is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" *Allen v. Allen*, 168 N.C. App. 368, 374, 607 S.E.2d 331, 335 (2005) (citation and quotation marks omitted). This Court has interpreted "presently owned" to mean property owned by either party as of the date of separation.

See Lawrence v. Lawrence, 100 N.C. App. 1, 16-17, 394 S.E.2d 267, 275 (1990)(ruling that the trial court erred in classifying certain funds as marital property where the funds had been used to purchase assets that were not owned by either party on the date of separation).

Here, the trial court found that defendant removed from the marital home $350,000 in cash and checks, which were marital funds. It is irrelevant whether the cash and checks were actually in the safe on the date of separation, especially since the record is devoid of any evidence that the cash or checks were ever owned by someone other than plaintiff or defendant. Thus, we hold that the cash and checks were "presently owned," and defendant's argument fails.

c.) In-Kind Distribution

[3] Finally, defendant argues that the trial court erred by ordering an in-kind distribution[1] of $178,667.49 without first considering whether defendant had sufficient liquid assets to satisfy such an award. We disagree.

N.C. Gen. Stat. § 50–20(e) (2013) "creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award 'to facilitate, effectuate, or supplement' the distribution." *Allen*, 168 N.C. App. at 372–73, 607 S.E.2d at 334. "[I]f the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004). Should a party successfully rebut the equity of an in-kind distribution, a trial court may order a distributive award pursuant to N.C. Gen. Stat. § 50-20(c) (2013). This statute sets forth distributional factors that the trial court must consider before ordering a distributive award. *Id.* One of those factors is "[t]he liquid or nonliquid character of all marital property and divisible property." *Id.* In other words, "[t]he trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the *distributive award payment*." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908 (emphasis added).

Here, the trial court specifically ordered an in-kind distribution of the marital funds, but defendant did not rebut the presumption that an

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1. The difference between a "distributive award" and an "in-kind distribution" is explained in 1 Lloyd T. Kelso, N.C. Family Law Practice § 6:60 (2008): "An 'in-kind distribution' refers to a distribution of the property itself as opposed to a substitute for the property such as a cash award equal to the value of the property." *Id.* § 6:60, at 447.

in-kind distribution of the cash and checks would be equitable. As such, the trial court was not required to consider the distributive award factors enumerated under N.C. Gen. Stat. § 50-20(c), including whether defendant had sufficient assets to pay the award. Furthermore, because the trial court specifically ordered defendant to pay $178,667.49 from the $350,000 in cash and check proceeds in his possession, it is clear that the same liquidity concerns raised with distributive awards are not present in this case.

III. Conclusion

In sum, the trial court did not err in finding as fact that the parties had $350,000 in cash and checks as of the date of separation, or in ordering defendant to pay plaintiff $178,667.49 in cash or check proceeds as an in-kind distribution. The trial court's findings of fact are supported by competent evidence in the record, and it was not required to make a specific finding that defendant had sufficient liquid assets to pay the in-kind distribution. Accordingly, the trial court's equitable distribution order and order denying defendant's motion for a new trial are affirmed.

Affirmed.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY DAVIS

No. COA13-1092

Filed 16 September 2014

1. Drugs—methamphetamine—manufacturing—trafficking—motion to dismiss—sufficiency of evidence—presence at the scene

The trial court did not err by denying defendant's motions to dismiss the manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges even in the absence of an acting in concert instruction. A reasonable inference of defendant's guilt could be drawn from defendant's presence with another person at the scene for the duration of the time law enforcement observed, approximately 40 minutes, along with the evidence

recovered from the scene that was consistent with the production of methamphetamine.

2. Drugs—methamphetamine—possession—trafficking—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motions to dismiss the trafficking in methamphetamine by possession and possession of drug paraphernalia charges even in the absence of an acting in concert instruction. The totality of circumstances revealed that there was sufficient evidence of constructive possession and that defendant had the capability and intent to control the items that he was near and moving around.

3. Conspiracy—manufacture of methamphetamine—motion to dismiss—sufficiency of evidence—implied agreement

The trial court did not err by denying defendant's motion to dismiss the conspiracy charge even in the absence of an acting in concert instruction. Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, the evidence is sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss.

4. Drugs—methamphetamine—trafficking—motion to dismiss—sufficiency of evidence—any mixture containing methamphetamine

The trial court did not err by denying defendant's motion to dismiss the trafficking in methamphetamine charges based on use of the weight of the liquid containing methamphetamine. The statute provided that a defendant is guilty of trafficking when he manufactures any mixture containing methamphetamine meeting the minimum 28 gram weight requirement.

Appeal by defendant from judgments entered 30 May 2013 by Judge J. Thomas Davis in Jackson County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

David L. Neal for defendant.

McCULLOUGH, Judge.

Billy Ray Davis ("defendant") appeals from judgments entered upon his convictions for trafficking in methamphetamine by possession, trafficking in methamphetamine by manufacture, conspiring to traffic in methamphetamine, manufacturing methamphetamine, possession of an immediate precursor chemical to methamphetamine, and possession of drug paraphernalia. For the following reasons, we find no error.

I. Background

On 14 December 2011, a Jackson County grand jury indicted defendant on charges of trafficking in methamphetamine by possession, trafficking in methamphetamine by manufacture, conspiring to traffic in methamphetamine by manufacture, manufacturing methamphetamine, possession of an immediate precursor chemical to methamphetamine, and possession of drug paraphernalia. Defendant's case then came on for jury trial in Jackson County Superior Court on 28 May 2013, the Honorable J. Thomas Davis, Judge presiding.

The evidence offered during the presentation of the State's case tended to show the following: On 29 July 2011, Jim Henry, a senior K-9 deputy sheriff with the Jackson County Sheriff's Office, responded to an alert of possible drug activity by subjects in a small gray Dodge pickup with a white camper cover in the Greens Creek area off the south side of Highway 441. Dep. Henry located the vehicle upon arrival to the area, observed that no one was around, and proceeded down a trail at the rear of the vehicle leading into the woods along the creek. Dep. Henry recalled that the vegetation on the trail was crushed down as if someone had recently walked over it.

Approximately 20 to 30 yards down the trail, Dep. Henry heard two individuals talking and crawled to a position where he could see what was going on. From his position on the bank, Dep. Henry observed a male and a female, later identified as defendant and Keisha Maki, on a grassy area in the middle of the creek near a blanket that was covered with bags and other various items. From his position on the bank, Dep. Henry observed Maki use tongs to lower a bottle into the creek. At that time, defendant instructed Maki to "[p]ut the glasses over [her] eyes, [because she didn't] want that stuff in [her] eyes." Maki then removed the bottle from the creek and the bottle began smoking.

After observing defendant and Maki for approximately ten minutes, Dep. Henry retreated up the trail to call his superior officer and Lee Tritt,

a Special Agent with the State Bureau of Investigation. Special Agent Tritt arrived shortly thereafter and met Dep. Henry on the trial. He and Dep. Henry then proceeded back down the trail to the area overlooking the creek to observe what was going on.

Dep. Henry and Special Agent Tritt observed defendant and Maki for approximately thirty minutes before Maki noticed them and alerted defendant. During this time, defendant and Maki were moving back and forth around the site where the blanket was laid out. Dep. Henry recalled that they were moving bottles back and forth. Special Agent Tritt testified that he became curious about a bottle sitting near the edge of the creek because it was obvious that it did not have a liquid like Coke or Sprite in it, but rather some type of solid substance.

Approximately thirty minutes after Special Agent Tritt arrived, Maki entered the creek and noticed they were being watched. At that point, Maki motioned for defendant to come over to her and alerted him of Dep. Henry and Special Agent Tritt's presence. Dep. Henry and Special Agent Tritt then came down the bank toward defendant and Maki and identified themselves as law enforcement. At that instant, Maki, who had backed out of the creek with defendant, hurriedly moved the bottle sitting at the edge of the creek into the creek near a concrete bridge support. The bottle immediately began to react with the water and started to smoke.

Special Agent Tritt was aware that the smoke from methamphetamine production was corrosive and dangerous and removed Maki from the smoky area while Dep. Henry apprehended defendant. Both defendant and Maki were taken into custody. Dep. Henry recalled that as he took defendant into custody, defendant stated several times that "[i]t wasn't me, I was at Food Lion, I wasn't making dope[,]" indicating he was aware what was going on.

After defendant and Maki were in custody, law enforcement secured the area. Among the items recovered were the following: a handbag that was found to contain a syringe and a white substance wrapped in a coffee filter, a duffle bag in which a clear two liter bottle containing white and pink granular material, gray metal pieces, and a clear liquid was found, empty boxes and blister packs of pseudoephedrine, a blister pack still containing pseudoephedrine, an empty pack of AA Energizer lithium batteries, a AA Energizer lithium battery that someone had cut the top off of and removed the lithium, iodized salt, sodium hydroxide, drain opener, funnels, tubing, coffee filters,

syringes, and various items of clothing. The plastic bottle Maki placed into the creek was also recovered. There was white and pink granular material in the burned bottle.

Testing of the white substance found wrapped in the coffee filter inside the handbag revealed the substance to be .8 grams of methamphetamine. Testing of the clear liquid removed from the bottle found inside the duffle bag revealed the liquid, weighing 73.6 grams, contained methamphetamine.

At trial, officers testified about the methamphetamine production process and explained that the remnants of packaging of four out of five ingredients – drain cleaner, sodium hydroxide, lithium batteries, and pseudoephedrine - used to manufacture methamphetamine using the "shake and bake" or "one pot" method were recovered at the scene, as well as many of the items used to manufacture methamphetamine. Testimony also explained that lithium metal is water reactive and can ignite when it is exposed to moisture. From the totality of everything found, Special Agent Michael Piwowar, a forensic scientist with the North Carolina State Crime Lab, "confirmed that it was a methamphetamine one pot reaction going on."

At the close of the State's evidence, defendant moved to dismiss all charges. Defendant focused his argument in support of dismissal on the trafficking charges, arguing the entire weight of the liquid recovered could not be considered because it was at an intermediate stage in the methamphetamine production process. After clarifying that the pseudoephedrine had already been converted to methamphetamine in the mixture and it was just a matter of extracting the methamphetamine from the liquid, the trial court denied defendant's motion to dismiss the charges.

Defendant did not call any witnesses in his defense, but submitted three exhibits that were admitted without objection. Defendant then renewed his motion to dismiss all charges, which the trial court denied.

On 30 May 2013, the jury returned verdicts finding defendant guilty on all charges. The trial court consolidated defendant's convictions between two judgments and sentenced defendant to consecutive terms totaling 153 months to 193 months imprisonment. Defendant was further ordered to pay costs, fees, restitution, and a $50,000 fine. Defendant gave notice of appeal in open court.

II. Discussion

Motion to Dismiss

In the first issue raised on appeal, defendant contends the trial court erred in denying his motion to dismiss the charges for insufficiency of the evidence made at the close of the State's evidence and renewed at the close of all the evidence. Specifically, defendant contends that absent an acting in concert instruction the State failed to offer sufficient evidence that he manufactured or possessed methamphetamine. Defendant also contends the State failed to offer sufficient evidence of a conspiracy.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation, quotation marks, and emphasis omitted).

Manufacturing Charges

[1] Defendant first argues there was insufficient evidence to support the manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges.

Crucial to defendant's argument, the sufficiency of the evidence to support defendant's conviction must be reviewed with respect to the theory of guilt presented to the jury. *See State v. Sullivan*, 216 N.C. App. 495, 503, 717 S.E.2d 581, 586-87 (2011) (citing *State v. Smith*, 65 N.C. App. 770, 310 S.E.2d 115, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984)), *disc. rev. denied*, 366 N.C. 229, 726 S.E.2d 839 (2012); *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978). In this case, the jury was not instructed on acting in concert. Consequently, defendant's convictions may be upheld only if there is evidence he committed the offenses. *See State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986) ("The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense.").

At trial, testimony was presented about the steps to produce methamphetamine using a "shake and bake" or "one pot" method. Defendant now contends the trial court erred in denying his motion to dismiss the manufacturing-related charges because there was no evidence that he performed any of the steps identified by law enforcement. We disagree.

As the State points out, this Court has previously addressed whether a defendant's presence at a place where a controlled substance is being manufactured is sufficient to withstand a motion for dismissal of manufacturing charges. In *State v. Shufford*, this Court addressed whether a defendant's presence in a house where marijuana was being manufactured was sufficient to withstand a motion for dismissal. *State v. Shufford*, 34 N.C. App. 115, 117-18, 237 S.E.2d 481, 483 (1977). Relying on *State v. Adams*, 191 N.C. 526, 132 S.E. 281 (1926), a case involving an illegal whiskey still, this Court in *Shufford* held the defendant's presence, along with other evidence that marijuana was being manufactured in the house, was sufficient to overcome a motion for dismissal. *Shufford*, 34 N.C. App. at 118, 237 S.E.2d at 483 ("It has been held that presence at a place where illegal whiskey is being manufactured, along with other supporting evidence, is sufficient to overcome a defendant's motion for nonsuit.") Furthermore, in *Shufford*, this Court noted that in possession cases, "[t]he State may overcome a motion for a nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the

same was in his possession.' " *Id.* at 119, 237 S.E.2d at 483 (quoting *State v. Allen*, 279 N.C. 406, 411-12, 183 S.E.2d 680, 684 (1971)). This Court then "perceive[d] no reason why the principle of 'close juxtaposition' should not apply to manufacturing of controlled substances as well as to their possession." *Id.* at 119, 237 S.E.2d at 483-84.

In the present case, we hold a reasonable inference of defendant's guilt can be drawn from defendant's presence with Maki at the scene for the duration of the time law enforcement observed, approximately 40 minutes, along with the evidence recovered from the scene that was consistent with the production of methamphetamine, testimony that defendant and Maki were back and forth in the area moving bottles, and testimony that defendant gave instructions to Maki to keep the smoke out of her eyes. Thus, the evidence was sufficient to withstand defendant's motion to dismiss the manufacturing-related charges and the trial court did not err.

<u>Possession Charges</u>

[2] Defendant next argues there was insufficient evidence to support the trafficking in methamphetamine by possession and possession of drug paraphernalia charges.

As previously mentioned, law enforcement searched the area where defendant and Maki were observed subsequent to taking them into custody. The search of items found at the scene resulted in the recovery of .8 grams of methamphetamine, a bottle of a liquid weighing 73.6 grams that tested positive for methamphetamine, and syringes. Defendant correctly contends that because none of the above items were found on his person, or in any property linked directly to him, the State was required to prove constructive possession. Defendant, however, further contends there was insufficient evidence of constructive possession. We disagree.

"Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). "As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

In this case, the evidence tended to show that the .8 grams of methamphetamine and a syringe were found in a camouflage handbag at the

scene. The handbag also contained a wallet, cosmetics, a metal spoon, and a Social Security card with Maki's name on it. The 73.6 grams of liquid containing methamphetamine was in a clear two liter bottle in a closed purple duffle bag found at the scene. Various clothing items were also in the duffle bag. Both the handbag and the duffle bag were near the other items recovered on the blanket laid out near the creek in the area where defendant and Maki were moving back and forth.

In arguing the evidence was insufficient to show constructive possession by defendant, defendant contends there is nothing indicating defendant had the intent and capability to control the methamphetamine, syringes, or liquid containing methamphetamine because the evidence tends to show that the bags belonged to Maki. While we agree that the evidence tends to show the handbag containing the .8 grams of methamphetamine and syringe belonged to Maki, there is no evidence that the duffle bag or other items were Maki's. Defendant asserts that the clothes in the purple duffle bag were women's clothes; yet, defendant's assertion is a mischaracterization of the evidence. There is no indication in the evidence that the clothes found with the liquid in the duffle bag were women's clothes. In fact, when questioned whether there was anything in the purple duffle bag that would identify who it belonged to, Special Agent Piwowar simply stated he just found clothes and the bottle.

Reviewing the totality of the circumstances, we find there was sufficient evidence of constructive possession to present the possession-related charges against defendant to the jury. First, defendant and Maki were the only persons present during the 40 minutes that law enforcement observed. Second, both defendant and Maki moved freely around the site where all the belongings and items were laid out on the blanket. It is apparent from Special Agent Piwowar's testimony that among the items were multiple syringes, not just the syringe found in the handbag with Maki's Social Security card. Moreover, the evidence suggests that not all the items of clothing recovered at the scene belonged to Maki. Namely, two pairs of shoes were recovered from the scene in addition to general items such as a hat and a belt. While Special Agent Tritt testified that one pair of the shoes appeared to be women's shoes, the second pair was a larger plain white pair.

Viewing the totality of the evidence in the light most favorable to the State, we hold the evidence was sufficient for the jury to find that defendant had the capability and intent to control the items that he was

near and moving around. Thus, the trial court did not err in denying defendant's motion to dismiss the possession-related charges.

Conspiracy Charge

[3] Defendant's final argument under the first issue on appeal is that there was insufficient evidence of a conspiracy. Specifically, defendant contends there was no direct evidence of an agreement between him and Maki to traffic in methamphetamine by manufacture and there was insufficient circumstantial evidence of an agreement to support the charge. Defendant asserts the conspiracy charge was supported only by suspicion built on conjecture. Again, we disagree.

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citing *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984)). As this Court noted in *State v. Jenkins*, 167 N.C. App. 696, 699-700, 606 S.E.2d 430, 432-33 (2005), "[a] conspiracy may be shown by circumstantial evidence, or by a defendant's behavior. Conspiracy may also be inferred from the conduct of the other parties to the conspiracy." *Id.* (citations omitted). Yet, "[w]hile conspiracy can be proved by inferences and circumstantial evidence, it 'cannot be established by a mere suspicion . . . .' " *State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (quoting *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985)).

Upon review of all the evidence in this case, we hold there was sufficient evidence to infer an implied agreement between defendant and Maki. It is undisputed that defendant was present and aware that Maki was involved in the production of methamphetamine. Moreover, as we already held, there is sufficient evidence from which a reasonable inference can be drawn that defendant was also involved in the manufacturing process. Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss.

Considering the totality of the evidence in the light most favorable to the State, we hold there was substantial evidence supporting the manufacturing, possession, and conspiracy charges against defendant, even in the absence of an acting in concert instruction. As a result, we hold the trial court did not err in denying defendant's motion to dismiss.

Trafficking Charges

[4] Based on the 73.6 grams of liquid that tested positive for methamphetamine, defendant was charged and convicted of three trafficking offenses. Now in the second issue on appeal, defendant contends that, even if there is sufficient evidence he was involved in the crimes, there is still insufficient evidence of the amounts alleged in the indictment to sustain the trafficking charges. Specifically, defendant argues the entire weight of a mixture containing methamphetamine at an intermediate stage in the manufacturing process cannot be used to support trafficking charges because the mixture is not ingestible, is unstable, and is not ready for distribution. Relying on *State v. Willis*, 61 N.C. App. 23, 300 S.E.2d 420 (1983) and *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), as well as non-controlling federal cases, defendant contends it is inconsistent with the intent of the trafficking statutes to use the total weight of such mixture to support trafficking charges.

"The purpose of the [trafficking statutes] is to prevent trafficking in controlled substances." *Perry*, 316 N.C. at 101, 340 S.E.2d at 459. With that in mind, in *Willis* and *Perry*, our State's appellate courts recognized that the tough punishment scheme in the trafficking statutes was justified to deter large scale distribution of drugs, regardless of the percentage of controlled substance in the mixture. *Willis*, 61 N.C. App. at 42, 300 S.E.2d at 431, *modified and aff'd*, 309 N.C. 451, 306 S.E.2d 779 (1983); *Perry*, 316 N.C. at 101-02, 340 S.E.2d at 459. While we are sympathetic to defendant's argument that the methamphetamine recovered in this case was not yet in a usable form, we find the purpose of the trafficking statutes is still served in the present case where defendant admitted the methamphetamine had already been formed in the liquid and it was only a matter of extracting it from the mixture.

Moreover, the trafficking statute does not specify a certain type of mixture. In *State v. Conway*, this Court addressed whether, under a prior version of N.C. Gen. Stat. § 90-95(h)(3b), "the entire weight of a liquid containing a detectable, but undetermined, amount of methamphetamine establishes a [trafficking] violation . . . ." *State v. Conway*, 194 N.C. App. 73, 78, 669 S.E.2d 40, 44 (2008). Noting the "statute [at that time was] silent on whether the weight of a liquid mixture containing detectable, but undetermined, amounts of methamphetamine is sufficient to meet the requirements set forth within the statute to constitute 'trafficking[,]' " *id.* at 79, 669 S.E.2d at 44, this Court undertook a statutory analysis and determined that if the legislature intended to include the weight of a mixture containing methamphetamine, it would have

done so as it did in other subsections of the trafficking statutes. *Id.* at 82-85, 669 S.E.2d at 46-47. This Court then held the total weight of the mixture containing methamphetamine in *Conway* did not support the trafficking charges and reversed the defendant's trafficking convictions. *Id.* at 85, 669 S.E.2d at 48.

However, in 2009 the trafficking in methamphetamine statute was amended to include the "any mixture" language that *Conway* noted was omitted. N.C. Gen. Stat. § 90-95(h)(3b) now provides "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine *or any mixture containing such substance* shall be guilty of a felony which felony shall be known as 'trafficking in methamphetamine[.]' " N.C. Gen. Stat. § 90-95(h)(3b) (2013) (emphasis added). The statute then sets forth different punishments based on the amount of methamphetamine or mixture containing methamphetamine.

Where the statute provides that a defendant is guilty of trafficking when he manufactures "any mixture containing [methamphetamine]" meeting the minimum 28 gram weight requirement, we hold the trial court did not err in using the weight of the liquid containing methamphetamine in the present case.

III. Conclusion

For the reasons discussed, we hold the defendant received a fair trial free of error.

No error.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LYNWOOD EUGENE HARRIS, JR.

No. COA13-1330

Filed 16 September 2014

1. Constitutional Law—effective assistance of counsel—failure to move to dismiss charge—record evidence supported conviction

Although defendant contended that he received ineffective assistance of counsel based upon his trial counsel's failure to move to have a contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence, the evidence supported defendant's conviction, thus necessitating the conclusion that defendant's ineffective assistance of counsel claim had no merit.

2. Child Abuse, Dependency, and Neglect—contributing to abuse or neglect of juvenile—jury instructions—no plain error

The trial court did not commit plain error by misstating the applicable law when instructing the jury on contributing to the abuse or neglect of a juvenile. The outcome of defendant's trial would not have been different had the trial court correctly instructed the jury concerning the issue of whether defendant had placed the victim in a place or set of circumstances under which she could be adjudicated abused or neglected.

3. Criminal Law—prosecutor's arguments—ruined victim's childhood—credibility of victim

The trial court did not err in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile case by failing to intervene ex mero motu during the prosecutor's challenged comments. The prosecutor's comment to the effect that defendant had ruined the victim's childhood represented a reasonable inference drawn from the record. Further, the comments were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing the victim because the record did not contain corroborative physical evidence.

4. Evidence—testimony—relevancy—vouching for credibility—no plain error

The trial court did not commit plain error in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile

case by failing to exclude challenged portions of the testimony of the victim's grandmother, who was also defendant's former girlfriend, on relevance grounds and for alleged impermissible vouching of the victim's credibility. The outcome of the trial would not have been different had the trial court refrained from allowing the challenged testimony.

Appeal by defendant from judgments entered 29 May 2013 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 5 June 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ERVIN, Judge.

Defendant Lynwood Eugene Harris, Jr., appeals from judgments based upon his convictions for misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile. On appeal, Defendant contends that his trial counsel provided him with constitutionally deficient representation by failing to properly preserve his challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile for the purpose of appellate review, incorrectly instructing the jury concerning the issue of his guilt of contributing to the abuse or neglect of a juvenile, failing to intervene *ex mero motu* for the purpose of addressing certain remarks made during the prosecutor's final argument, and allowing the admission of testimony that was irrelevant and improperly vouched for the prosecuting witness' credibility. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On 23 June 2012, Diane Phillips had a birthday party at her house. Among those in attendance were Defendant and J.W., Ms. Phillips' eight-year-old granddaughter.[1] As of the date of the party, Ms. Phillips and

1. J.W. will be referred to throughout the remainder of this opinion as Jessica, a pseudonym used for ease of reading and to protect J.W.'s privacy.

Defendant had been involved in a romantic relationship for approximately 14 years. On the day of the party, Defendant came and left the house on a regular basis and consumed alcohol throughout the course of the day.

On the evening of the party, Jessica was lying in Ms. Phillips' bed when Defendant entered the room with a cup full of liquor. Defendant offered Jessica a drink from the cup and tried to hand the cup to her. Jessica claimed that Defendant played with her hair, squeezed her buttocks, and "kept on talking about if I let him suck on my chest they'll grow up really big and pretty." According to Jessica, Defendant "kept on squeezing [Jessica's] bottom and then he--he stuck his thumb in [her] mouth and said--Suck it, baby. Suck it."

During the evening, Jessica came to the screen door leading to the porch and said that she needed to tell Ms. Phillips something. Jessica told Ms. Phillips that she was scared, that she thought that Defendant had tried to rape her, and that Defendant was "feeling on [her] buttocks," "talking about sucking on [her] breasts," and asking if she would "let [him] suck on [her] breasts so they'll [be] big and pretty when [she got] big." After receiving this information, Ms. Phillips threw Defendant out of the house and threatened to kill him if he ever returned. Subsequently, Ms. Phillips laid down with Jessica and began crying, stating that she "shut down" after her conversation with Jessica because she "was in shock."

Early the next morning, Ms. Phillips called the police. When the investigating officers arrived, Ms. Phillips told them what had happened. After speaking with Ms. Phillips, Officer Tabitha Johnson of the Greenville Police Department interviewed Jessica, who stated that

> [her brother] was asleep and she was watching TV and eating Cheetos, and [Defendant] came into the room. [Defendant] asked her what she was doing. She told him she's eating Cheetos and drinking a Pepsi. He asked her if she wanted something stronger to drink, referring to his alcoholic beverage in his hand. [Jessica] told--stated that she told him no, but he tried to make her drink his beverage. She also reported to me that he said to her, while putting his finger in his mouth--Suck it, baby. Suck it. Started trying to put it in her mouth. I apologize.
>
> She reported that he then began kissing her neck and her face and rubbing and squeezing her butt. [Defendant] asked her to kiss—asked her if she could kiss his chest

> and saying--If you let me suck on your chest, your breasts will grow in nice and pretty. She said that she moved away, and he grabbed her hand and tried to put it--his hands in his pant--put her hands in his pants near his private. She snatched her hand away. [Defendant] told her--I was just trying to have a little fun with you. And this is her–me quoting what she's saying--and walked out of the room. She said he returned with another alcoholic beverage and put some in a cup and tried–and made [Jessica] drink it. She said she pushed him away but continued to rub on her hair and kiss her neck and telling her just to go to sleep. [Jessica] said she would not to go sleep, and he left out of the room.

B. Procedural History

On 24 June 2012, a warrant for arresting charging Defendant with misdemeanor sexual battery and contributing to the abuse and neglect of a juvenile was issued. On 23 January 2013, Judge David A. Leech found Defendant guilty as charged in the Pitt County District Court. On the following day, Judge Leech entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery, with this sentence being suspended and with Defendant being placed on supervised probation, subject to certain terms and conditions, for a period of 24 months, and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a juvenile, with this sentence also being suspended and Defendant being placed on supervised probation, subject to certain terms and conditions, for a period of 24 months. Defendant noted an appeal to Pitt County Superior Court for a trial *de novo*.

The charges against Defendant came on for trial before the trial court and a jury at the 28 May 2013 session of the Pitt County Superior Court. On 29 May 2013, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 150 days imprisonment based upon his conviction for misdemeanor sexual battery and to a consecutive term of 120 days imprisonment based upon his conviction for contributing to the abuse or neglect of a minor, with this second sentence being suspended and with Defendant being placed on supervised probation for a period of 18 months, subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Sufficiency of the Evidence

[1] In his initial challenge to the trial court's judgments, Defendant contends that he received constitutionally deficient representation from his trial counsel based upon his trial counsel's failure to move to have the contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence. More specifically, Defendant contends that his trial counsel's failure to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence fell below an objective standard of reasonableness and that, had such a motion been made, it would have been allowed given that the State failed to prove that Defendant was Jessica's caretaker and that merely offering Jessica an alcoholic beverage did not constitute an act of abuse or neglect. Defendant is not entitled to relief from his conviction for contributing to the abuse or neglect of a juvenile on the basis of this claim.

As Defendant candidly concedes, he failed to move that the contributing to the abuse or neglect of a juvenile charge be dismissed for insufficiency of the evidence at trial. As a general proposition, a defendant's failure to make a dismissal motion after the State's evidence precludes the defendant from challenging the sufficiency of the evidence to support his conviction on appeal. N.C. R. App. P. 10(a)(3). "However, pursuant to N.C. R. App. P. 2, we will hear the merits of [D]efendant's claim despite the rule violation because [D]efendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss." *State v. Fraley*, 202 N.C. App. 457, 461, 688 S.E.2d 778, 783 (2010) (quotation marks and citation omitted), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

"To survive a motion to dismiss in a criminal action, the State's evidence must be substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. The trial court must view all evidence in the light most favorable to the State, including evidence that was erroneously admitted." *State v. Denny*, 179 N.C. App. 822, 824, 635 S.E.2d 438, 440 (2006) (internal quotation marks and citations omitted), *aff'd in part, modified on other grounds in part, and rev'd on other grounds in part*, 361 N.C. 662, 652 S.E.2d 212 (2007). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Tabron*, 147 N.C. App. 303, 306, 556 S.E.2d 584, 585 (2001) (quotation marks and citations

omitted), *disc. review improvidently granted*, 356 N.C. 122, 564 S.E.2d 881 (2002). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We will now utilize this standard of review to evaluate the validity of Defendant's challenge to the sufficiency of the evidence to support his conviction for contributing to the abuse or neglect of a juvenile.

N.C. Gen. Stat. § 14-316.1 provides that:

> [a]ny person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by [N.C. Gen. Stat. §] 7B-101 and [N.C. Gen. Stat. §] 7B-1501 shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 7B-101(1) defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker" (1) inflicts or allows to be inflicted upon the juvenile a serious physical injury; (2) creates or allows to be created a substantial risk of serious physical injury to the juvenile; (3) uses or allows to be used on the juvenile cruel or grossly inappropriate procedures or devices to modify behavior; (4) commits, permits, or encourages the commission of a variety of specific sexual assaults, acts of prostitution, and obscenity offenses by, with, or upon the juvenile; (5) creates or allows to be created serious emotional damage to the juvenile evinced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; (6) encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or (7) commits or allows to be committed acts of human trafficking, involuntary servitude or sexual servitude against the child. A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15). Finally, a caretaker, for purposes of the abuse and neglect statutes, is defined as

> [a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

N.C. Gen. Stat. § 7B-101(3).

In seeking to persuade us that the record did not support Defendant's conviction for contributing to the abuse or neglect of a juvenile, Defendant initially argues that the record does not suffice to support a determination that he was Jessica's caretaker. Defendant's argument is, however, simply inconsistent with our recent decision in *State v. Stevens*, __ N.C. App. __, __, 745 S.E.2d 64, 67, *disc. review dismissed*, 367 N.C. 256, 749 S.E.2d 885, *disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013), in which this Court explicitly held that a finding of guilt for violating N.C. Gen. Stat. § 14-316.1 "does not require a parental or caretaker relationship between a defendant and a juvenile" and stated, instead, that "[d]efendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care." *See also State v. Cousart*, 182 N.C. App. 150, 153, 641 S.E.2d 372, 374-75 (2007) (stating that the gravamen of the act of contributing to the delinquency, abuse, or neglect of a minor is "conduct on the part of the accused" in willfully "caus[ing], encourag[ing], or aid[ing]") (alterations in original). As a result, as long as Defendant's conduct placed Jessica in a position in which she did "not receive proper care from a caretaker or is not provided necessary medical care," *Stevens*, __ N.C. App. at __, 745 S.E.2d at 67, he is subject to the criminal sanction for violating N.C. Gen. Stat. § 14-316.1.

In apparent recognition of the problems with his initial argument, Defendant also contends that the record did not suffice to support a determination that his actions placed Jessica in a position in which she

could be found to be abused or neglected. As the record clearly establishes, however, Defendant entered the bedroom in which Jessica was attempting to go to sleep, tried to get her to take a drink from the cup of liquor that he was carrying, played with her hair, and squeezed her buttocks. As Defendant squeezed Jessica's buttocks, he asked her to suck his thumb and requested that she allow him to suck on her chest so "they'll grow up really big and pretty." In view of the fact that a juvenile who found herself in the position that Jessica occupied and was subject to the attentions that Defendant attempted to pay to her was clearly placed in a location in which and subject to conditions under which she could not and did not receive proper care from her caretakers, the State's evidence clearly sufficed, given the test enunciated in *Stevens*, to support Defendant's conviction for contributing to the abuse or neglect of a juvenile.[2] As a result, the record evidence clearly sufficed to support Defendant's conviction for contributing to the abuse or neglect of a juvenile, a fact that necessitates the conclusion that Defendant's ineffective assistance of counsel claim has no merit.[3]

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2. As the State notes in its brief, Defendant's conduct as described in Jessica's testimony clearly constituted the taking of an indecent liberty with a minor in violation of N.C. Gen. Stat. § 14-202.1, which is one of the offenses that can underlie an abuse adjudication. N.C. Gen. Stat. § 7B-101(1)(d). In addition, this Court has held that a father's decision to offer marijuana and beer to a child, while not rising to the level of abuse, constituted neglect. *In re M.G.*, 187 N.C. App. 536, 551, 653 S.E.2d 581, 590 (2007), *rev'd on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009). Thus, given the absence of any requirement that Defendant be Jessica's parent, guardian, or caretaker and the fact that Defendant's conduct placed Jessica in a position and subject to conditions under which she could be found to be abused or neglected, the relevant statutory provisions and decisions of this Court clearly support Defendant's conviction for contributing to the abuse or neglect of a juvenile.

3. The warrant charging Defendant with contributing to the abuse or neglect of a juvenile alleged, in pertinent part, that "the defendant named above unlawfully and willfully did knowingly, while at least 16 years of age, cause[], encourage, and aid [Jessica], age 8 years, a juvenile, to commit an act, consume alcoholic beverage, whereby that juvenile could be adjudicated abused and neglected." In his brief, Defendant argues, in reliance upon *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890 894 (stating that "[i]t has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment"), *cert. denied*, 444 U.S. 874, 100 S. Ct. 156, 62 L. Ed. 2d 102 (1979), that the only basis upon which Defendant could lawfully have been convicted of contributing to the abuse or neglect of a juvenile was by encouraging her to consume alcohol. We do not find this argument persuasive for two reasons. First, as this Court held in *Stevens*, __ N.C. App. at __, 745 S.E.2d at 66, an indictment that fails to allege the exact manner in which the defendant allegedly contributed to the delinquency, abuse, or neglect of a minor is not fatally defective. Unlike the situation at issue in *Faircloth*, in which the State sought to convict the defendant of a completely different offense from the one alleged in the indictment, the State did, in fact, proceed against Defendant on the grounds that he committed the offense of contributing to the abuse or

B. Jury Instructions

[2] After the completion of the evidence and the arguments of counsel, the trial court instructed the jury with respect to the issue of Defendant's guilt of contributing to the abuse or neglect of a juvenile as follows:

> The defendant has also been charged with contributing to the abuse and neglect of a juvenile. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant was at least 16 years old.
>
> Second, that the defendant caused, encouraged, and aided the juvenile to commit an act whereby the juvenile could be adjudicated abused and neglected.
>
> Third, that [Jessica] was a juvenile. An abused and neglected juvenile is a person who has not reached her 18th birthday, and is not married, emancipated, or a member of the armed forces of the United States.
>
> And [f]ourth, that the defendant acted knowingly or willfully.

As Defendant candidly concedes, he failed to object to the trial court's contributing to the abuse or neglect of a minor instruction at or before the time that the jury retired to begin its deliberations, so that our review is limited to determining whether plain error occurred. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334, (2012). A plain error is an error that is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. As a result, in order to establish the existence of plain error, a "defendant must convince this Court not only that there was error, but

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neglect, rather than the delinquency, of a juvenile. *State v. Tollison*, 190 N.C. App. 552, 557, 660 S.E.2d 647, 651 (2008) (stating that, since "a victim's age is not an essential element of first degree kidnapping," "the variance in the indictment was not fatal"). Secondly, and more importantly, Defendant's argument relies upon an unduly narrow reading of the contributing to the abuse or neglect of a juvenile warrant that completely overlooks the context in which Defendant attempted to persuade Jessica to consume alcohol. As a result, Defendant's argument in reliance upon the language of the contributing warrant is not persuasive.

that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

As Defendant correctly asserts in his brief, the trial court's instructions misstated the applicable law by instructing the jury that it should find that Jessica was an abused or neglected juvenile in the event that it found beyond a reasonable doubt that she had not reached her 18th birthday and had not been married, emancipated, or entered military service.[4] For that reason, the only issue that remains for our consideration is whether Defendant is entitled to relief from his contributing to the abuse or neglect of a juvenile conviction based upon this erroneous instruction. As a result, the ultimate question raised by Defendant's challenge to the trial court's instructions concerning the issue of his guilt of contributing to the abuse or neglect of a minor is the extent to which it is probable that the outcome of Defendant's trial would have been different had the trial court correctly instructed the jury concerning the issue of whether Defendant had placed Jessica in a place or set of circumstances under which she could be adjudicated abused or neglected.

The only evidence before the jury concerning the issue of Defendant's guilt of contributing to the abuse or neglect of a minor consisted of Jessica's testimony and evidence concerning statements that Jessica had made to other persons that was offered for corroborative purposes. As we read the record, the argument that Defendant advanced before the jury in support of his request for an acquittal on both the contributing to the abuse or neglect of a minor charge and the misdemeanor sexual battery charge rested on a contention that Defendant had no motivation for engaging in the conduct described in Jessica's testimony, an assertion that Jessica was biased against him, a description of certain inconsistencies in the accounts concerning Defendant's conduct that Jessica provided on different occasions, and a claim that certain statements that Jessica had made were unlikely to be true given other surrounding circumstances. Thus, the ultimate issue presented for the

4. As we have already noted, in order to convict Defendant of the offense made punishable by N.C. Gen. Stat. § 14-316.1 in light of the allegations set out in the warrant that had been issued against him, the jury had to find beyond a reasonable doubt that Defendant caused, encouraged, or aided Jessica to be placed in a location or situation in which she could be adjudicated abused or neglected. A cursory reading of the trial court's instructions establishes that the trial court totally failed to instruct the jury concerning the meaning of the statutory references to abuse or neglect and, in essence, told the jury to find the existence of those prerequisites for a conviction on the sole basis of Jessica's age and the fact that she had not been married, emancipated, or entered military service. Thus, the trial court's instructions, which are consistent with the applicable pattern jury instruction, clearly misstated the applicable law.

jury's consideration at trial was whether Jessica was a credible witness, an issue that the jury clearly answered in the affirmative.

A careful review of the record satisfies us that, even though the trial court's instructions rested on a clear misstatement of the applicable law, it is not probable that the outcome at trial would have been different in the event that the jury had been correctly instructed. The description of Defendant's conduct contained in Jessica's testimony, which the jury obviously believed, sufficed to support a determination that he contributed to the abuse or neglect of a minor. We are unable to see how the trial court's erroneous instruction in any way enhanced the likelihood that the jury would have resolved the underlying credibility contest in Defendant's favor. Having determined, contrary to the arguments vigorously advanced by Defendant's trial counsel, that Jessica's testimony was credible, the jury would necessarily have determined that Defendant placed her in a location or set of circumstances under which she "[did] not receive proper care from a caretaker or [was] not provided necessary medical care." *Stevens*, __ N.C. App. at __, 745 S.E.2d at 67. As a result, given that "the term 'plain error' does not simply mean obvious or apparent error, but rather has the meaning given by the court in" *Lawrence*, *Odom*, 307 N.C. 660, 300 S.E.2d 378 (holding that the failure to instruct on the issue of the defendant's guilt of a lesser included offense did not rise to the level of plain error), *see also Lawrence*, 365 N.C. at 519, 723 S.E.2d at 334-35 (holding that the omission of an element from the trial court's instruction to the jury concerning the issue of Defendant's guilt of conspiracy to commit robbery with a dangerous weapon did not rise to the level of plain error), we conclude that the trial court's instructional error did not constitute plain error and that Defendant is not, for that reason, entitled to relief from his conviction for contributing to the abuse or neglect of a minor based upon the trial court's erroneous instruction.

C. Prosecutor's Final Argument

[3] Thirdly, Defendant contends that he is entitled to relief from his convictions based upon remarks that the prosecutor made during his closing argument. More specifically, Defendant contends that the prosecutor's comments to the effect that Defendant had ruined Jessica's childhood and that, in the event that the jury failed to find Jessica's testimony to be credible, it would be sending a message that Jessica would need to be hurt, raped, or murdered before an alleged abuser could be convicted, were improper. Defendant is not entitled to relief from his convictions based upon this set of contentions.

Statements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference. *State v. Jaynes*, 353 N.C. 534, 559, 549 S.E.2d 179, 198 (2001) (citation omitted), *cert. denied*, 535 U.S. 934, 122 S. Ct. 1310, 152 L. Ed 2d 220 (2002). As a general proposition, counsel are allowed wide latitude in closing arguments, *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted), so that a prosecutor is entitled to argue all reasonable inferences drawn from the facts contained in the record. *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citations omitted), *cert. denied*, __ U.S. __, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). "Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted). As a result, given that Defendant did not object to the prosecutorial comments that are addressed in his brief, the ultimate issue raised by Defendant's challenge to the prosecutor's closing argument is the extent, if any, to which the challenged comments were so egregiously improper as to necessitate judicial intervention despite the absence of an objection.

In the course of his closing argument, the prosecutor asserted that:

> [The Defendant] has no right to ruin [Jessica's] childhood, because how--what memories is she going to have as--of her eight-year old time? What's going to be the dominant thing in her life when she thinks back to being eight and nine? It's going to be this man groping her, having to come in and testify and face him.
>
> . . . .
>
> So it comes down to is it sufficient to listen to an eight-year-old girl--convict somebody of this crime? And if it's not, then this case is never going to be--we'll never prove it. Never. So why shouldn't we believe her? Because she's eight? Is that why? Do we say that no eight-year-old is ever going to be believable? . . . Now, if you don't believe her because she's eight or because there's no forensic evidence, then what you're saying is --Well, maybe we should let it go a little further so we can get more evidence. Is it fair to tell an eight-year-old–Well, you know, honey, we'd like to help you, but you got to get hurt first. You got to

> get hurt first. Now, we've got some evidence then. You get hurt, get raped or murdered, we got some evidence then. But just your word, just your word, nah.

We do not believe that either of the challenged comments necessitated *ex mero motu* intervention on the part of the trial court.

1. Ruining Jessica's Childhood

In arguing that Defendant had ruined Jessica's childhood, the prosecutor simply made a reasonable inference, based upon the record evidence, that Jessica would be traumatized by the events in question. According to the record, Jessica was eight years old at the time of the incident underlying this case. In addition, Jessica told Ms. Phillips that she believed that Defendant, whom she had known for her entire life, was attempting to rape her. Under that set of circumstances, the prosecutor's inference that Jessica had been traumatized by Defendant's actions was a reasonable one. As a result, since the prosecutor's comment to the effect that Defendant had ruined Jessica's childhood represented a reasonable inference drawn from the record, the trial court did not err by failing to intervene *ex mero motu* to address the challenged prosecutorial argument.

Although the Supreme Court has held that an argument that undermines reason and is designed to viscerally appeal to the jurors' passions or prejudices is improper, *see State v. Jones*, 355 N.C. 117, 132-33, 558 S.E.2d 97, 107 (2002) (holding that references to the Columbine school shooting and Oklahoma City bombing during a murder trial was improper, in part, because it attempted to lead jurors away from the evidence by appealing to their sense of passion and prejudice), a prosecutor may argue that the jury should use its verdict to "send a message" to the community. *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L. Ed. 2d 1074 (2003); *State v. Nicholson*, 355 N.C. 1, 43-44, 558 S.E.2d 109, 138 (citations omitted), *cert. denied*, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002). Finally, a prosecutor is entitled to argue that the jury should or should not believe a witness and explain the reasons that the prosecutor believes should cause the jury to reach such a credibility-related conclusion in his or her final argument. *See State v. Wilkerson*, 363 N.C. 382, 425, 683 S.E.2d 174, 200 (2009) (citation omitted), *cert. denied*, 559 U.S. 1074, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010); *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006); *State v. Scott*, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996) (citation omitted).

2. Jessica's Credibility

As we have already noted, the ultimate issue before the jury in this case was Jessica's credibility. The obvious purpose of the second set of challenged prosecutorial comments was to urge the jury to find Jessica's testimony to be credible despite the fact that the record did not contain physical evidence that supported her description of Defendant's conduct. Admittedly words like "murder" and "rape" are, without doubt, emotionally charged. Although Defendant attempts to analogize the prosecutor's second set of challenged remarks to those at issue in *Jones*, that analogy is unpersuasive given that the remarks under consideration in *Jones* referred to information outside the record and compared the defendant's conduct with infamous acts committed by others, neither of which is true of the prosecutorial comments at issue here. As a result of the fact that the prosecutorial comments at issue here were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing Jessica because the record did not contain corroborative physical evidence, we conclude that the trial court did not err by failing to intervene *ex mero motu* to address the second set of prosecutorial comments that Defendant has challenged in his brief. Thus, Defendant is not entitled to relief from his convictions based on allegedly improper comments by the prosecutor.

D. Ms. Phillips' Testimony

[4] Finally, Defendant contends that the trial court committed plain error by allowing Ms. Phillips to deliver testimony that, in Defendant's opinion, improperly appealed to the jury's sympathy and impermissibly vouched for Jessica's credibility. According to Defendant, the trial court should have excluded this evidence despite the fact that he failed to object to its admission at trial on the grounds that the evidence in question was irrelevant and constituted impermissible lay opinion testimony. We do not find Defendant's argument persuasive.

1. Relevance

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citations omitted), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Evidence that is "not part of the crime charged but pertain[s] to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if

linked in time and circumstances with the charged crime, or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *U.S. v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)) (internal brackets omitted). A trial court's ruling with respect to relevance issues is "technically . . . not discretionary and therefore is not reviewed under the abuse of discretion standard[,]" but is, nevertheless, entitled to great deference on appeal. *Sherrod v. Nash General Hosp. Inc.*, 126 N.C. App. 755, 762, 487 S.E.2d 151, 155 (1997) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)) (internal quotation marks and brackets omitted), *aff'd in part and rev'd in part on other grounds*, 348 N.C. 526, 500 S.E.2d 708 (1998). As a result of the fact that Defendant failed to object to the admission of the challenged evidence at trial, we review Defendant's challenge to the admission of this evidence using a plain error standard of review.

At trial, Ms. Phillips testified that, after Jessica told her about Defendant's conduct, Ms. Phillips "got scared and shut down," "was in shock," laid down with Jessica, and "started crying." Subsequently, Ms. Phillips saw Defendant coming out of the bathroom, "grabbed him by the shirt," "threw him out the screen door," and "told him if he ever come back to [her] house again," she "would kill him, because [she] was mad and scared at the time." Finally, Ms. Phillips also stated that she told Jessica's father about Defendant's actions and "he got up raging."

The challenged portion of Ms. Phillips' testimony was relevant to show what occurred immediately after Defendant's alleged assault upon Jessica. The fact that Jessica reported the incident to Ms. Phillips immediately after it occurred, rather than waiting until a later time to make her accusation, tends to bolster the credibility of her testimony and was relevant for that reason. Similarly, the challenged portion of Ms. Phillips' testimony tends to show that Jessica had given a consistent account of her interaction with Defendant from the time of her first conversation with Ms. Phillips immediately after the incident occurred until she testified at trial. Finally, the challenged portion of Ms. Phillips' testimony, which details her reaction to Jessica's allegations and the events that led up to Defendant's arrest, helped complete the story of Defendant's assault upon Jessica for the jury. As a result, the trial court did not err by failing to exclude the challenged portion of Ms. Phillips' testimony on relevance grounds.

2. Vouching for Jessica's Credibility

According to N.C. Gen. Stat. § 8C-1, Rule 701, the testimony of a non-expert witness "in the form of opinions or inferences is limited to . . . opinions or inferences [that] are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his [or her] testimony or the determination of a fact in issue." The admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates N.C. Gen. Stat. § 8C-1, Rule 701. *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 123 S. Ct. 488, 154 L. Ed. 2d 404 (2002). "As long as the lay witness has a basis of personal knowledge for his [or her] opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991).

In addition to questioning its relevance, Defendant contends that the challenged portion of Ms. Phillips' testimony impermissibly vouched for Jessica's credibility. However, Ms. Phillips never directly commented on the issue of Jessica's credibility. Put another way, Ms. Phillips never specifically stated whether she believed Jessica or not. Although Defendant argues that the challenged portion of Ms. Phillips' testimony contained an implicit expression of confidence in Jessica's veracity, we are unable to read such an implication into what Ms. Phillips actually said. Finally, even if Ms. Phillips' testimony did, in some manner, amount to an impermissible comment concerning Jessica's credibility, any error that the trial court may have committed by allowing the admission of that testimony did not rise to the level of plain error. In view of the relatively incidental nature of any vouching for Jessica's credibility that might have occurred and the fact that most jurors are likely to assume that a grandmother would believe an accusation of sexual abuse made by one of her own grandchildren, *see State v. Freeland*, 316 N.C. 13, 18, 340 S.E.2d 35, 37 (1986) (stating that a jury would naturally assume that a mother would believe that her daughter was telling the truth concerning a sexual assault allegation); *State v. Dew*, __ N.C. App. __, __, 738 S.E.2d 215, 219 (stating that "most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children."), *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013) we are simply unable to conclude that the outcome at Defendant's trial would probably have been different had the trial court refrained from allowing the admission of the challenged portion of Ms. Phillips' testimony. As a result, the trial court did not commit plain error by allowing the admission of the challenged portion of Ms. Phillips' testimony.[5]

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5. In his brief, Defendant contends that, even if he is not entitled to relief from his convictions based on a single error, the cumulative effect of the errors that he contends

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judge ROBERT N. HUNTER, JR., concurring in the result only prior to 6 September 2014.

Judge DAVIS concurs.

STATE OF NORTH CAROLINA
v.
MONTICE TERRILL HARVELL

No. COA14-228

Filed 5 September 2014

1. Identification of Defendants—show-up identification—motion to suppress—suggestive—no plain error

The trial court did not commit plain error in a felony breaking and entering and felony larceny case by denying defendant's motion to suppress a victim's show-up identification of defendant. Although it was suggestive, under the totality of the circumstances it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process.

2. Criminal Law—instructions—flight

The trial court did not err in a felony breaking and entering and felony larceny case by instructing the jury regarding flight. The State presented evidence that reasonably supported the theory that

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that the trial court committed deprived him of a fair trial. However, given that "the plain error rule may not be applied on a cumulative basis," *State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009), and given that none of Defendant's challenges to the trial court's judgments were properly preserved for purposes of appellate review, we conclude that Defendant is not entitled to relief from the trial court's judgments on the basis of the cumulative error doctrine.

defendant fled after breaking and entering into the victim's home. Further, the instruction was not prejudicial given the victim's identification of defendant.

3. Larceny—felony larceny—taking—carrying away—jury request for clarification

The trial court did not violate N.C.G.S. § 15A-1234 by responding to a jury question regarding the distinction between "taking" and "carrying away" after receiving a request from the jury on the clarification of the terms for felony larceny. Neither party objected to the instructions after they were given, and the trial court specifically asked both parties if there were any objections. Further, the parties were given an opportunity to be heard and defendant was not prejudiced by the additional instructions.

Appeal by defendant from judgment entered 30 August 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Josephine Tetteh, for the State.

Sharon L. Smith, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Montice Terrill Harvell ("Defendant") appeals from a judgment sentencing him as a habitual felon for felony breaking and entering and felony larceny. Defendant argues that the trial court erred by denying his motion to suppress the show-up identification and by giving a flight instruction to the jury. Defendant also argues that the trial court violated statutory mandate by responding to a jury question regarding the distinction between "taking" and "carrying away" without affording counsel an opportunity to be heard before answering the jury's inquiry. For the following reasons, we find no error.

I. Facts and Procedural History

On 11 June 2012, Defendant was indicted on one count of felony breaking and entering and one count of felony larceny. Defendant was also indicted on attaining habitual felon status on 30 July 2012. On 19 March 2013, Defendant filed a motion to suppress the in-court and out-of-court identification by Maurice Perdue ("Mr. Perdue"). Defendant's case came before the Mecklenburg County Superior Court on 28 August

2013. After a hearing, the trial court denied Defendant's motion to suppress. The jury found Defendant guilty of felony breaking and entering and felony larceny and Defendant pled guilty to attaining habitual felon status. The record and trial transcript tended to show the following facts.

On 21 May 2012, around 2:15 p.m., Army veteran Mr. Perdue left his Charlotte home on Panglemont Drive to pick up a sandwich for lunch. Before leaving, Mr. Perdue locked his doors and set his house alarm. Thirty minutes later, Mr. Perdue returned home to find an unfamiliar Ford Explorer parked in his driveway with the back door open. He also noticed that his front door was wide open. He parked his car, unholstered his pistol, and approached the open front door of his residence. Mr. Perdue looked in through the open front door and saw a black male standing in front of his TV stand with Mr. Perdue's television and XBOX on the floor in front of the stand. At the time, Mr. Perdue was approximately twenty feet from the man. He ordered the black male to "freeze," but the man turned and ran out the open back door. Mr. Perdue ran after the man.

When Mr. Perdue got to his back door, the black male was running diagonally across his neighbor's yard. He then turned and looked over his shoulder at Mr. Perdue. Mr. Perdue fired a shot from his pistol at the black male. The black male turned and cut in between two neighboring homes. Mr. Perdue ran in between his house and his neighbor's house toward his front yard in order to cut the man off. When Mr. Perdue reached his front yard, the black male ran out from in between the houses and toward Mr. Perdue. Mr. Perdue was only twenty feet from the man and was able to observe his full face as the man ran toward him. Mr. Perdue fired two shots at the man who took off running around the neighbor's house and up the street. Mr. Perdue continued to chase after the man yelling, "Stop running. I'm going to catch you, I'm going to get you." Mr. Perdue fired three more shots at the ground near the man intending to warn him not to return to Mr. Perdue's home. The black male ran up a hill in the neighborhood and turned to look back at Mr. Perdue. Mr. Perdue ran back to his house to call 911.

During Mr. Perdue's encounter with the black male, Mr. Perdue was able to observe the man's face three different times. While on the phone with the 911 operator, Mr. Perdue described the man as a black male in his mid-twenties with dreadlocks and a goatee wearing a white T-shirt and dark jeans.

That same day, Officer Robert Roberts ("Officer Roberts") with the Mecklenburg Police Department was on patrol in a marked patrol

car near Mr. Perdue's neighborhood. Officer Roberts received the dispatch call and responded to Mr. Perdue's neighborhood. In an attempt to cut off a fleeing suspect, Officer Roberts drove past the neighborhood entrance and turned down a small dirt road not normally used by traffic that backed up to the houses in Mr. Perdue's neighborhood.

As he was driving, Officer Roberts saw Defendant walk out of the woods behind the houses. Defendant matched the description Mr. Perdue gave to the 911 operator; he was a black male in his mid-twenties with a goatee and dreadlocks and wearing a white T-shirt. Defendant walked up to the window of a white Dodge Charger and appeared to briefly talk with the driver before the car drove away. Officer Roberts pulled his marked patrol car up to Defendant and asked him to "wait a minute[.]" Officer Roberts then stepped out of his vehicle and approached Defendant on foot.

Upon approaching Defendant, Officer Roberts observed that Defendant "was hot . . . [and] sweating. He had . . . little berry-like things that attach to your clothing after you run through the woods. He had them all over his pants, [and Officer Roberts] saw he had sandals on." Officer Roberts advised Defendant that there had been a crime in the area and that Defendant matched the description of the suspect. Officer Roberts asked Defendant if he would mind waiting for a few minutes and asked to perform a pat down of Defendant to check for weapons. Defendant agreed to wait and to the pat down. During the pat down, Officer Roberts found a pair of winter gloves in Defendant's right pocket which Officer Roberts thought was odd because "[i]t was hot out that day, [and there was] no reason to have winter gloves."

Officer Andrew Weisner ("Officer Weisner") with the Mecklenburg Police Department also responded to the dispatch call and arrived at Mr. Perdue's house within 15 minutes. When Officer Weisner arrived at the house, Officer Roberts radioed that he had a suspect in custody matching the description Mr. Perdue gave to the 911 operator. Mr. Perdue testified that officers informed him "they had detained an individual and wanted me to go and identify him to see if that was the person that was in my house."

Officer Weisner took Mr. Perdue two streets over to where Officer Roberts was waiting with Defendant. At the time, Defendant was handcuffed and seated in the back seat of Officer Roberts' patrol car with the back door open. When Mr. Perdue arrived, Officer Roberts had Defendant step out of the patrol car and face Officer Weisner's vehicle. When he saw Defendant, Mr. Perdue leaned out the window and

immediately identified Defendant as the person who had been inside his house and who he subsequently chased.

After Officer Weisner's testimony, the State rested. Defendant moved to dismiss both charges, which the trial court denied. Defendant rested without presenting any evidence.

The jury found Defendant guilty of felony breaking and entering and felony larceny. Defendant pled guilty to habitual felon status and the trial court sentenced Defendant to a term of 72 to 99 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Defendant's appeal from the superior court's final judgment lies of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013).

III. Analysis

A. Show-up Identification

[1] Defendant contends that the trial court erred in denying his motion to suppress Mr. Perdue's show-up identification of Defendant. Specifically, Defendant argues the trial court erred because Mr. Perdue's mindset and other circumstances surrounding the "inherently suggestive" show-up identification gave rise to a substantial likelihood of irreparable misidentification. We disagree.

Generally, our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

Here, Defendant made a pretrial motion to suppress Mr. Perdue's identification of Defendant as the individual who he saw in his home on 21 May 2012. Defendant, however, did not object to the admission of the in-court identification by Mr. Perdue. This Court has held that "a pretrial motion to suppress . . . is not sufficient to preserve for appeal the issue of admissibility of evidence." *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000); *see also State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on

the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (internal quotation marks and citation omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Our Supreme Court has recognized show-up identifications, whereby a single suspect is shown to a witness shortly after the crime, as inherently suggestive "because the witness would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties." *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194 (1981) (internal quotation marks and citation omitted) (alterations in original). However, "suggestive pretrial show-up identifications are not *per se* violative of a defendant's due process rights." *State v. Watkins*, 218 N.C. App. 94, 105, 720 S.E.2d 844, 851 (2012) (internal quotation marks and citation omitted). "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 57 (2013).

In determining the likelihood of irreparable misidentification, we consider five factors: (1) the witness' opportunity to view the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the defendant, (4) the witness' level of certainty at the time of confrontation, and (5) the length of time between the crime and the confrontation. *State v. Rawls*, 207 N.C. App. 415, 424, 700 S.E.2d 112, 118–19 (2010); *Harris*, 308 N.C. at 164, S.E.2d at 95. In evaluating these factors, we consider whether "under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *State v. Jackson*, ___ N.C. App. ___, ___, 748 S.E.2d 50, 58 (2013); *see also State v. Breeze*, 130 N.C. App. 344, 352, 503 S.E.2d 141, 147 (1998).

Here, Mr. Perdue was able to view Defendant's face three separate times during the encounter. During two of those observations, Mr. Perdue was only twenty feet from Defendant. At the time of the incident, Mr. Perdue's senses were in a heightened state. Mr. Perdue testified that

the incident took him "back into a combative mind state as if [he] was back in Iraq again" and that "[w]hen you're in combat, it's all – it's game on, all senses are on . . . ."

Defendant argues that Mr. Perdue's description was inaccurate because he initially told officers that the suspect was "tall" and Defendant is only 5'7". Mr. Perdue accurately described the suspect as being a "black male in his mid twenties with dreadlocks and a goatee wearing a white T-shirt and dark colored jeans." Mr. Perdue testified that he did not remember describing the suspect as "tall" and that "[h]e was not tall to my understanding of it."

Mr. Perdue was "very certain" about his identification stating that he was "[o]ne hundred percent" certain that Defendant was the man he had seen inside his living room. Officer Weisner also testified that Mr. Perdue did not struggle in identifying Defendant, but rather "[h]e actually leaned out the window when he saw [Defendant] and immediately identified him."

Mr. Perdue's identification of Defendant occurred within fifteen to twenty minutes of Mr. Perdue finding the suspect in his home. Officers arrived at Mr. Perdue's house in fifteen to twenty minutes of the 911 call and within minutes Mr. Perdue was taken two streets over to identify the suspect.

Although the show-up identification was suggestive, under the totality of the circumstances the show-up identification was not so impermissibly suggestive as to cause irreparable mistaken identification and violate Defendant's constitutional right to due process. Accordingly, we hold that the trial court did not plainly err in denying Defendant's motion to suppress.

B. Flight Instruction to the Jury

[2] Defendant contends that the trial court erred in instructing the jury regarding flight where there was no evidence that Defendant fled after committing the crime. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.*

Our Supreme Court has held that

> an instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Blakeney, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (internal quotation marks and citations omitted). Further, we have also held that "an action that was not part of Defendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319, 657 S.E.2d 909, 915 (2008) (quotation marks and citation omitted).

In *State v. Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325 (2005), this Court upheld the flight instruction to the jury where the State presented some evidence of flight. In *Ethridge*, the defendant was charged with breaking and entering, larceny after breaking and entering, and possession of stolen goods. *Id.* at 361, 607 S.E.2d at 327. The defendant broke into a vacant home and removed more than thirty items from the home, including furniture and air conditioners. *Id.* at 361, 607 S.E.2d at 326–27. A neighbor noticed a car that was backed into the driveway of the vacant home with the tailgate open and with what appeared to be a coffee table hanging out the back. *Id.* at 361, 607 S.E.2d at 327. The neighbor recognized one of the men and recognized the car, which the neighbor saw drive away from the house, as belonging to the defendant. *Id.* Police officers quickly located the defendant's car but were unable to locate the defendant until about a month later. *Id.* This Court held that

> the State provided some evidence of flight. Defendant left the crime scene shortly after [the neighbor] arrived home. Furniture that had been in the house was found scattered in the backyard. While the police found [the defendant's] vehicle, they were not able to locate [the defendant] for several weeks. This evidence reasonably supports the

> theory that [the defendant] fled after commission of the crimes charged. We therefore find no error with the trial court's instructing the jury on flight.

Id. at 363, 607 S.E.2d at 328.

Here, similar to *Ethridge*, the State presented evidence that reasonably supports the theory that Defendant fled after breaking and entering into Mr. Perdue's home. Defendant argues that he ran out the back door after Mr. Perdue pulled his firearm and that Defendant fled to avoid being shot. Mr. Perdue, however, testified that when he approached his front door and saw Defendant standing in his living room, Defendant looked at Mr. Perdue and then took off running out the back door. It was not until Defendant was already outside the home and running across the neighbor's yard that Mr. Perdue fired the first shot. Thus, Defendant was already fleeing from the scene before Mr. Perdue fired any shots at Defendant.

Officer Roberts testified that not more than fifteen minutes after the 911 call, he saw Defendant on a dirt road that was "on the back side of [Mr. Perdue's] neighborhood" and was "not a road that people use for traffic." He also testified that he saw Defendant coming from behind a row of houses that backed up to the dirt road "which [was] rare" because it was "through high grass." Defendant also had "hitchhikers, little berry-like things that attach to your clothing after you run through the woods. . . . all over his pants[.]" Although Defendant in this case was located shortly after the crime, unlike in *Ethridge* where the defendant was not located for weeks, the evidence still reasonably supports the theory that Defendant fled after the commission of the crime.

Defendant also argues that the flight instruction was prejudicial to Defendant because the only evidence against Defendant was Mr. Perdue's identification, and cites *State v. Lee*, 287 N.C. 536, 541, 215 S.E.2d 146, 149 (1975) ("Evidence of flight is not only competent but often considered *material* . . . where there is a dispute or doubt as to the identity . . . [of] the perpetrator of the crime.") (internal quotation marks and citations omitted). In *Lee*, evidence tended to show that the witness did not consistently identify the defendant as one of the assailants. *Id.* In this case, however, we held above that Mr. Perdue's identification contained sufficient aspects of reliability and he has consistently identified Defendant as the person he saw in his home. Mr. Perdue provided an accurate description of the suspect and was "very certain" Defendant was the man he saw inside his house and had "no doubt about it." Thus, Defendant's reliance on *Lee* is misplaced. Accordingly, the flight

instruction was not prejudicial and we hold that the trial court did not err in instructing the jury on flight.

C. Clarifying Terms for the Jury

[3] Defendant also contends that the trial court violated statutory mandate by responding to a jury question regarding the distinction between "taking" and "carrying away" without affording counsel an opportunity to be heard. Defendant argues further that he was prejudiced by the trial court's error as the court's impromptu demonstration improperly assisted the State in proving the elements of the case. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1234 (2013),

> [a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

Further,

> [b]efore the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

N.C. Gen. Stat. § 15A-1234(c).

Here, after receiving a request from the jury on the clarification of the terms "taking" and "carrying away," the trial court informed the parties that it was "going to tell [the jury] the definition of taking is to lay hold of something with one's hands." Neither party objected at that time to the proposed instructions. The trial court then instructed the jury on this definition and further demonstrated the difference between the two terms with a coffee cup. The trial court also repeated the elements of felony larceny.

Under N.C. Gen. Stat. § 15A-1234, the judge "must inform the parties *generally* of the instructions he intends to give . . . ." N.C. Gen. Stat. § 15A-1234(c) (emphasis added). Here, the trial court informed the parties of the additional instructions it intended to give and provided that exact definition to the jury. The trial court also provided further clarification of the two terms by visual demonstration. Although the trial court did not inform the parties of its visual demonstration, the statute only requires that the trial court inform the parties *generally*. The trial court provided the definition as stated and the demonstration was consistent with the provided definition, only providing further clarification of the two terms.

Additionally, neither party objected to the instructions after they were given. The trial court specifically asked both parties if there were "[a]ny objections to the instructions given by the [c]ourt." Defendant's counsel responded "[n]o, your Honor." Therefore, the trial court did not violate N.C. Gen. Stat. § 15A-1234 in making its additional instructions.

Defendant also argues that the trial court's failure to include the language that the State had the burden of proving all of the elements beyond a reasonable doubt after repeating the elements of felony larceny improperly aided the State in proving its case. The jury previously submitted two inquiries to the trial court regarding which elements it was required to find. At 10:05 a.m., the jury entered the courtroom and the trial court further instructed the jury that the State was required to prove beyond a reasonable doubt all elements of the underlying offenses and repeated the required elements. Just over thirty minutes later, at 10:42 a.m., the jury was brought back into the courtroom for the additional instructions on "taking" and "carrying away." Since only thirty-seven minutes had passed since the trial court had reinstructed the jury on the elements and the State's burden of proving all elements beyond a reasonable doubt, Defendant was not prejudiced by the trial court omitting the language pertaining to the State's burden at this time.

Since the parties were given an opportunity to be heard and Defendant was not prejudiced by the additional instructions, we hold the trial court did not err in clarifying the elements of the underlying offenses and the distinction between "taking" and "carrying away."

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
DELUNTA ALUNDUS HULL AND SHARRELLE LYNN DAVIS

No. COA14-251

Filed 16 September 2014

1. **Larceny—from the person—sufficient evidence—jury instruction not erroneous**

The trial court did not err by denying defendants' motions to dismiss the charge of larceny from the person. The State presented sufficient evidence of all elements of the crime, including that a computer was within the victim's protection and presence at the time it was taken. Moreover, the trial court did not commit plain error when it instructed the jury on the offense of larceny from the person. There is no substantial difference between the holdings in *State v. Buckom*, 328 N.C. 313 (1991) and *State v. Barnes*, 345 N.C. 146 (1996), with regard to the element that the taking be "from the person" and North Carolina Pattern Jury Instruction Criminal 216.20 sufficiently instructs on this cause of action.

2. **Sentencing—larceny from the person—statutory mitigating factors—presumptive range—no findings required**

The trial court did not abuse its discretion in a larceny from the person case by failing to find a statutory mitigating factor and by failing to consider mitigating evidence. The trial court was not required to make findings of aggravating or mitigating factors, or to impose a mitigated range sentence, as defendant was sentenced in the presumptive range.

3. **Larceny—from the person—misdemeanor larceny—no instruction necessary**

The trial court did not err in a larceny from the person case by denying defendant's request to instruct the jury on the lesser-included offense of misdemeanor larceny. The evidence supported both elements of proximity and control of the crime of larceny from the person.

Appeal by defendants from judgments entered 6 August 2013 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2014.

Roy Cooper, Attorney General, by Anne J. Brown and Richard H. Bradford, Special Deputy Attorneys General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant Hull.

Amanda S. Zimmer for defendant-appellant Davis.

STEELMAN, Judge.

Where there was evidence of all of the elements of the charge of larceny from the person, the trial court did not err in denying defendants' motions to dismiss. The trial court did not commit plain error in its jury instructions on that charge. Where defendant was sentenced from the presumptive range, the trial court did not err by failing to make findings in mitigation or aggravation, or in not sentencing defendant from the mitigated range. Where the State presented evidence that Stuart's computer was in proximity to her and under her control, the trial court did not err in declining to submit the lesser charge of misdemeanor larceny to the jury.

I. Factual and Procedural Background

On 8 May 2012, Rashad Perry, Robert Hawkins, David Williams, Gabrielle Stuart, Braielyn Peoples and Emory Matthews were gathered at Hawkins' apartment in Greensboro for "study and fellowship" in preparation for exam week. Perry and Hawkins stepped outside, and were approached by a man armed with a handgun, who robbed them of their cellular telephones. Two more people, Delunta Alandis Hull (Hull) and Sharrelle Lynn Davis (Davis), then approached, and the five people – Perry, Hawkins, Hull, Davis, and the gunman – entered Hawkins' apartment.

Davis pulled Perry into the kitchen while Hull and the gunman went through the apartment. Two laptop computers and another cellular telephone were taken. One of the computers belonged to Stuart.

Prior to the time of the theft, Stuart had been working on her physics homework. While studying, Stuart, along with Peoples, Hawkins, Matthews, and Perry, was playing a computer game called "Dance Central" on the television. Each would take turns playing the game. At the time of the theft, it was Stuart's turn to play. Shortly after her turn started, Stuart was "knocked [] out of the game and [] realized something was out of order." She saw that Hull and the gunman had possession of

her laptop, which had been on a table three feet away from her, with her homework still visible on the screen.

Davis and Hull were each indicted on four counts of robbery with a dangerous weapon, and one count of first-degree burglary. At the close of the State's evidence, defendants moved to dismiss the charges. The trial court granted these motions with respect to the robbery with a dangerous weapon of Stuart, and denied them as to the other charges. With respect to the robbery of Stuart, the trial court submitted the lesser included offense of larceny from the person to the jury.

Defendants were found guilty of all charges. Hull was sentenced to consecutive active prison terms of 51-74 months for the robbery of Hawkins, 51-74 months for the robbery of Williams, and 5-15 months for the larceny from Stuart. He was also sentenced to concurrent active prison terms of 51-74 months for the robbery of Perry and 51-74 months for first-degree burglary. Davis was sentenced to consecutive active prison terms of 57-81 months for the robbery of Hawkins, 57-81 months for the robbery of Williams, and 6-17 months for the larceny from Stuart. She was also sentenced to concurrent active prison terms of 57-81 months for the robbery of Perry, and 57-81 months for first-degree burglary.

Defendants appeal.

II. Larceny from the Person

[1] In defendants' first and second arguments, they contend that the trial court erred by denying their motions to dismiss the charge of larceny from the person as to Stuart, or alternatively that the trial court committed plain error when it instructed the jury on that offense. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

We review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial,

> so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

At the close of State's evidence, defendants moved to dismiss the charge of robbery as to Stuart. The trial court dismissed that charge, but submitted to the jury the lesser offense of larceny from the person. On appeal, defendants first contend that the trial court erred in denying their motions to dismiss the charge of larceny from the person.

The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property. *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). It is larceny from the person if the property is taken from the victim's person or "within the victim's protection and presence at the time of the taking." *Id.* at 691, 573 S.E.2d at 196 (quoting *State v. Barnes*, 121 N.C. App. 503, 505, 466 S.E.2d 294, 296, *aff'd*, 345 N.C. 146, 478 S.E.2d 188 (1996)).

In the instant case, the State presented evidence that Stuart was using her computer to do her physics homework and, while studying, was also playing a computer game called "Dance Central." The game was operated by a Kinect video game system connected to Hawkins' television. A participant of the game was to duplicate dance moves on the television display. The participant's dance moves were captured by a video camera and the game then compared the displayed moves with the participant's moves in a side by side display.

When defendants and the gunman entered the apartment, it was Stuart's turn to play the game. She had just started her turn – Stuart testified that it was "shortly after I got like maybe like a verse -- like a couple of sentences into the song" – when Stuart was "bumped" by someone, which caused her to be "kicked out" of the game. At that point, she saw defendants absconding with her laptop.

Defendants contend that Stuart was unaware of the taking until after it occurred; however, the evidence suggests that Stuart became aware of the taking as it occurred. Specifically, Matthews testified:

> I was pretty much oblivious to what was happening, so I was just like who was this person picking up [Stuart]'s laptop, and so I asked [Stuart], I said, "Do you know this person?" and she said, "No." I was like, "Well, she took your laptop."

Stuart saw the laptop among the items that defendants were stealing, and which were in the possession of defendants as they exited the apartment.

The test set forth in *Barnes* was whether the property stolen was taken from the victim's person or within the victim's protection and presence when the property was stolen. *Barnes*, 121 N.C. App. at 505, 466 S.E.2d at 296. In the instant case, the laptop computer was not on Stuart's person when it was taken. However, it was about three feet from Stuart, and the homework, from which she was taking a momentary break, was still on the computer screen. The computer was therefore within her protection and presence at the time it was taken. The brief break from her studies did not remove the laptop from her protection or presence.

The trial court did not err in denying the motions of the defendants to dismiss the charge of larceny from the person at the close of all of the evidence.

Defendants next argue, in the alternative, that the trial court erred in its instructions to the jury with regard to the charge of larceny from the person. Since defendants failed to object to the trial court's jury instruction at trial, we review this issue only for plain error.

The trial court charged the jury in accordance with North Carolina Pattern Jury Instruction Criminal 216.20 as follows: "Property is stolen from the person if it was under the protection of the person at the time. Property may be under the protection of the person although not actually attached to her, for that which is taken in her presence is, in law, taken from her person." *See* N.C.P.I., Crim. 216.20, fn. 1 (2011). Defendants contend that this instruction was based upon the Supreme Court case of *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991), and that since *Buckom* was decided, the Supreme Court narrowed the definition of that element of larceny from the person. Defendants cite to the case

of *State v. Barnes*, in which our Supreme Court held that "for larceny to be 'from the person,' the property stolen must be in the immediate presence of and under the protection or control of the victim *at the time the property is taken*." *Barnes*, 345 N.C. at 149, 478 S.E.2d at 190 (emphasis in original).

Defendants contend that *Barnes* abrogated the holding in *Buckom*. We hold that there is no substantial difference between the holdings of *Buckom* and *Barnes*. In *Buckom*, the Court observed that:

> Taken in the context of the foregoing common law principles, "[p]roperty is stolen 'from the person,' if it was under the protection of the person at the time.... [P]roperty may be under the protection of the person although not actually 'attached' to him." R. Perkins & R. Boyce, *Criminal Law* 342 (3d ed. 1982) (footnotes omitted). For example, if a jeweler places diamonds on a counter for inspection by a customer, under the jeweler's eye, the diamonds remain under the protection of the jeweler. *Id.* It has not been the general interpretation that larceny from the person "requires an actual taking from the person, and is not committed by a taking from the immediate presence and actual control of the person.... As said by Coke in the 1600's: 'for that which is taken in his presence, is in law taken from his person.' " *Id.* at 342-43 (quoting 3 Coke, *Institutes* *69).

Buckom, 328 N.C. at 317-18, 401 S.E.2d at 365. In *Barnes*, the Court did not disagree with this analysis; in fact, it relied upon *Buckom*:

> The crime of larceny from the person is regularly understood to include the taking of property "from one's presence and control." Thus, for larceny to be "from the person," the property stolen must be in the immediate presence of and under the protection or control of the victim *at the time the property is taken*.

State v. Barnes, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (citing, *inter alia*, *Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365) (citations omitted) (emphasis in original). *Barnes* ultimately distinguished *Buckom* based upon the facts of the case, but in terms of the law the two opinions were in agreement. The addition of the words "at the time the property is taken" adds nothing to the legal analysis of the elements of the crime. The only temporally relevant time is the time of the theft itself.

Even assuming *arguendo* that *Barnes* superseded the holding in *Buckom*, defendants have failed to show how this impacts the outcome of their case. Whether we rely upon *Buckom* or *Barnes*, there was substantial evidence that the property was taken from Stuart's presence, that she was using the computer to perform her physics homework, and that the computer was under her control or protection at the time it was taken. Even had the jury been instructed as defendants suggest, we hold that it would not have had a "probable impact on the jury's finding that the defendant was guilty." Defendants have failed to show that the trial court committed plain error in its jury instruction concerning the charge of larceny from the person.

This argument is without merit.

III. Mitigating Factor

[2] In her third argument, Davis contends that the trial court abused its discretion by failing to find a statutory mitigating factor, and by failing to consider mitigating evidence. We disagree.

A. Standard of Review

> The standard of review for application of mitigating factors is an abuse of discretion. The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence as appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A–1340. 17(c)(2).

State v. Hagans, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785 (2006) (citations and quotations omitted).

B. Analysis

We have previously held that the trial court is required to make findings of aggravating and mitigating factors "only if, in its discretion, it departs from the presumptive range of sentences[.]" *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 785. Davis was sentenced from the presumptive range. Accordingly, we hold that the trial court was not required to make findings of aggravating or mitigating factors, or to impose a mitigated range sentence.

This argument is without merit.

IV. Lesser Included Offense

[3] In his third argument, Hull contends that the trial court erred in denying defendant's request to instruct the jury on the lesser included offense of misdemeanor larceny with regard to the theft of Stuart's laptop computer. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

Hull contends that Stuart's lack of awareness of the theft as it happened did not support a conviction of larceny from the person, but rather supported a conviction for the lesser offense of misdemeanor larceny. Hull cites to our decision in *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 646 (1988), in which we held that the theft of a woman's purse from a shopping cart while she was several steps away and unaware of the theft did not constitute larceny from the person, but rather constituted misdemeanor larceny.

Hull, in his argument on appeal, challenges only the element of proximity and control. As he does not challenge the other elements of larceny from the person, we limit our review only to proximity and control. *See State v. Lucas*, ___ N.C. App. ___, ___, 758 S.E.2d 672, 676 (2014).

We note first that *Lee* was decided prior to both *Buckom* and *Barnes*, and that these later Supreme Court cases clarified the law of larceny from the person. We further note that, in contrast with the victim in *Lee*, who did not realize that the theft had occurred until sometime later, the evidence in the instant case was that Stuart became aware of the theft immediately, as it was occurring. We hold that the instant case is distinguishable from *Lee*.

The crucial elements of larceny from the person are proximity and control. The evidence in the instant case supports both elements. Stuart's awareness, although not one of the elements of the offense, is a factor to be considered in analyzing her control. As stated in section

II B of this opinion, Stuart was sufficiently aware of the larceny as it occurred to have been in control of her property.

Because the evidence satisfied the element of proximity and control, and Hull challenges no other elements of larceny from the person, we hold that the evidence satisfied all of the requirements of the greater offense. The trial court did not err in declining to instruct the jury upon the lesser offense of misdemeanor larceny. This argument is without merit.

NO ERROR.

Judge GEER concurs.

Judge HUNTER, Robert N., Jr. concurring prior to 6 September 2014.

STATE OF NORTH CAROLINA
v.
JOSEPH OVEROCKER, Defendant

No. COA14-270

Filed 16 September 2014

1. Motor Vehicles—driving while impaired—unsafe movement—findings of fact—sufficiency

The trial court did not err in an impaired driving and unsafe movement case by making its findings of fact numbers 6, 10, and 19. Each of the findings was supported by competent evidence or was a reasonable inference drawn from the evidence.

2. Search and Seizure—motion to suppress—lack of probable cause—impaired driving—unsafe movement

The trial court did not err by granting defendant's motion to suppress evidence based on a lack of probable cause to arrest defendant for impaired driving and unsafe movement. The findings of fact supported the conclusions of law that the reasons relied upon by the officer for the arrest did not provide the officer with probable cause that defendant was either impaired or had engaged in unsafe movement.

3. Civil Procedure—motion to dismiss erroneously granted—failure to make written or oral motion to dismiss

The trial court erred by dismissing the charges of impaired driving and unsafe movement against defendant. Defendant did not make a written or oral motion to dismiss, and thus, controlling precedent required the Court of Appeals to reverse the trial court's dismissal of the charges.

Appeal by the State from order entered 4 October 2013 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 28 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellee.

GEER, Judge.

The State appeals the trial court's order granting defendant Joseph Overocker's motion to suppress and dismissing the charges against him based on a lack of probable cause to arrest defendant for impaired driving and unsafe movement. We hold that the trial court's findings of fact are supported by the evidence and in turn support the court's conclusion of law that the reasons relied upon by the officer for the arrest did not provide the officer with probable cause that defendant was either impaired or had engaged in unsafe movement. We, therefore, affirm the order to the extent it grants the motion to suppress. Because, however, defendant did not make a written or oral motion to dismiss, controlling precedent requires that we reverse the trial court's dismissal of the charges.

Facts

On 11 October 2012, defendant arrived at about 4:00 p.m. at a sports bar called Time Out Bar & Grill in Durham, North Carolina. Defendant parked his Porsche Cayenne SUV directly in front of the bar and met up with several friends, including Claude "Chip" Teeter. While defendant was inside the bar, a group of motorcyclists pulled into the Time Out parking lot, and one of them parked her motorcycle behind defendant's SUV. When defendant left the bar and started backing out of his parking spot, he collided with the motorcycle.

Officer Everette Jefferies, an off-duty police officer with the Durham Police Department, had ridden his motorcycle to Time Out and noticed defendant when he first arrived. Officer Jefferies was outside in the parking lot when defendant was leaving, and he witnessed the collision.

Officer Mark Lalumiere, who was on duty with the Durham Police Department, was dispatched to the scene. After talking with defendant and Officer Jefferies, Officer Lalumiere had defendant perform standardized field sobriety tests ("FSTs"). Another Durham Police Department officer, Officer Marvin Hembrick, performed two portable breath tests ("PBTs") on defendant. Officer Lalumiere then arrested defendant for impaired driving and unsafe movement.

On 11 April 2013, a district court judge found defendant guilty of both charges, and defendant timely appealed to superior court. On 11 July 2013, defendant filed a motion to suppress, asking the superior court to suppress (1) all evidence gathered after the stop of defendant's vehicle or the first interview of defendant for lack of reasonable suspicion and (2) all evidence based on a lack of probable cause to arrest defendant. After hearing testimony from defendant, Mr. Teeter, and Officers Jefferies, Lalumiere, and Hembrick, the superior court entered an order granting defendant's motion to suppress. Additionally, in the same order, the court dismissed the charges against defendant.

In the suppression order, the court made the following findings of fact. Defendant and Mr. Teeter arrived at Time Out at around 4:00 or 4:30 p.m. Mr. Teeter testified that he and defendant were sitting at a table outside on Time Out's patio. Defendant and Mr. Teeter left Time Out at around 8:00 or 8:30 p.m. Over the course of the evening, Mr. Teeter consumed four beers, and defendant consumed four bourbons on the rocks.

Officer Jefferies noticed defendant and Mr. Teeter and because "they were talking loudly, . . . Officer Jeffries [sic] believed the Defendant was impaired." Apart from talking loudly, "there was nothing unusual about the Defendant's behavior or conversation in the bar."

While defendant and Mr. Teeter were in the restaurant, a group of motorcyclists parked their vehicles in Time Out's parking lot. One of these, "a pink, ninja sport motorcycle," parked "three to four feet behind the Defendant's Porsche sport utility vehicle on the passenger side." The trial court found that the pink motorcycle was "illegally parked."

At around 8:15 p.m., when it was dark outside, Officer Jefferies saw defendant and Mr. Teeter walk out of the restaurant, and he noticed that defendant and Mr. Teeter were still talking loudly. The trial court

found that "[w]hen the Defendant left with his friend, [Officer Jefferies] saw the Defendant and thought the Defendant should not be driving because he continued to talk loudly. He did not observe anything unusual about the Defendant's appearance, smell, walking, balance, eyes, or speech, other than he was talking loudly, upon which he based his opinion that the Defendant was impaired and should not be driving."

Defendant got into his vehicle with the radio playing and the air conditioning on. When defendant began to back up, a motorcyclist ran toward the illegally parked motorcycle, and, together with other motorcyclists, started yelling at defendant's SUV. One motorcyclist got onto the motorcycle, but was unable to move it in time. He jumped off, and defendant's SUV "backed over it, or struck it." The motorcycle fell over and it was dragged along the pavement for a short distance.

When defendant "heard something," he stopped and got out of his vehicle. One person was slapping his vehicle, while two others were holding the motorcycle he had struck. Defendant's SUV had a small scratch on the bumper.

The trial court found that "[b]ecause the motorcycle stood lower than the rear window of the Defendant's vehicle and there were other motorcycles parked in the parking space next to the passenger side of the Defendant's vehicle, there is no evidence the Defendant saw, or could even see the pink motorcycle parked behind his vehicle which was in a parking space, or was otherwise aware of its presence."

After defendant's collision with the pink motorcycle, the police were called, and Officer Lalumiere was dispatched to Time Out at around 8:15 p.m. When he arrived, Officer Lalumiere "found a Porsche Cayenne sport utility vehicle and a pink motorcycle behind the parking spaces in the lane between parking spaces in the parking lot of the establishment. The motorcycle had scratches on it and there were gouge marks in the pavement from the kick stand of the motorcycle."

Officer Lalumiere spoke with defendant, and defendant said that "he came out of the restaurant and backed up striking the motorcycle." Defendant told the officer that he "had been at the bar for four hours" and initially claimed he had two drinks. When Officer Lalumiere asked him again about the drinks, defendant said he might have had three. The trial court found that "[t]he Defendant had an odor of alcohol which Officer Lalumiere described as 'not real strong, light.' "

Defendant then consented to Officer Lalumiere's conducting two FSTs. The first test Officer Lalumiere asked defendant to perform was

the "Walk and Turn Test." After Officer Lalumiere instructed him how to perform the test, defendant "took nine steps heel-to-toe down one of the lines for a parking space while counting aloud without a problem." Defendant then asked Officer Lalumiere what he was supposed to do next. Officer Lalumiere reminded defendant to follow the instructions, and defendant "walked back nine steps heel-to-toe down on the line while counting aloud without a problem."

Officer Lalumiere then asked defendant to perform the "One-Legged Stand Test." He explained the directions for that test, and when defendant was told to start, defendant "raised his foot more than six inches above the pavement, stopped after fifteen seconds, [and] put his foot down[.]" Defendant then looked at Officer Lalumiere and asked what he was supposed to do next. After Officer Lalumiere told defendant to complete the test, defendant "picked up his foot and continued for at least fifteen more seconds until he was stopped by Officer Lalumiere."

Mr. Teeter watched defendant while he performed the FSTs. According to the trial court, "Mr. Teeter did not see anything wrong with the Defendant's standardized field sobriety tests and he did not believe the Defendant was impaired, or unfit to drive on this occasion." The trial court noted that Mr. Teeter had no prior criminal convictions and that he "has a severe and very noticeable stutter when he talks and neither Officer Jeffries [sic] nor Officer Lalumiere recalled Mr. Teeter spoke with a stutter when he was interviewed after the accident."

Officer Lalumiere had requested an officer who was certified to administer PBTs. Officer Hembrick responded and, once at the scene, noticed that defendant had "a faint odor of alcohol on his person and red, glassy eyes." Defendant submitted to two PBTs, both of which indicated the presence of alcohol in defendant.

Overall, Officer Lalumiere observed defendant for about an hour and concluded that defendant " 'had consumed alcohol.' " However, defendant "was not slurring his speech and he walked without stumbling." While in the presence of the three officers -- Officers Lalumiere, Jefferies, and Hembrick -- "[d]efendant's speech was not slurred and he never staggered when he walked . . . ." Nonetheless, "[b]ased upon the fact that the Defendant had been at a bar, he was involved in a traffic accident, his performance tests and the odor of alcohol, Officer Lalumiere believed the Defendant 'was impaired and it was more probable than not that he would blow over the legal limit.' Therefore, he placed the Defendant under arrest for Impaired Driving."

Based on these findings, Judge Fox concluded,

> 3. The facts and circumstances known to Officer Lalumiere as a result of his observations and testing of the Defendant were insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe that the offenses of Impaired Driving and Unsafe Movement had been committed and the Defendant was the person who committed those offenses.
>
> 4. The arrest of the Defendant for Impaired Driving and Unsafe Movement on this occasion violated the Fourth Amendment of the United States Constitution and the North Carolina Constitution.

The trial court, therefore, allowed defendant's motion to suppress and ordered that "[t]he charges of Impaired Driving and Unsafe Movement against the Defendant" be dismissed. The State timely appealed to this Court.

Standard of Review

" '[T]he scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court]'s ultimate conclusions of law.' " *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Findings of fact that are not challenged "are presumed to be supported by competent evidence and are binding on appeal." *Tinkham v. Hall*, 47 N.C. App. 651, 652-53, 267 S.E.2d 588, 590 (1980).

Further, " '[i]f there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.' " *State v. Veazey*, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (quoting *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses. . . . '[B]y reason of his more favorable position, [the trial judge] is given the responsibility of discovering the truth.' " *State v. Hughes*, 353 N.C. 200, 207-08, 539 S.E.2d 625, 631 (2000) (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)).

The State's Challenges to Findings of Fact

[1] The State challenges a number of the trial court's findings of fact. Based on our review of the record, we hold that each of the findings is supported by competent evidence or is a reasonable inference drawn from the evidence.

The State first points to the part of the trial court's finding of fact number 6 that the pink motorcycle "stood lower than the rear window of the Defendant's vehicle." At the hearing, Officer Jefferies stated that the height of the motorcycle was "[c]lose -- right at" defendant's rear window and that the motorcycle "probably would come up . . . to that line right there." Officer Jefferies demonstrated where he was referring to on a photo of the rear of defendant's SUV, although the record does not indicate the location of the line on the photo where Officer Jefferies was pointing.

Because of the failure of counsel to memorialize in the record where Officer Jefferies pointed, the State contends that "close" "could mean above or below the [rear] window level," and this ambiguity renders the evidence incompetent. The trial court, however, was able to observe precisely where the officer was pointing.

In addition, Officer Jefferies explained that the pink motorcycle's "fairing is on the bottom," the windshield was part of the fairing, the windshield is "exposed . . . maybe about a [sic] inch" over the handlebars, and "the windshield is approximately 3 to 4 feet tall from the fairing." Later in the hearing, after all the evidence was presented, Judge Fox indicated his own familiarity with the same or similar type of motorcycle as the pink motorcycle defendant struck:

> I'm wondering how in the world any idiot would park a motorcycle behind an SUV. I mean, I'm quite familiar with those ninja bikes. They are not very tall. They're shorter than the average motorcycle, which is not very tall. . . . [I]t's unfathomable to me how you could do that. I mean, how you could do that and leave your motorcycle and not expect to come back and find it creamed. I just don't understand that.

"[I]t is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal[,]" *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994), and the State has failed to show that Officer Jefferies' reference to the photo of the SUV supported a finding contrary to the finding that "the motorcycle stood lower than the rear

window of the Defendant's vehicle." Further, the finding that the motorcycle "stood lower than the rear window of the Defendant's vehicle," along with Judge Fox's remark that "it's unfathomable . . . how you could . . . leave your motorcycle [behind an SUV] and not expect to come back and find it creamed," indicate that Judge Fox dismissed any suggestion that the top of the motorcycle stood at or above the bottom of defendant's rear windshield. To the extent that any of the evidence offered as to the height of the pink motorcycle was conflicting, it was the duty of the trial court to resolve the conflict.

The State also challenges the portion of finding of fact number 6 that "there is no evidence the Defendant saw, or could even see the pink motorcycle parked behind his vehicle which was in a parking space, or was otherwise aware of its presence." Defendant testified that when he was walking to his SUV he did not see the motorcycle, and when he got to the SUV he did not walk around it "to check . . . if anything was parked behind it." Moreover, the trial court found that the motorcycle stood lower than defendant's rear windshield, suggesting that defendant would not have been able to see the motorcycle from inside the SUV.

In arguing that the finding incorrectly stated that "no evidence" existed that defendant saw or could see the motorcycle, the State chiefly contends that Officer Jefferies testified "that a reasonable person would be able to see the motorcycle parked four to five feet behind the defendant's car." This assertion is not a fair representation of Officer Jefferies' testimony. When Judge Fox asked Officer Jefferies whether defendant "[w]as . . . in a position to see the motorcycle parked [behind his SUV] [,]" Officer Jefferies responded, "I think a reasonable person probably could have seen it *because there were several motorcycles out there*." (Emphasis added.) The trial court could reasonably have concluded that the mere fact (1) that Officer Jefferies thought defendant "could have seen it" or (2) that there were other motorcycles parked elsewhere in the parking lot was not evidence that defendant did see or should have seen the motorcycle parked directly behind his SUV.

The State also suggests that there was actual evidence that defendant could see the motorcycle because it "was only partially behind the defendant's car" and "there was [sic] at least three people that saw the motorcycle[,]" including Officer Jefferies, the individual who tried to move the motorcycle, and Mr. Teeter. With respect to the position of the motorcycle, while Officer Jefferies testified that "[t]he front wheel -- the forks, the front tire and part of the front fender was behind part of the vehicle," the trial court's unchallenged finding of fact that there were motorcycles parked in the parking space on defendant's passenger

side suggests that defendant's view of the rest of the pink motorcycle was obfuscated.

As for the ability of others to see the motorcycle, the State disregards the fact that it did not show that any of the people who saw the motorcycle were in a location with similar visibility to that of defendant at the time they noticed the motorcycle. Indeed, the record shows that these three individuals had very different vantage points than defendant when he walked to his car, got into his car, and backed up.

Moreover, although the record indicates that Officer Jefferies and Mr. Teeter witnessed one to three individuals trying to move the pink motorcycle before defendant hit it, there is no actual testimony from Officer Jefferies or Mr. Teeter that either one of them noticed that the pink motorcycle was parked behind defendant's SUV before the frenzied efforts to try to move it. At most, Officer Jefferies testified that, prior to defendant's backing up, he was aware that there were motorcycles in the parking lot. Based on our review of the evidence, the trial court could reasonably conclude that even though others may have been aware of the pink motorcycle before defendant backed into it, none of the evidence showed that defendant did see or could have seen the pink motorcycle parked behind his SUV.

The State next challenges the portion of finding of fact 10 that the pink motorcycle was "illegally parked" behind defendant's SUV. The State presented evidence -- including testimony from Officers Jefferies and Lalumiere – that the pink motorcycle was not parked within the lines of any parking space and that it was parked directly behind defendant's SUV in the area of the parking lot where vehicles were intended to drive.

We fail to see any basis for objecting to the trial court's finding given the undisputed evidence regarding the location of the motorcycle. Indeed, the State during the motion to suppress hearing essentially conceded that point, although arguing that the fact was immaterial: "Maybe the motorcycle being behind the defendant's car led to an incident that wasn't the defendant's fault. That's not the issue. The issue is: Was the defendant impaired at the time that this incident happened?"

Finally, the State challenges finding of fact 19:

> 19. Mr. Teeter did not see anything wrong with the Defendant's standardized field sobriety tests and he did not believe the Defendant was impaired, or unfit to drive on this occasion. He has no prior criminal convictions.

> Mr. Teeter also has a severe and very noticeable stutter when he talks and neither Officer Jeffries [sic] nor Officer Lalumiere recalled Mr. Teeter spoke with a stutter when he was interviewed after the accident.

First, the State argues that there was no competent evidence to support a finding that Mr. Teeter "did not believe the Defendant was impaired, or unfit to drive on this occasion." However, Mr. Teeter's testimony indicated that he was with defendant throughout the entire evening and that he did not "notice [defendant] acting unusually . . . in the restaurant at all" or "being unusually loud or boisterous." Mr. Teeter also stated that he "did not see anything wrong" with defendant's performance on the FSTs that Officer Lalumiere conducted. This testimony was competent and supported the trial court's finding -- a reasonable inference from that testimony -- that Mr. Teeter did not believe defendant was impaired or unfit to drive.

The State also contends there is no evidence that "Mr. Teeter . . . has a severe and very noticeable stutter when he talks[.]" However, as the trial court was able to "see[] the witnesses, [and] observe[] their demeanor as they testif[ied]," he was in the best position to determine that Mr. Teeter spoke with a stutter. *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. The State does not point to any evidence that Mr. Teeter did not have a stutter. Indeed, defense counsel noted that stutter on the record. Accordingly, we conclude that competent evidence supports finding of fact 19.

<u>The State's Challenges to the Conclusions of Law</u>

[2] The State argues that the trial court's findings of fact do not support the conclusion that Officer Lalumiere lacked probable cause to arrest defendant for impaired driving.[1] Initially, we note that the trial court determined Officer Lalumiere lacked probable cause based on "[t]he facts and circumstances known to Officer Lalumiere as a result of his observations and testing of the Defendant . . . ." Additionally, the trial court also stated in finding of fact 23 that Officer Lalumiere concluded there was probable cause based on "the fact that the Defendant had been at a bar, he was involved in a traffic accident, his performance tests[,] and the odor of alcohol[.]" Because the State does not challenge this finding, it is binding on appeal.

In reviewing the determination that probable cause was lacking, therefore, we consider only those "facts and circumstances known to

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1. The State does not challenge the trial court's conclusion that probable cause was lacking for defendant's unsafe movement violation.

Officer Lalumiere as a result of his observations," which include the fact that defendant had been at a bar, was involved in a collision with the pink motorcycle, performed sobriety tests, and had an odor of alcohol.

Probable cause "deals with probabilities and depends on the totality of the circumstances" and " '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.' " *Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775, 124 S. Ct. 795, 800 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302, 1310 (1949)). " 'The test for whether probable cause exists is an objective one -- whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another.' " *Thomas v. Sellers*, 142 N.C. App. 310, 315, 542 S.E.2d 283, 287 (2001) (quoting *Moore v. Evans*, 124 N.C. App. 35, 43, 476 S.E.2d 415, 422 (1996)).

With regard to what Officer Lalumiere knew when he arrested defendant, the trial court found that when he arrived at Time Out, Officer Lalumiere knew that defendant had been inside Time Out drinking up to three drinks over the course of approximately four hours (although in actuality defendant had had four drinks). Defendant "came out of the restaurant and backed up striking the motorcycle[,]" which was illegally parked behind defendant's SUV. There was no evidence that defendant saw the motorcycle or should have seen it before he backed up.

The State argues that other findings of fact related to the collision with the motorcycle support a conclusion that defendant was impaired. The State points to the trial court's finding that defendant dragged the motorcycle for a short distance before stopping, that there were gouge marks in the pavement as a result, and that defendant did not react to the individuals yelling at him to stop. The State argues that these findings constitute "evidence of the defendant's failure to recognize his surroundings . . . and . . . defendant had a delayed reaction time after he hit the motorcycle."

The trial court, however, made no finding -- and the record contains no evidence -- regarding whether defendant's reaction time was delayed in light of the "short distance" defendant traveled after hitting the motorcycle. Moreover, the trial court found that defendant's SUV suffered only a small scratch and the motorcycle's only reported damage was that it had "scratches on it." Further, the trial court's findings explained why defendant did not hear individuals yelling: he had the radio and air conditioning on. The State's argument regarding defendant's recognition of his surroundings and any delayed reaction asks this Court to weigh the

evidence and assess its credibility in a manner different from that of the trial court. We are not allowed to do so.

In short, the trial court's findings of fact support its conclusion that there was no probable cause to believe that defendant had engaged in unsafe movement. The State, at the trial level, essentially conceded that point, but argued there was still evidence of impairment.

The trial court's findings proceed to establish the lack of any other reasonable basis for concluding that defendant was impaired. The trial court found that apart from the traffic accident, Officer Lalumiere relied for probable cause on the fact that defendant had been at a bar, his performance tests, and the odor of alcohol on defendant. Yet, the trial court found that Officer Lalumiere testified that the strength of the alcohol odor was " 'not real strong, light.' " In addition, none of the three officers on the scene observed defendant staggering or stumbling when he walked, and his speech was not slurred. Further, the only error defendant committed when performing the two field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, defendant did so.

The State points to Officer Lalumiere's testimony that defendant "didn't do terrible" on the FSTs as "additional evidence . . . that defendant had committed an implied consent offense." However, this testimony conflicts with Mr. Teeter's testimony that he saw nothing wrong with defendant's performance on the FSTs. Further, the trial judge remarked that "these tests do not even begin to . . . come to the level . . . that I would view as being failed." The court, therefore, resolved any conflict in the evidence as to defendant's performance on the FSTs in favor of defendant.

The State argues on appeal that because Officer Lalumiere testified he spoke with Officer Jefferies, necessarily, Officer Jefferies' observations of defendant and his belief about his impairment provided part of Officer Lalumiere's probable cause. The trial court, however, in finding of fact 23, set out the circumstances upon which Officer Lalumiere relied in determining that he had probable cause to arrest defendant. That finding, which is binding on appeal, does not mention Officer Jefferies. It is apparent from other findings of fact that the trial court did not find Officer Jefferies completely credible. After weighing the evidence and assessing credibility, the trial court apparently determined that Officer Jefferies' claimed observations of defendant's prior behavior were not part of the basis for defendant's arrest. The State presents no grounds for us to revisit that determination on appeal.

In sum, the trial court found that while defendant had had four drinks in a bar over a four-hour time frame, the traffic accident in which he was involved was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The State contends that the facts of this case are similar to those in *Steinkrause v. Tatum*, 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010), in which this Court found probable cause to arrest the driver for impaired driving when (1) the driver was involved in a one-car accident that resulted in the car being found upside down in a ditch after rolling several times, (2) one officer noted an odor of alcohol on the driver, and (3) a second officer observed that the driver looked dirty and sleepy. The Court specifically found probable cause based on the "fact and severity of the one-car accident coupled with some indication of alcohol consumption." *Id.*

The Court emphasized that a "car accident alone does not support a finding of probable cause." *Id.* at 294, 689 S.E.2d at 382. In this case, the accident was minor and determined by the trial court to not be defendant's fault. Nothing in *Steinkrause* or any of the other cases cited by the State suggest that such an accident combined with evidence of alcohol consumption and a light odor of alcohol is sufficient to give rise to probable cause with no evidence of actual impairment.

Finally, the State argues that "while the numerical reading on the portable breath test was not admissible at the probable cause hearing, that number was before the officer in his consideration of whether defendant had operated a motor vehicle with a certain alcohol concentration." The State represents that finding of fact 23 finds that "Officer Lalumiere had a portable breath test reading that indicated to him that defendant 'was impaired and it was more probable than not that he would blow over the legal limit.' " However, contrary to the State's implication that Officer Lalumiere used a specific alcohol concentration reading from one of the PBTs to form probable cause, the evidence and the order only indicate that the PBTs returned "positive" results for alcohol in defendant's bloodstream.

Notwithstanding the absence of any numerical reading from an alcohol screening test in the evidence before us, the State cites

State v. Rogers, 124 N.C. App. 364, 370, 477 S.E.2d 221, 224 (1996), for support. In *Rogers*, the trial court admitted the numerical reading of an Alco-sensor test, in accordance with N.C. Gen. Stat. § 20-16.3 (1995), to help establish whether the arresting officer had probable cause for the defendant's driving impaired. 124 N.C. App. at 370, 477 S.E.2d at 224. However, the pertinent language of N.C. Gen. Stat. § 20-16.3 that allowed the arresting officer in *Rogers* to consider the numerical reading of the Alco-sensor test was supplanted in 2006 by the current version of the statute. 2006 N.C. Sess. Laws ch. 253, § 7. The plain language of N.C. Gen. Stat. § 20-16.3(d) (2013) prohibits "the actual alcohol concentration result" of an "alcohol screening test" from being used "by a law-enforcement officer . . . in determining if there are reasonable grounds for believing . . . [t]hat the driver has committed an implied-consent offense under G.S. 20-16.2[,]" such as driving while impaired.

Moreover, in light of the absence of any numerical reading in the evidentiary record before us, the State's argument would effectively allow law enforcement to evade review when arresting individuals for impaired driving after conducting alcohol screening tests. This argument, therefore, is wholly without merit.

Motion to Dismiss

[3] We lastly address the issue whether the trial court erred in dismissing the charges against defendant. We note that the State, in support of its position, merely repeats its arguments that the trial court erred in concluding that Officer Lalumiere lacked probable cause to arrest defendant. The State does not, however, cite any authority suggesting that the trial court erred in dismissing the charges.

However, pursuant to her ethical duty of candor to this Court, defendant's appellate counsel properly referred the Court to *State v. Jo*e, 365 N.C. 538, 723 S.E.2d 339 (2012) (per curiam). In *Joe*, the Supreme Court reversed this Court for affirming a trial court's dismissal of the State's charge of felony possession of cocaine with intent to sell or deliver because the defendant made no written or oral motion to dismiss that charge. *Id.* at 539, 723 S.E.2d at 340. Here, defendant made no written or oral motion to dismiss the charges, and, therefore, we must reverse the trial court's dismissal.

Affirmed in part; reversed and remanded in part.

Judge STEELMAN concurs.

Judge ROBERT N. HUNTER, JR. concurring in this opinion prior to 6 September 2014.

STATE OF NORTH CAROLINA
v.
BOBBY LEE RAWLINGS, Defendant

No. COA14-242

Filed 16 September 2014

1. Homicide—first-degree murder—self-defense—defensive force in commission of a felony—applicable to offenses after certain date—jury instruction not prejudicial

The Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to review the issue of whether the trial court erred an attempted first-degree murder case by instructing the jury that self-defense is not available to a person who used defensive force in the commission of a felony under N.C.G.S. § 14-51.4. That statute only applies to offenses committed on or after 1 December 2011 and the offense at issue in this case happened in 2006. The State, defendant, and the trial court all operated under the erroneous assumption that the law applied to defendant's offense. The instruction did not amount to plain error because defendant failed to show that the instruction had a probable impact on the verdict, as opposed to possibly influencing a single juror.

2. Appeal and Error—preservation of issues—double jeopardy—issue not raised at trial

Defendant failed to persevere for appellate review his argument that his sentences for offenses arising out of the shooting of a police officer violated the prohibition on double jeopardy. Defendant did not raise the double jeopardy issue below and constitutional issues not raised and ruled on at trial cannot be raised for the first time on appeal. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to review the issue.

3. Assault—with deadly weapon with intent to kill—assault with deadly weapon—clerical error

The trial court erred by entering judgment on the offense of assault with a deadly weapon with intent to kill where the trial court instructed the jury and accepted a verdict of guilty on the lesser-included offense of assault with a deadly weapon. The error was merely clerical. Furthermore, defendant failed to preserve for appellate review his argument that convictions for both assault with a deadly weapon and assault with a firearm on a law enforcement officer, when based upon the same conduct, violate double jeopardy.

Judge STEELMAN, concurring in the result in a separate opinion.

Appeal by defendant from judgments entered 16 August 2013 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 28 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

John R. Mills for defendant-appellant.

GEER, Judge.

Defendant Bobby Lee Rawlings appeals his convictions of attempted first degree murder, two counts of assault with a firearm on a law enforcement officer, assault with a deadly weapon with intent to kill ("AWDWIK"), and assault with a deadly weapon. On appeal, defendant primarily argues that the trial court erred in instructing the jury pursuant to N.C. Gen. Stat. § 14-51.4 (2013) that self-defense is not available to a person who used defensive force in the commission of a felony. Defendant asserts that the General Assembly did not intend N.C. Gen. Stat. § 14-51.4 to apply when the defendant was committing a non-violent felony and was not an aggressor.

We do not address defendant's statutory construction argument because N.C. Gen. Stat. § 14-51.4 only applies to offenses occurring on or after 1 December 2011 and is, therefore, inapplicable to the 15 March 2006 offenses charged in this case. Although defendant did not recognize the inapplicability of the provision and, as a result, did not raise the issue at trial or on appeal, we have elected, in our discretion, to invoke Rule 2 of the Rules of Appellate Procedure and review the instruction for plain error. We hold that while the trial court erred in instructing the jury regarding a statutory amendment to the law of self-defense that had an effective date after the date of the offenses in this case, defendant has failed to meet his burden of showing that he was prejudiced by the instruction.

Defendant additionally argues that his convictions violate double jeopardy and that the trial court erred in entering judgment on AWDWIK when the jury returned a verdict of assault with a deadly weapon. We hold that defendant waived the double jeopardy argument and remand for correction of the judgment.

Facts

The State's evidence tended to show the following facts. On 15 March 2006, at about 9:40 a.m., 11 officers from the Goldsboro Police Department ("GPD") and the Drug Enforcement Agency assembled at defendant's residence to execute a search warrant. Officer Daniel Peters of the GPD knocked on the back door and yelled, "Police, search warrant." He then struck the door with a ram three or four times but was unable to open it because there were two-by-fours propped up against the door from the inside to keep it shut. Eventually one of the officers was able to break the door off its hinges, and the officers entered the house.

Once inside, Officer Peters proceeded upstairs with Sergeant Max Staps of the Wayne County Sheriff's Office and Captain Brady Thompson of the GPD, announcing, again, "Police, search warrant," as they did so. Once upstairs, Sergeant Staps found defendant's roommate, Rico Lewis, asleep on a mattress in a room directly across from the stairs and apprehended him. Officer Peters and Captain Thompson proceeded down the hall to check the rest of the rooms. Officer Peters opened the door to defendant's room and saw defendant standing 10 to 15 feet away from him with a pistol in his hand. As soon as the door opened, defendant fired three shots. Officer Peters felt the first bullet go past his arm, and retreated. Captain Thompson was hit in his bullet proof vest by one of the bullets.

After the shots were fired, Sergeant Staps left the room where he had Mr. Lewis handcuffed and went to the room across the hall from defendant's room, where he found Captain Thompson lying on the ground. Sergeant Staps checked Captain Thompson's pulse and checked to see if there was any blood. As he was checking on Captain Thompson, the door to defendant's room began to open. Sergeant Staps drew his weapon, announced that he was the police, and told defendant to put his gun down and give up. When the door opened, defendant had put down his gun and was sitting on the floor with his hands over his head. Defendant did not resist arrest.

When officers searched defendant, they found a significant amount of cocaine on his person. Additionally, officers found a marijuana cigarette, a police scanner, digital scales, and sandwich bags in defendant's house, as well as cocaine residue and bullets in defendant's vehicle. Testimony was presented that in the drug trade, digital scales are used to weigh controlled substances for sale, and sandwich bags are used for packaging.

On 3 July 2006, defendant was indicted, with respect to the shooting of Captain Thompson, for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a firearm on a law enforcement officer. With respect to Officer Peters, defendant was indicted for assault with a firearm on a law enforcement officer and AWDWIK. Defendant pleaded guilty and was sentenced to a term of 133 to 169 months imprisonment. On 10 April 2012, the superior court granted defendant's motion for appropriate relief and vacated his convictions. Defendant subsequently entered a plea of not guilty and was tried from 13 to 16 August 2013.

At trial, defendant testified in his own defense that he is a Vietnam War veteran who suffers from post-traumatic stress disorder. He lived at the residence on East Elm Street with a series of roommates. Five days before the officers executed their search warrant, defendant's roommate, Mr. Lewis, was robbed after an intruder entered through the back door of the house. After the robbery, defendant braced the back door with two-by-fours to keep the door closed. Defendant also bought a handgun, which he kept in his nightstand, because Mr. Lewis told defendant that he thought that the robbers were coming back.

On the morning of 15 March 2006, defendant was asleep in his bedroom when he was awakened by a boom. He then heard running up the stairs that panicked him "because nobody came up [his] stairs." He pulled out the handgun from his nightstand, locked and loaded it, and laid back down to listen. The television in his bedroom was turned on, but he could hear "creeping" up the stairs and expected a robbery. He never heard anyone say "police" or "search warrant."

Defendant heard another boom as his bedroom door was kicked in, and he saw a black man wearing dark clothes with a gun pointed at him whom he thought was a "stickup kid." Defendant immediately fired two shots as the door flung open -- the door hit a file cabinet and bounced back shut again. After the door shut, defendant fired a clearance shot to make a noise so that he could crawl out of the bed onto the floor. When he then heard a lot of people running up the stairs, he asked, "[W]ho the hell is out there?" Several of the officers responded that it was law enforcement, and defendant realized, for the first time, that he was not being robbed. When he found out it was the police, he automatically put the gun down and lay down with his hands straight out in front of him until the officers arrested him.

The jury found defendant guilty of attempted first degree murder, AWDWIK, and assault with a firearm on a law enforcement officer for

shooting Captain Thompson. The trial court sentenced defendant to presumptive-range terms of 251 to 311 months imprisonment for attempted first degree murder, 46 to 65 months imprisonment for assault with a firearm on a law enforcement officer, and 46 to 65 months imprisonment for AWDWIK. With respect to Officer Peters, the jury found defendant guilty of assault with a deadly weapon and assault with a firearm on a law enforcement officer. The trial court consolidated the two convictions and sentenced defendant on the more serious conviction to a presumptive-range term of 46 to 65 months imprisonment. All of the sentences ran concurrently. Defendant timely appealed to this Court.

Discussion

[1] Defendant first contends that the trial court erred in instructing the jury that "[s]elf-defense is not available to a person who used defensive force in the commission of a felony." Defendant argues that N.C. Gen. Stat. § 14-51.4, the statute upon which the instruction was based, should only be read to apply to the commission of violent offenses or where the defendant is the aggressor.

North Carolina has long recognized the common law right to use defensive force in one's home. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002) (examining rules governing common law defense of habitation and common law right to self defense while in one's home). However, in this case, the trial court instructed the jury pursuant to the statutory right to use defensive force as provided by N.C. Gen. Stat. § 14-51.2 (2013) and N.C. Gen. Stat. § 14-51.3 (2013). Under the statutes, self-defense "is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4. Here, the trial court, over defendant's objection, granted the State's request to give this limiting instruction because the State presented evidence that at the time that defendant shot at the officers, he was committing the felonies of possession of cocaine and maintaining a dwelling for the purpose of using and selling controlled substances.

Defendant argues that the General Assembly did not intend N.C. Gen. Stat. § 14-51.4 to apply to the commission of non-violent felonies because that would deprive a non-aggressor of the ability to defend himself, with the result that "[t]he interpretation endorsed by the trial court would prevent a claim of self-defense during credit card fraud, tax evasion, possession of marijuana, or any other of the many non-violent felonies proscribed by North Carolina law." To avoid absurd consequences,

defendant asserts, N.C. Gen. Stat. § 14-51.4 should be applied only to commission of violent felonies or where the defendant is the aggressor.

Apparently, neither defendant, the State, nor the trial court realized that N.C. Gen. Stat. § 14-51.4 only applies to offenses committed on or after 1 December 2011. *See* 2011 N.C. Sess. Laws ch. 268, § 26 ("Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."). Because defendant was charged based on acts committed on 15 March 2006, defendant is not subject to the self-defense statutes enacted by the General Assembly in 2011.

Defendant failed to raise this argument to the trial court or on appeal. Even if defendant had raised this argument on appeal, " 'the law does not permit parties to swap horses between courts in order to get a better mount,' . . . meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

This Court has recognized, however, that "[i]n cases where a party has failed to preserve an argument for appellate review, 'Rule 2 permits the appellate courts to excuse a party's default . . . when necessary to prevent manifest injustice to a party or to expedite decision in the public interest.' " *In re Hayes*, 199 N.C. App. 69, 76, 681 S.E.2d 395, 400 (2009) (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008)). North Carolina courts have invoked Rule 2 when all the parties and the trial court operated under an erroneous assumption of law. *Id.*

In this case, the record reflects that the trial court prepared the proposed jury instructions "relying exclusively on the North Carolina Pattern Jury Instructions including the footnotes therein." The Pattern Jury Instruction Committee revised the criminal pattern instructions in June 2012 to incorporate the changes made to the common law by the new self-defense statutes enacted in 2011. It is evident from the record that the defendant, the State, and the trial court were all operating under the erroneous assumption that the Pattern Jury instructions correctly reflected the law applicable to defendant's offenses.

Defendant did, however, preserve at the trial level the statutory construction argument that he makes on appeal regarding the 2011 statute.

We are reluctant to decide, as a case of first impression, how this addition to the self-defense law should be interpreted and applied in a case in which the statute does not apply. Under these unique circumstances, we have decided, in the interest of justice, to invoke Rule 2 of the Rules of Appellate Procedure and to review the jury instructions for plain error.

In order to establish plain error, defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation and quotation marks omitted).

In arguing that the trial court erred in instructing the jury that self-defense did not apply if defendant was committing a felony, defendant argued that he was prejudiced because "[h]ad the jurors been properly instructed, there is a reasonable probability that at least one juror would have reached a different result. Without any reference to the 'in commission of a felony' limitation, at least one juror might have credited [defendant's] account and found him not guilty." This argument is insufficient to meet defendant's burden of showing that there is a reasonable possibility that *the jury* would have reached a different verdict in the absence of the instruction. *See* N.C. Gen. Stat. § 15A-1443(a) (2013) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, *a different result would have been reached* at the trial out of which the appeal arises." (emphasis added)). Certainly, defendant has not shown and, given the evidence, we cannot find, that the instruction had a *probable impact* on the verdict, as opposed to possibly influencing a single juror.

We, therefore hold that the trial court did not commit plain error when it instructed the jury using the 2012 version of the pattern jury instructions. We express no opinion regarding the proper construction of N.C. Gen. Stat. § 14-51.4.

[2] Defendant next argues that his sentences for the offenses arising out of the shooting of Captain Thompson violate the prohibition on double jeopardy. Defendant concedes that he did not raise the double jeopardy issue below. "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Our Supreme Court has held that the issue of double jeopardy cannot be raised for the first time on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67

(2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved[.]"); *see also State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (holding that defendant waived double jeopardy argument for failure to raise issue in trial court). Therefore, we hold that defendant has failed to preserve this issue for appellate review and do not address it.

Defendant, nevertheless, requests that we apply Rule 2 and address the issue of double jeopardy, citing *State v. Dudley*, 319 N.C. 656, 659-60, 356 S.E.2d 361, 364 (1987) (invoking Rule 2 to address double jeopardy issue), and *State v. Mulder*, ___ N.C. App. ___, ___, 755 S.E.2d 98, 101 (2014) (same). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary." *Id.* at ___, 755 S.E.2d at 101. Here, even assuming, without deciding, that sentencing defendant on all three convictions violated double jeopardy, arresting judgment on one of the convictions would not alter the total time defendant is required to serve because the trial court ordered the sentences to run concurrently. Under these circumstances, the extraordinary relief of invoking Rule 2 is not necessary to prevent manifest injustice. In our discretion, we decline to address this issue.

[3] Finally, defendant argues that, with respect to the charges related to Officer Peters, the trial court erred in entering judgment on the offense of AWDWIK because the trial court instructed the jury and accepted a verdict of guilty on the lesser-included offense of assault with a deadly weapon.

The State concedes that defendant was convicted of assault with a deadly weapon, and that the trial court erred and entered judgment on the greater offense of AWDWIK. It is, however, apparent that this error was merely a clerical one. The two offenses for which defendant was originally indicted regarding Officer Peters were AWDWIK (in Count IV) and assault with a firearm on a law enforcement officer (Count V). Both of those offenses are class E felonies. Assault with a deadly weapon is, however, punished as a class A1 misdemeanor. At sentencing, the trial court announced: "And then the last two, Count IV and Count V, the Court is going to consolidate these two, and the most serious of those two is the Count V, which is the Class E . . . ." Thus, because the trial court was aware that defendant's conviction under Count IV did not involve a class E felony, the court necessarily recognized that defendant had not been convicted of AWDWIK. Accordingly, any error on the judgment amounts to a clerical error. We, therefore, remand for correction of the judgment.

Defendant, however, citing *State v. Dickens*, 162 N.C. App. 632, 640, 592 S.E.2d 567, 573 (2004), also correctly notes that convictions for both assault with a deadly weapon and assault with a firearm on a law enforcement officer, when based upon the same conduct, violate double jeopardy. Defendant, however, failed to preserve this issue and, based on our review of the record, we cannot conclude that review is necessary to prevent manifest injustice since the trial court ordered that all of the sentences run concurrently.

No error in part; remanded in part.

Judge ROBERT N. HUNTER, JR. concurring prior to 6 September 2014.

Judge STEELMAN, concurring in the result in a separate opinion.

I concur in the result reached by the majority in this case, but write separately because it is inappropriate to invoke Rule 2 of the Rules of Appellate Procedure as to defendant's first argument. It cannot be a "manifest injustice" or the expediting of a "decision in the public interest" to consider an argument made by defendant under a statute that was inapplicable to the offenses for which defendant was tried. *See* N.C. R. App. P. 2; *see also* S.L. 2011-268 § 26, eff. Dec. 1, 2011.

STATE OF NORTH CAROLINA
v.
STILLOAN DEVORAY ROBINSON

No. COA14-224

Filed 16 September 2014

1. Constitutional Law—effective assistance of counsel—testimony of guilt not elicited by defense counsel

Defendant did not receive ineffective assistance of counsel in a possession of a stolen vehicle case. Contrary to defendant's argument on appeal, defense counsel did not elicit testimony at trial from defendant which conceded his guilt of any crime for which he was charged.

2. Possession of stolen property—possession of stolen vehicle—unauthorized use of a motor vehicle—lesser-included offense

The trial court did not err in a possession of a stolen vehicle case by denying defendant's request for a jury instruction on the unauthorized use of a motor vehicle. The Court of Appeals was bound by its decision in *State v. Oliver*, 217 N.C. App. 369 (2011), which relied on *State v. Nickerson*, 365 N.C. 279 (2011), even though the Court of Appeals in *Oliver* mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case. The Court of Appeals urged the Supreme Court to take the opportunity to clarify the case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle.

Appeal by Defendant from judgment entered 30 August 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Hugh Harris, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant.

STEPHENS, Judge.

Procedural and Factual Background

On 6 February 2012, Defendant Stilloan Devoray Robinson was indicted for possession of a stolen motor vehicle, breaking and entering a motor vehicle, and larceny of a motor vehicle.[1] On 2 April 2012, Defendant was indicted for having attained the status of an habitual felon. The evidence at Defendant's August 2013 trial tended to show the following:

On 13 January 2012, Defendant was arrested just after parking and exiting a car belonging to William Markham which Markham had reported stolen. At the time, Markham and Defendant were roommates at the McCloud Federal Halfway House[2] in Charlotte. Markham testified that, on 10 January 2012, he returned to the house after work, parking his car in a back parking lot. Markham checked in with staff and went to his room. Defendant and Markham's other roommates were present. After changing out of his work clothes, Markham hid his car keys in his shoe and left the room to make a phone call. When Markham returned, he discovered that Defendant and the car keys were both gone. Markham checked the parking lot and saw that his car was missing. Markham testified that he had not given Defendant permission to take his car. A staff member at the halfway house testified that she saw Defendant drive away in Markham's car and called the Charlotte-Mecklenburg Police Department.

Defendant's theory of the case was that Markham had given him permission to use the car on a limited basis. Specifically, Defendant testified that Markham had agreed to loan Defendant the car for one day in exchange for crack cocaine.[3] After being unable to obtain actual crack cocaine, Defendant gave Markham some counterfeit crack cocaine on 10 January 2012. In exchange, Markham gave Defendant his car keys with the understanding that Defendant would return the car by leaving it at a local McDonald's the following day. However, on direct examination, Defendant acknowledged that he kept Markham's car for three days:

Q. About how long would you have used the car?

A. He wanted it the next day.

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1. In two superseding indictments in May 2013, Defendant was indicted for the same three offenses.

2. The facility is also referred to as the "McCloud Center" at certain points in the trial transcript.

3. Markham testified that he had never used any form of cocaine.

> Q. So the understanding was that you were going to use it one day.
>
> A. Yes, sir.
>
> Q. You were only supposed to only have it one day.
>
> A. Yes, sir.
>
> Q. And you wound up keeping it longer?
>
> A. Longer than that.

At the charge conference following completion of the evidence, Defendant requested that the jury be instructed on the crime of unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle. The trial court denied the request.

The jury found Defendant guilty of possession of a stolen motor vehicle, but not guilty of the other two substantive criminal charges. Defendant admitted to having attained habitual felon status. The trial court sentenced Defendant to an active term of 84-113 months in prison. Defendant's trial counsel gave notice of appeal in open court following the jury's verdict, but failed to give notice of appeal following entry of the trial court's final judgment. Instead, trial counsel asked the court whether the appeal would be assigned to the Office of the Appellate Defender. The trial court responded by appointing the Office of the Appellate Defender to represent Defendant in his appeal, and stated, "I'll note your appeal for the record."

By failing to give timely notice of appeal, Defendant has lost his right of appeal. *See* N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). Recognizing this deficiency, Defendant's appellate counsel has filed, along with the record on appeal and Defendant's brief, a petition for writ of *certiorari* pursuant to Appellate Rule 21. "Rule 21 provides that a writ of *certiorari* may be issued to permit review of trial court orders . . . when[, *inter alia*] the right to an appeal has been lost by failure to take timely action . . . ." *Bailey v. North Carolina Dep't of Revenue*, 353 N.C. 142, 157, 540 S.E.2d 313, 322 (2000) (citing N.C.R. App. P. 21(a)) (italics added). The State did not oppose Defendant's petition, and we allowed Defendant's petition for writ of *certiorari* by order entered 23 July 2014.

Discussion

[1] Defendant argues that he received ineffective assistance of counsel ("IAC") in that "his trial attorney, on direct examination, asked him

questions to which the answers conceded his guilt to the only crime for which he was convicted[,]" to wit, possession of a stolen motor vehicle.

"An IAC claim must establish both that the professional assistance [the] defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

> IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated.

Id. at 166, 557 S.E.2d at 524-25 (citations and internal quotation marks omitted). Defendant contends that the record before us is sufficient for this matter to be resolved without further investigation, and we agree. Accordingly, we address the merits of his argument.

The only elements of the offense of possession of a stolen motor vehicle under N.C. Gen. Stat. § 20-106 are that (1) the defendant possessed a motor vehicle which (2) he knew or had reason to believe was stolen. *State v. Baker*, 65 N.C. App. 430, 437, 310 S.E.2d 101, 108 (1983), *cert. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). Property is stolen when it has been carried away without the owner's consent and *with the intent to permanently deprive the owner of the property. See, e.g.*, *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010).

As noted *supra* in the recap of the evidence presented at trial, Defendant never disputed that he possessed Markham's car. Rather, Defendant contended that he possessed the car with Markham's permission and that he intended to return it to Markham per their alleged agreement. On direct examination, defense counsel's questions only induced Defendant to admit that he had kept the car longer than the alleged agreement with Markham had permitted. Defense counsel's questions did not require Defendant to admit to believing the car was stolen, and indeed, Defendant never gave any testimony indicating that he knew or had reason to know that the car was stolen. To the contrary,

Defendant's testimony was that he knew the car was *not* stolen at the time he possessed it, in that Markham had given Defendant permission to use it. Although Defendant did admit to keeping Markham's car longer than permitted by the alleged agreement, he never suggested that he had the intent to permanently deprive Markham of the car. In sum, defense counsel did not elicit testimony from Defendant which conceded his guilt of any crime for which he was charged,[4] and thus, Defendant cannot show that he received ineffective assistance in this regard. Accordingly, Defendant's IAC argument is overruled.

Defendant's Motion to File Supplemental Brief

[2] On 30 June 2014, Defendant filed with this Court a "motion to file supplemental brief." In the motion, appellate counsel for Defendant states the following: That he intended to argue on direct appeal that the trial court committed reversible error in denying the defense request to instruct the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle. While researching the issue, however, appellate counsel reviewed this Court's opinion in *State v. Oliver*, __ N.C. App. __, 718 S.E.2d 731 (2011). In *Oliver*, the defendant had alleged error in the trial court's refusal to instruct on unauthorized use of a motor vehicle, contending that "all the essential elements of unauthorized use of a stolen vehicle are essential elements of possession of a stolen vehicle." *Id.* at __, 718 S.E.2d at 734. This Court rejected the defendant's contention on the following basis:

> During the pendency of [the] defendant's appeal, our Supreme Court addressed this very issue of whether unauthorized use of a motor vehicle is a lesser[-]included offense of possession of a stolen vehicle. *See State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). Due to our Supreme Court's recent decision, we see no need

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4. Defendant's testimony would have supported his conviction of a charge of unauthorized use of a motor vehicle (the current version of statute is titled "[u]nauthorized use of a motor-propelled conveyance"). "A person is guilty of [unauthorized use of a motor vehicle] if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C. Gen. Stat. § 14-72.2(a) (2013). "One of the essential elements of unauthorized use of a motor vehicle is the taking or operating of a motor vehicle without having formed an intent to permanently deprive the owner thereof." *State v. McCullough*, 76 N.C. App. 516, 518, 333 S.E.2d 537, 538 (1985) (contrasting this offense with that of common law robbery). This offense occurs, *inter alia*, where one initially has permission for the use of a vehicle, but keeps the vehicle after its owner has withdrawn his permission or requested that the vehicle be returned. *See, e.g.*, *State v. Milligan*, 192 N.C. App. 677, 666 S.E.2d 183 (2008).

> to further discuss this issue. *Id.* Consequently, the trial court did not err in not instructing the jury on the crime of unauthorized use of a stolen vehicle as it is not a lesser[-] included offense of possession of a stolen vehicle.

Id. However, as appellate counsel now notes, in *Nickerson* "the principal question [wa]s whether the crime of unauthorized use of a motor vehicle is a lesser[-]included offense of *possession of stolen goods*." *Nickerson*, 365 N.C. at 281, 715 S.E.2d at 846 (emphasis added). The Supreme Court reasoned that

> [b]oth offenses concern personal property. However, the specific definitional requirement that the property be a "motor-propelled conveyance" is an essential element unique to the offense of unauthorized use of a motor vehicle. For the offense of possession of stolen goods, the State need not prove that [the] defendant had a "motor-propelled conveyance" but rather that the property in [the] defendant's possession is any type of personal property. As such, unauthorized use of a motor vehicle has an essential element not found in the definition of possession of stolen goods. Because we conclude that this element of the lesser crime is not an essential element of the greater crime, we need not address the other elements.

Id. at 282, 715 S.E.2d at 847 (citation omitted). Thus, in *Oliver*, this Court mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case.

To compound that error, appellate counsel concedes that he relied solely on our opinion in *Oliver* in determining that the law on whether unauthorized use of a stolen vehicle is a lesser-included offense of possession of a stolen vehicle was settled contrary to Defendant's prospective argument on this issue. Appellate counsel did not read *Nickerson* at that time, and thus did not discover the discrepancy in the opinions. Instead, appellate counsel filed Defendant's brief and petition for writ of *certiorari* with this Court without including the jury instruction issue.

In June 2014, appellate counsel read *Nickerson* and realized the discrepancy between that opinion's actual holding and the holding as described in and relied upon by this Court in *Oliver*. In Defendant's "motion to file supplemental brief[,]" he asks this Court to exercise our discretion under Rule 2 of our Rules of Appellate Procedure to prevent manifest injustice to Defendant. *See* N.C.R. App. P. 2. In its response filed

8 July 2014, the State did not object to Defendant's motion. By order entered 24 July 2014, we allowed Defendant's motion and instructed the State to file its own supplemental brief on the jury instruction issue no later than 8 August 2014. The following day, the State filed a motion for an extension of time until and including 20 August 2014 to file its supplemental brief which we allowed by order entered 1 August 2014.

As for the merits of this argument, as Defendant concedes in his supplemental brief, we are bound by this Court's decision in *Oliver*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") (citations omitted). However, we hope that by noting the clear discrepancy between *Oliver* and *Nickerson*, the Supreme Court may take this opportunity to clarify our case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court."). In light of *Oliver*, we must conclude that the trial court did not err in denying Defendant's request for an instruction on unauthorized use of a motor vehicle.

NO ERROR.

Judges CALABRIA and ELMORE concur.

[236 N.C. App. 453 (2014)]

STATE OF NORTH CAROLINA
v.
SUSAN DENISE SHAW

No. COA14-125

Filed 16 September 2014

Appeal and Error—appeal after guilty plea—driving while impaired—no statutory right

Defendant's appeal from judgment entered after pleading guilty to driving while impaired was dismissed because she had no statutory right to appeal.

Appeal by defendant from judgment entered 25 February 2013 by Judge Sharon Tracey Barrett in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant.

ELMORE, Judge.

Defendant appeals from judgment entered 25 February 2013 after she pled guilty to driving while impaired (DWI). The trial court sentenced defendant to imprisonment for 12 months minimum, 12 months maximum, which was suspended for 18 months on various conditions including an active sentence of 14 days imprisonment. After careful consideration, we dismiss defendant's appeal.

I. Facts

On 25 October 2011, Susan Denise Shaw (defendant) was convicted of misdemeanor DWI in Mecklenburg County District Court. She appealed the conviction to Mecklenburg County Superior Court and pled guilty to the same charge on 25 February 2013. The trial court found one grossly aggravating factor, a prior DWI conviction within seven years before the current conviction's offense date, and imposed a Level Two punishment. Defendant timely appeals to this Court.

II. Analysis

a.) Right to Appeal

The State argues for this Court to dismiss defendant's appeal because defendant has no statutory right to appeal. We agree.

N.C. Gen. Stat. § 15A-1444(e) (2013), in relevant part, states:

> Except as provided in subsections (a1) and (a2) of this section . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Thus, a defendant can appeal as a matter of statutory right pursuant to a guilty plea, in pertinent part, if she satisfies either N.C. Gen. Stat. §§ 15A-1444 (a1) or (a2). Under subsection (a1):

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2013).

The provision of (a1) does not apply to the case at bar because defendant did not enter a plea of guilty to a felony. *See id.* Moreover, defendant's argument on appeal solely relates to the State's failure to give timely notice of its intent to seek a grossly aggravating factor at sentencing, not whether her sentence was supported by evidence introduced at the sentencing hearing. We also note that while defendant requests, in the alternative, that we "review the case under [our] certiorari jurisdiction[,]" we do not have the authority to do so under these circumstances. *See* N.C. R. App. P. 21(a)(1) (providing that this Court may issue a writ of certiorari to "permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been

lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review . . . of an order of the trial court denying a motion for appropriate relief"). Even if we had such authority, defendant nevertheless fails to satisfy the filing and content requirements of a petition for writ of certiorari pursuant to Appellate Rule 21(c). *See* N.C. R. App. P. 21(c).

Under subsection (a2), the specific enumerated statutory avenues of appeal fall under Article 81B (Structured Sentencing), which is expressly inapplicable to a defendant convicted of DWI. *See* N.C. Gen. Stat. § 15A-1444(a2); *see also* N.C. Gen. Stat. § 15A-1340.10 (2013) ("[Article 81B] applies to criminal offenses in North Carolina, *other than impaired driving* under G.S. 20-138.1[.]") (emphasis added).

Defendant cites *State v. Parisi* in support of her assertion that she has a statutory right to appeal her DWI guilty plea. 135 N.C. App. 222, 519 S.E.2d 531 (1999). We are unpersuaded. In *Parisi*, the defendant pled guilty to DWI in superior court, and the sentencing judge determined that the defendant's prior conviction for "driving while ability impaired" in New York constituted a grossly aggravating factor. *Id.* at 222, 519 S.E.2d at 532. Defendant appealed, and this Court ruled on the merits of the defendant's argument. *Id.* at 223, 519 S.E.2d at 532. Unlike the case at bar, there is no indication that the State raised the issue of the defendant's statutory right to appeal through a motion to dismiss, and the *Parisi* court's opinion indicates that it did not consider or rule on that issue. This Court only addressed whether the prior New York conviction was a grossly aggravating factor. *Id.* at 223-27, 519 S.E.2d at 532-34.

However, in *State v. Absher*, our Supreme Court addressed the very issue presented to us in this appeal. 329 N.C. 264, 265, 404 S.E.2d 848, 849 (1991). In *Absher*, the defendant pled guilty to DWI in superior court, and he attempted to appeal the sentencing court's judgment to this Court. *Id.* at 265, 404 S.E.2d at 849. The State filed a motion to dismiss on appeal, arguing that the defendant "had no right to appellate review from the judgment and sentence imposed pursuant to his plea of guilty." *Id.* Our Supreme Court ruled that dismissal of the defendant's appeal was necessary because "[n]one of the exceptions mentioned in [N.C. Gen. Stat. § 15A-1444(e)] apply in this case, and defendant is therefore not entitled to appeal as a matter of right from the judgment entered on his plea of guilty." *Id.* Similarly, no provision in N.C. Gen. Stat. § 15A-1444(e) gives defendant in this case a statutory right to appeal. Thus, we dismiss defendant's appeal.

III. Conclusion

In sum, we dismiss the appeal because defendant does not have a statutory right to appeal.

Dismissed.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
BRUCE ALLEN TOWNSEND, JR., DEFENDANT

No. COA14-129

Filed 16 September 2014

1. Motor Vehicles—Knoll motion—secured bond—no written findings—not prejudicial

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to dismiss based on the magistrate's alleged failure to inform defendant of the charges; his right to communicate with counsel, family, and friends; and of the general circumstances for his release (a *Knoll* motion). Defendant had several opportunities to call counsel and friends but did not do so and, while the magistrate did not make the required written findings for the secured bond option, defendant was released to his wife on an unsecured bond and suffered no prejudice.

2. Evidence—intoxication—motion to suppress—probable cause—driving while impaired

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress for lack of probable cause to arrest. Although defendant argued that he did not exhibit signs of intoxication such as slurred speech or glassy eyes, defendant had bloodshot eyes, an odor of alcohol, showed signs of intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests.

3. Evidence—alco-sensor test—not redacted—not introduced at trial

The trial court did not abuse its discretion in a driving while impaired prosecution by allowing into evidence at a pretrial hearing

the numerical results of an alco-sensor test. Although the admission of the numerical results was error, the numerical results of the test were never admitted before the jury and there was sufficient other evidence to survive defendant's motion to dismiss for lack of probable cause.

4. Evidence—driving while impaired—checkpoint—motion to suppress—legitimate purpose—requirements satisfied

The trial court did not err during a driving while impaired prosecution by denying defendant's motion to suppress evidence resulting from a checkpoint. The trial court determined that the checkpoint had a legitimate primary purpose and that the requirements of *Brown v. Texas*, 443 U.S. 47 (1979), were met.

Appeal by defendant from judgment entered 1 August 2013 by Judge Susan E. Bray in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Arnold & Smith, PLLC, by Laura M. Cobb, for defendant-appellant.

BRYANT, Judge.

Defendant's *Knoll* motion was properly dismissed where the magistrate followed N.C. Gen. Stat. § 15A-511(b) in informing defendant of his rights and in setting an option bond such that any technical statutory violation committed by the magistrate was not prejudicial to defendant. Where the State presented sufficient evidence such that a reasonable person could believe defendant committed the offense of driving while impaired, the trial court properly denied defendant's motion to suppress for lack of probable cause. A technical statutory violation committed by the trial court during a pre-trial hearing but not at trial did not result in error that would entitle defendant to a new trial. Where the trial court determined that a driving while impaired checkpoint was established for a legitimate primary purpose and that the *Brown* factors were met, defendant's motion to suppress evidence of the checkpoint was properly denied.

On 21 October 2010, defendant Bruce Allen Townsend, Jr., was arrested for driving while impaired. On 24 August 2011, defendant was convicted in Mecklenburg County District Court of driving while

impaired and sentenced to thirty days imprisonment. The District Court suspended defendant's sentence and placed him on unsupervised probation for twelve months. Defendant was further ordered to obtain a substance abuse assessment, comply with recommended treatment, complete twenty-four hours of community service, and pay courts costs, a $100.00 fine, and a $250.00 community service fee.

Defendant appealed to Superior Court, and on 30 August 2012, was tried before a jury during the criminal session of Mecklenburg County Superior Court, the Honorable Susan E. Bray, Judge presiding. At trial, the State's evidence tended to show the following.

On the evening of 21 October 2010, a checkpoint was established in the 7200 block of Providence Road in Charlotte by the Charlotte-Mecklenburg Police Department to check for impaired drivers and other vehicular infractions. At approximately 11:28 p.m., defendant drove up to the checkpoint where he encountered Officer Todd Davis. Officer Davis engaged defendant in conversation and noticed that defendant emitted an odor of alcohol and had red, bloodshot eyes. When asked by Officer Davis whether he had had anything to drink that evening, defendant responded that he had consumed several beers earlier. Officer Davis administered two alco-sensor tests to defendant; both tests were positive for alcohol.

Officer Davis then asked defendant to perform several field sobriety tests. Officer Davis testified that when he administered a horizontal gaze nystagmus test to defendant, he noticed three signs of intoxication. On a "walk and turn" test, defendant exhibited two signs of intoxication, and on a "one leg stand" test, defendant showed one sign of intoxication. Officer Davis also requested that defendant recite the alphabet from J to V, which defendant did without incident. Officer Davis subsequently arrested defendant for driving while impaired.

Defendant was taken to a Breath Alcohol Testing vehicle located at the checkpoint where he blew a 0.10 on his first test and a 0.09 on his second test. Officer Davis then drove defendant to the Mecklenburg County jail. Defendant was admitted to the jail at 12:56 a.m., appeared before the magistrate at 2:54 a.m., and was released to his wife's custody at 4:45 a.m.

Defendant was convicted by a jury of driving while impaired and sentenced by the trial court to sixty days imprisonment. Defendant's sentence was suspended and he was placed on unsupervised probation for twenty-four months. Defendant was also ordered to pay court costs, a $100.00 fine, and a $250.00 community service fee; perform

twenty-four hours of community service; surrender his driver's license to the clerk; not operate a motor vehicle until his license is restored; and to complete all treatments recommended by his alcohol assessment. Defendant appeals.

On appeal, defendant raises four issues as to whether the trial court: (I) erred in denying defendant's motion to dismiss pursuant to defendant's *Knoll* motion; (II) erred in denying defendant's motion to suppress for lack of probable cause; (III) abused its discretion in denying defendant's motion to redact evidence of the alco-sensor test; and (IV) erred in denying defendant's motion to suppress evidence resulting from the checkpoint.

I.

Knoll Motion

[1] Defendant first argues that the trial court erred in denying his *Knoll* motion to dismiss. We disagree.

A *Knoll* motion, based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), alleges that a magistrate has failed to inform a defendant of the charges against him, his right to communicate with counsel, family, and friends, and of the general circumstances under which he may secure his release pursuant to N.C. Gen. Stat. § 15A-511. *See* N.C.G.S. § 15A-511(b) (2013); *Knoll*, 322 N.C. at 536, 369 S.E.2d at 559 ("Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release." (citation omitted)). If a defendant is denied these rights, the charges are subject to being dismissed. *Knoll*, 322 N.C. at 544-45, 369 S.E.2d at 564. "[I]n those cases arising under N.C.G.S. § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.* at 545, 369 S.E.2d at 564. On appeal, the standard of review is whether there is competent evidence to support the trial court's findings of fact and its conclusions of law. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982) (citation omitted). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.* (citation omitted).

Defendant raised his *Knoll* motion during his pre-trial hearing, contending he was denied his right to communicate with counsel and

friends, and that this denial to have others observe him resulted in substantial prejudice.

In its order denying defendant's motion to dismiss pursuant to *Knoll*, the trial court made the following findings of fact:

> 1. Officer Davis stopped [defendant] at a checkpoint on Providence Road at approximately 11:28pm on Thursday, October 21, 2010.
>
> 2. Defendant submitted to portable breath tests and had a positive reading for alcohol.
>
> 3. Officer Davis took Defendant to [the Blood Alcohol Testing] mobile unit for [an] intoxilyzer test. Defendant signed [a] rights [form] at 11:55pm, acknowledging his right to call an attorney or witness.
>
> 4. Defendant blew 0.09 on Intox EC/IR-II.
>
> 5. Defendant did not at any time call a witness or ask for a witness.
>
> 6. Defendant did call his wife . . . to let her know he had been arrested, [and] told her he or someone would call her later to come pick him up.
>
> 7. Officer Davis transported Defendant to [the] Mecklenburg County Jail, where he was received at approximately 12:56 am on October 22, 2010.
>
> 8. At the jail, Defendant had his property checked, was booked, saw the nurse, [and] was fingerprinted [and] photographed.
>
> 9. Officer Davis submitted his arrest paper work and charging affidavit to the magistrate.
>
> 10. Defendant signed [an] implied consent offense notice (AOC-CR-271) in front of [the] magistrate at 2:34am, giving his [wife's] name and phone number as a contact person.
>
> 11. [The] [m]agistrate had [Officer Davis's] information about the charge, BAC results, information from Defendant about address, length of employment, etc. and set conditions of release. Those conditions were a $1000 secured bond or a $1000 unsecured release to a sober

> responsible adult with ID or any terms or conditions of pretrial services if accepted by the program.
>
> 12. Some official from the jail called [defendant's wife] to inform her that she could come pick up Defendant. She left her home around 3am and arrived at the jail around 3:15 or 3:20am to pick up Defendant.
>
> 13. [Defendant's wife] waited for about 20 minutes in the wrong area of the jail, then went to another area, spoke with appropriate personnel around 3:52am, [and] signed Defendant out at 4:21am (after jailers verified he had no outstanding criminal warrants, was medically cleared, retrieved his property, etc.).

The trial court then made the following conclusions of law:

> In accordance with NCGS 15A-534(a), a judicial official, in determining conditions of pretrial release, must impose [at least] one of the following conditions:
>
> > 1. Release the defendant on his written promise to appear.
> >
> > 2. Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
> >
> > 3. Place the defendant in the custody of a designated person or organization agreeing to supervise him.
> >
> > 4. Require the execution of an appearance bond in a specified amount secured by a cash deposit in the full amount of the bond, by a mortgage pursuant to NCGS 58-74-5, or by at least one solvent surety.
>
> Further, in accordance with NCGS 15A[-]534(b), the judicial official, in granting pretrial release, must impose condition (1), (2) or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3) and must record the reasons for doing so in writing to the

> extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to NCGS 15A-535(a).
>
> In this matter, the magistrate's terms and conditions of release for [defendant] included a combination of conditions (2) and (3), an unsecured bond and release to a sober responsible adult with ID, that person being [defendant's wife]. Defendant never asked for witnesses; in fact [defendant] only asked his wife to come pick him up.

North Carolina General Statutes, section 15A-534, provides that:

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2013). "If the provisions of the . . . pretrial release statutes are not complied with by the magistrate, *and* the defendant can show irreparable prejudice directly resulting from [this non-compliance], the DWI charge must be dismissed." *State v. Labinski*, 188 N.C. App. 120, 126, 654 S.E.2d 740, 744 (2008) (citation omitted).

In its findings of fact and conclusions of law, the trial court noted that defendant had the opportunity to contact counsel and friends to observe him. A review of the record shows that defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but that defendant failed to do so. In fact, the record shows that defendant asked that his wife be called, but only for the purpose of telling her that he had been arrested. As such, defendant was not denied his rights pursuant to *Knoll*.

Defendant further contends his rights were violated because the magistrate ordered defendant held under a $1,000.00 secured bond without justification and prior to meeting with him. Defendant cites *State v. Labinski* in support of his argument.

In *Labinski*, the defendant was arrested for driving while impaired. *Id.* at 122, 654 S.E.2d at 741. The defendant did not request that she be observed by witnesses, nor did she seek to have an independent chemical analysis conducted, even though her friends were at the detention center to help her. *Id.* at 122, 654 S.E.2d at 741-42. The magistrate gave the defendant a $500.00 secured bond without making any findings of fact as to why a secured bond was required. *Id.* at 122-23, 654 S.E.2d at 742. On appeal, this Court determined that the magistrate's failure to make findings as to why a secured bond was necessary amounted to a statutory violation. *Id.* at 126-27, 654 S.E.2d at 744-45. However, this Court affirmed the trial court, finding that despite the magistrate's commission of a statutory violation, the defendant failed to show how that violation was prejudicial to her. *Id.* at 127-28, 654 S.E.2d at 745.

Here, the conditions of the release order did not, as defendant contends, strictly impose a $1,000.00 secured bond on him. Rather, as noted by the trial court in its findings of fact, the magistrate set an option bond that gave defendant a choice between paying a $1,000.00 secured bond or a $1,000.00 unsecured bond and being released to a sober, responsible adult; defendant was eventually released to his wife. Defendant now challenges the secured bond option, arguing that the magistrate was required to make written findings of fact as to the terms of defendant's option bond.

Pursuant to N.C. Gen. Stat. § 15A-534(a), a magistrate is not required to make written findings of fact when setting conditions of release unless the terms of defendant's release require a secured bond. N.C.G.S. § 15A-534(a) (2013). As such, although the magistrate was not required to make any written findings of facts in the option bond when imposing the condition of allowing defendant to pay an unsecured bond and be released to a sober, responsible adult, the magistrate was required to make written findings as to the option bond's other potential condition for release — a secured bond.

However, even though the magistrate may have committed a technical statutory violation, defendant has failed to demonstrate how he was prejudiced as a result. Defendant was not released on a secured bond — he was instead released on an unsecured bond to the custody of his wife. Therefore, even had the magistrate been required to make findings of fact as to the secured bond option, no secured bond was imposed, and defendant cannot show prejudice. *See Labinski*, 188 N.C. App. at 127-28, 654 S.E.2d at 745 (holding that even though the magistrate committed a technical statutory violation by failing to make findings of fact regarding a secured bond, the defendant was unable to

show how such a violation prejudiced her). Moreover, here, defendant was afforded his statutory right to pretrial release and his right to communicate with counsel and friends. Accordingly, defendant's argument is overruled.

II.

Probable Cause

[2] Next, defendant contends the trial court erred in denying defendant's motion to suppress for lack of probable cause. We disagree.

We note at the outset that defendant has not assigned error to the trial court's findings of fact, and those findings are therefore binding on appeal. *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006) (citation omitted). Our review is thus limited to considering whether the trial court erred by concluding, as a matter of law, that there was probable cause to arrest defendant for driving while impaired. This Court reviews conclusions of law *de novo*. *State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006) (citations omitted).

> Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. The existence of such grounds is determined by the practical and factual considerations of everyday life on which reasonable and prudent people act. If there is no probable cause to arrest, evidence obtained as a result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed.

State v. Tappe, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000) (citations and quotation omitted).

Defendant argues the trial court erred in denying his motion to suppress for lack of probable cause because "there was no set of facts in the case at hand that would lead a reasonable, cautious person to believe that [defendant] was driving while impaired." Defendant's argument lacks merit, as the evidence supports the trial court's determination that Officer Davis had probable cause to arrest defendant.

In its order denying defendant's motion to suppress for lack of probable cause, the trial court noted that when Officer Davis stopped defendant at the checkpoint, he immediately noticed that defendant had "bloodshot eyes and a moderate odor of alcohol about his breath." Defendant admitted to "drinking a couple of beers earlier" and had "stopped drinking about an hour" prior to being stopped at the checkpoint. Two alco-sensor tests administered to defendant yielded positive results, and defendant exhibited clues indicating impairment on three field sobriety tests. Officer Davis determined that defendant was "under the influence of some impairing substance," regardless of the positive alco-sensor test results. The trial court further acknowledged Officer Davis' twenty-two years' experience as a police officer.

Defendant argues that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause for Officer Davis to arrest defendant for driving while impaired. We are not persuaded; as this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired. *See State v. Rogers*, 124 N.C. App. 364, 369-70, 477 S.E.2d 221, 224 (1996); *see also State v. Fuller*, 176 N.C. App. 104, 109, 626 S.E.2d 655, 658 (2006) ("The results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied-consent offense[.]" (citations and quotation omitted)).

Here, Officer Davis noted that defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues as to intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests. As such, there was sufficient probable cause for Officer Davis to arrest defendant for driving while impaired.

III.

[3] Defendant next argues that the trial court abused its discretion in denying his request to redact evidence of the alco-sensor test. Specifically, defendant contends the trial court's admission of the alco-sensor test's numerical results was an abuse of discretion, thus entitling him to a new trial. We disagree.

On appellate review, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *State v. Rasmussen*, 158 N.C. App. 544, 555, 582 S.E.2d 44, 53 (2003) (citation omitted).

Although the results of a defendant's alco-sensor test are not admissible as substantive evidence, *State v. Bartlett*, 130 N.C. App. 79, 82, 502 S.E.2d 53, 55 (1998), an officer who arrests a defendant for driving while impaired may testify that a defendant's alco-sensor test indicated the presence of alcohol. *Fuller*, 176 N.C. App. at 109, 626 S.E.2d at 658.

Defendant contends the trial court abused its discretion during the pre-trial hearing by allowing into evidence the numerical results of defendant's alco-sensor test. During the pre-trial hearing, the results of the alco-sensor test were offered to the trial court as part of Officer Davis's paperwork which was submitted to the magistrate; the paperwork was proffered by the State to show that Officer Davis had probable cause to arrest defendant for driving while impaired. Specifically, Officer Davis' arrest affidavit described how he encountered defendant, his observations of defendant, defendant's performance on the field sobriety tests, and the numerical results of defendant's alco-sensor test. This admission of the actual numerical results of defendant's alco-sensor test was error, as only "a positive or negative result on an alcohol screen test" may be admissible in court. *See* N.C. Gen. Stat. § 20-16.3 (2013) ("The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result . . . is admissible in a court[.]").

However, while we note the technical violation of the statute, we do not agree with defendant that this violation entitles him to a new trial. "A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985) (citation omitted).

Here, the numerical results of defendant's alco-sensor test were admitted into evidence *only* during the trial court's pre-trial hearing on defendant's motions to suppress and dismiss; the results were never introduced into evidence before the jury. Moreover, even without the results of the alco-sensor test, the State presented sufficient evidence, via the testimony of Officer Davis, to survive defendant's motion to dismiss for lack of probable cause. As such, despite committing a technical statutory violation by admitting the numerical results of defendant's alco-sensor test, the trial court did not err in denying defendant's motion to dismiss for lack of probable cause.

Further, when Officer Davis testified at trial before the jury as to the circumstances under which he encountered and eventually arrested defendant for driving while impaired, Officer Davis did not discuss

defendant's alco-sensor test other than to state that defendant was administered a preliminary breath test along with field sobriety tests as part of Officer Davis' investigation. When asked at trial about how he came to form an opinion as to defendant's state of being on the evening of 21 October 2010, Officer Davis did not mention the alco-sensor test at all:

> Based on my conversation with [defendant], with the physical observations of [defendant] when I was talking to him at the car, based on [defendant's] standardized field sobriety tests, I did form the conclusion or the opinion that [defendant] had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental and/or physical faculties.

Indeed, despite defendant's contentions to the contrary, the actual numerical results of his alco-sensor test were never admitted into evidence at trial before the jury. Therefore, because this evidence was never admitted before the jury, it could not and did not cause defendant to receive an unfair verdict that would entitle him to a new trial. Defendant's argument is therefore overruled.

IV.

[4] Finally, defendant contends the trial court erred in denying his motion to suppress evidence resulting from the checkpoint. We disagree.

> When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . .
>
> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

State v. Veazey, 191 N.C. App. 181, 185-86, 662 S.E.2d 683, 686-87 (2008) (citations and quotations omitted).

Defendant argues the trial court erred in denying his motion to suppress evidence resulting from the checkpoint because the checkpoint lacked an acceptable primary purpose and was, therefore,

unconstitutional. In its order denying defendant's motion to suppress, the trial court made the following findings of fact:

> The Court considered all evidence presented, as well as the arguments and contentions of counsel, and makes the following findings of fact by a preponderance of the evidence:
>
> 1. The Charlotte Mecklenburg Police Department, under supervision of Sgt. David Sloan, set up a DWI check point near [the] 7200 block of Providence Road between 11pm October 21, 2010 and 3am October 22, 2010.
>
> 2. Sgt. Sloan chose the location because over 30 traffic fatalities had occurred in the vicinity since 2006, with about half of those involving impaired driving.
>
> 3. The area is near the Arboretum Shopping Center, which houses several restaurants and other businesses which serve or sell alcohol.
>
> 4. The check point was set up in compliance with NCGS 20-16.3A: there was a written plan; Sgt. Sloan briefed the 25 officers from 6 different agencies who were operating the checkpoint; every vehicle was to be stopped and was stopped; signs notifying approaching motorists of a DWI check point ahead were placed approximately 200 yards from [the] check point; [and] non-impaired drivers were only delayed about 15 seconds each.

The trial court then concluded that the checkpoint was proper and denied defendant's motion to suppress.

Defendant contends the trial court erred in denying his motion to suppress because the State failed to meet its burden of demonstrating the checkpoint was set-up for anything other than the improper purpose of general crime detection. Defendant's argument lacks merit, as during the pre-trial hearing on defendant's motion to suppress, the State presented testimony by Sergeant Sloan regarding the checkpoint. Sergeant Sloan testified that the checkpoint was administered according to a written plan, and that the date for the checkpoint had been selected almost a year prior to that date based on when the Blood Alcohol Testing mobile lab would be available. Sergeant Sloan further testified that the location of the checkpoint, in the 7200 block of Providence Road, was chosen because of the statistically high number of impaired driving offenses and fatalities that had occurred in the Providence Road and Highway

55 corridor. Further, Sergeant Sloan stated that the main purpose of the checkpoint was to check for DWIs.

We agree with the trial court's findings that the checkpoint was conducted for a legitimate primary purpose, as the record indicates the checkpoint was established, pursuant to N.C. Gen. Stat. § 20-16.3, to check all passing drivers for DWI violations. *See* N.C.G.S. § 20-16.3 (2013) (permitting law enforcement agencies to set-up DWI checkpoints provided such checkpoints are administered according to established, written plans, are well-marked for drivers, and detain all passing drivers only to the extent necessary to determine if reasonable suspicion exists that a driver has committed a DWI violation).

Defendant further contends the trial court erred in denying his motion to suppress because the checkpoint was unreasonable and therefore unconstitutional. After finding a legitimate programmatic purpose, the trial court must determine whether the roadblock was reasonable and, thus, constitutional. "To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest." *State v. Rose*, 170 N.C. App. 284, 293, 612 S.E.2d 336, 342 (2005) (citation omitted). "In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979)." *State v. Jarrett*, 203 N.C. App. 675, 679, 692 S.E.2d 420, 424-25 (2010) (citation omitted). "Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty." *Id.* at 679, 692 S.E.2d at 425 (citation and quotation omitted).

"The first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342 (citation omitted).

Here, the State presented evidence that the checkpoint was intended to screen all passing drivers for DWI violations. When Officer Davis stopped defendant at the checkpoint, Officer Davis noticed defendant had red, bloodshot eyes and emitted a "moderate odor of alcohol." When Officer Davis asked defendant if defendant had been drinking that evening, defendant responded that he had consumed several beers.

Officer Davis then asked defendant to take an alco-sensor test and perform several field sobriety tests. As such, the first *Brown* factor was met. *See State v. Kostick*, ___ N.C. App. ___, ___, 755 S.E.2d 411, 420 (2014) (finding the first *Brown* factor was met where an officer stopped the defendant at a checkpoint and noticed the defendant had red, bloodshot eyes, emitted an odor of alcohol, and admitted to drinking that evening); *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 ("Both the United States Supreme Court as well as our Courts have suggested that license and registration checkpoints advance an important purpose[.]" (citation and quotation omitted)).

The second *Brown* prong examines "the degree to which the seizure advance[s] the public interest," and requires the trial court to determine whether "[t]he police appropriately tailored their checkpoint stops to fit their primary purpose." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citations and quotations omitted).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id. (citation omitted).

In its findings of fact, the trial court found that the checkpoint had fixed starting and ending times; the checkpoint was located in the 7200 block of Providence Road, an area located within a mile of a major shopping area where there are businesses which serve or sell alcohol; the checkpoint's location was selected based on impaired driving statistics; and the checkpoint was conducted according to a written plan, was properly marked, and was intended to stop all passing drivers to check for impaired driving violations. These findings of fact are supported by the evidence and "indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong." *Jarrett*, 203 N.C. App. at 680-81, 692 S.E.2d at 425.

"The final *Brown* factor to be considered is the severity of the interference with individual liberty." *Id.* at 681, 692 S.E.2d at 425. "[C]ourts

have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192-93, 662 S.E.2d at 690-91 (citations omitted).

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic[]; whether police took steps to put drivers on notice of an approaching checkpoint[]; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field[]; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern[]; whether drivers could see visible signs of the officers' authority[]; whether police operated the checkpoint pursuant to any oral or written guidelines[]; whether the officers were subject to any form of supervision[]; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691 (citations omitted). "Our Court has held that these and other factors are not 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint." *Id.* (citation and quotation omitted).

As previously discussed, in its findings of fact the trial court noted the following:

> 4. The check point was set up in compliance with NCGS 20-16.3A: there was a written plan; Sgt. Sloan briefed the 25 officers from 6 different agencies who were operating the checkpoint; every vehicle was to be stopped and was stopped; signs notifying approaching motorists of a DWI check point ahead were placed approximately 200 yards from [the] check point; [and] non-impaired drivers were only delayed about 15 seconds each.

Such findings meet the third factor of *Brown*, as "the totality of the circumstances in examining the reasonableness of [the] checkpoint" was examined and set forth by the trial court in its order. *See Kostick*, ___ N.C. App. at ___, 755 S.E.2d at 421 (citation omitted) (holding that where the record showed the trial court heard and weighed the evidence regarding

whether a DWI checkpoint was established for a legitimate primary purpose and the checkpoint stops were reasonable, advanced an important public interest, and were conducted pursuant to a written plan, the trial court's denial of the defendant's motion to suppress evidence of the checkpoint was affirmed). Therefore, as the trial court determined the checkpoint had a legitimate primary purpose and that the *Brown* factors were met, defendant's argument is accordingly overruled.

No error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
JAMES LEWIS WILSON, JR.

No. COA13-1395

Filed 16 September 2014

1. Indictment and Information—defective short form indictment—attempted first-degree murder—lesser-included offense—attempted voluntary manslaughter

Although the short form indictment used to charge defendant with attempted first-degree murder failed to include the essential element of malice aforethought, the jury's guilty verdict of attempted first-degree murder necessarily meant that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter. The case was remanded to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter.

2. Constitutional Law—effective assistance of counsel—alleged concessions of guilt—closing arguments—no Harbison error

Defendant did not receive ineffective assistance of counsel at trial based on his counsel's alleged concessions of defendant's guilt during closing arguments without defendant's express consent. Although defense counsel's statements were less than clear at closing, none of his statements amounted to a *Harbison* error.

Appeal by Defendant from judgment entered 22 March 2013 by Judge David L. Hall in Superior Court, Guilford County. Heard in the Court of Appeals 12 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Kimberly P. Hoppin for Defendant.

McGEE, Chief Judge.

James Lewis Wilson ("Defendant") appeals his conviction of attempted first-degree murder. Defendant contends that (1) the corresponding short form indictment against him for attempted first-degree murder was defective and (2) he received ineffective assistance of counsel at trial. We agree that the indictment against Defendant was defective, but we do not agree that Defendant received ineffective assistance of counsel.

I. Background

Around five or six in the evening of 19 July 2011, Timothy Lynch ("Mr. Lynch") was walking on a street in the Five Points area in High Point. Mr. Lynch was accompanied by a small group of people.

A blue Cavalier ("the Cavalier") approached and stopped near where Mr. Lynch and his companions were standing. Four men inside the Cavalier, including Defendant, exited the vehicle. Defendant had been riding in the front passenger seat of the Cavalier and was carrying a gun. Defendant testified at trial that the four men were there to confront Mr. Lynch, whom they believed had recently beaten up Defendant's cousin. Defendant further testified that, upon exiting the Cavalier, he pointed his gun at the group with Mr. Lynch in order to get them to disperse. Mr. Lynch's companions fled the scene immediately, but Mr. Lynch remained.

There was conflicting testimony as to what happened next. Multiple witnesses testified that Defendant pulled on the slide of his gun to cock it and then pointed the gun at Mr. Lynch. One witness testified that Defendant next tried to pull the trigger three or four times, but the gun jammed and did not fire. Defendant testified that he tried to cock the gun after Mr. Lynch's companions began running, but the slide itself was jammed and did not move in spite of his multiple efforts. Defendant also testified that he never pointed the gun at Mr. Lynch or tried to pull the trigger after the crowd dispersed.

Defendant then left in the Cavalier, along with the three men who were accompanying him. However, the police soon pulled over the

vehicle and took Defendant into custody. Upon performing a protective sweep of the Cavalier, one officer found Defendant's gun with its safety still on.

Defendant was indicted on 7 November 2011 for attempted first-degree murder. A jury found Defendant guilty of that charge on 20 March 2013. The following day, Defendant gave oral notice of appeal in open court.

II. Defective Indictment

A. Standard of Review

On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

B. Analysis

[1] Defendant contends that the indictment against him for attempted first-degree murder was defective because it omitted an essential element of the offense: malice aforethought. The short form indictment against Defendant, in relevant part, states as follows: "The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to murder Timothy Lynch." By contrast, N.C. Gen. Stat. § 15-144 (2013), entitled "Essentials of bill for homicide," states that in the body of the indictment, "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law."

> The purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense. An indictment is insufficient if it fails to allege the essential elements of the crime charged as required by Article I, Section 22 of the North Carolina Constitution and our legislature in N.C.G.S. § 15-144. When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment.

State v. Bullock, 154 N.C. App. 234, 244–45, 574 S.E.2d 17, 23–24 (2002) (citations omitted).

In this case, the indictment on its face failed to include the essential element of "malice aforethought" as required by Article I, Section 22 of the North Carolina Constitution, N.C.G.S. § 15-144, and *Bullock*. As a result, just as in *Bullock*, we arrest the judgment in Defendant's attempted first-degree murder conviction. *See id.* at 245, 574 S.E.2d at 24 (arresting the judgment in an attempted first-degree murder conviction where the short form indictment failed to allege that the defendant acted with malice aforethought).

However, again, as in *Bullock*, "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *Id.* Voluntary manslaughter consists of an unlawful killing without malice, premeditation, or deliberation. *See id.* (citing *State v. Robbins*, 309 N.C. 771, 777, 309 S.E.2d 188, 191 (1983)). Because the jury's guilty verdict of attempted first-degree murder necessarily means that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter, we remand this matter to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter. *See id.* (citing *State v. Wilson*, 128 N.C. App. 688, 696, 497 S.E.2d 416, 422 (1998)).

III. Ineffective Assistance of Counsel

A. Standard of Review

On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo. *See State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983).

B. Analysis

[2] In his next assignment of error, Defendant contends that he received ineffective assistance of counsel at trial, purportedly because his counsel made concessions of Defendant's guilt during closing arguments without Defendant's express consent. Specifically, during closing arguments, Defendant's counsel told the jury:

> You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun. Pointing the gun with what was some sort of guilt in mind, some intent to use the gun, that can be a crime: Assault with a deadly weapon, intent to kill.
>
> So if this guilty mind points a weapon at someone, assault with a deadly weapon, intent to kill. But, again, what are

> we here for? Attempted first-degree murder of Timothy Lynch. And you're thinking to yourself, those of you who have worked with attorneys, those lawyers need to split hairs. Mr. Green was talking about my client splitting hairs; maybe I am.
>
> But, ladies and gentlemen, this is a case about details. Hopefully, you saw that with the questions that I was asking witnesses. Attempted first-degree murder, intent to kill, pointing the weapon at Timothy Lynch. This is mere preparation; moving the slide. Moving the slide is mere preparation.
>
> The Judge will instruct you on that; mere preparation is not enough. Intent to kill. [T]here has to -- what is that? Mr. Green argued to you in his opening statement and so did I is the pulling of the trigger. That is what this case is about.
>
> Guilty mind, intent to kill Timothy Lynch by my client pointing the weapon at Timothy Lynch. Not moving the slide; pointing, clicking the trigger. That is what this case is about, amd [sic] that is also what you'll need to decide if that has been proven beyond a reasonable doubt.

"In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986), [the North Carolina Supreme Court] held that a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser-included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002). Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error. *See State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986) ("Although counsel stated [at closing that] there was malice, he did not admit guilt . . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]").

In the case before us, Defendant's trial counsel did state that "my client basically admit[ed] that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Notably, at trial, Defendant testified and openly admitted to pointing a gun at the crowd with Mr. Lynch in order to get them to disperse. Although Defendant's counsel used the singular "someone" to describe those at whom Defendant pointed a gun, dispersing the crowd was the only time

Defendant admitted to pointing the gun at anyone. Indeed, throughout direct and cross-examination, Defendant consistently denied that he pointed the gun at Mr. Lynch after the crowd dispersed, despite the State's repeated attempts to elicit such an admission.

Defendant was not charged with the offense of assault by pointing a gun at the crowd; he was charged with attempted first-degree murder of Mr. Lynch after the crowd dispersed. Even if we were to assume *arguendo* that Mr. Lynch was in fact the "someone" referred to by Defendant's trial counsel, assault by pointing a gun is not a lesser-included offense of attempted first-degree murder. *Cf. State v. Dickens*, 162 N.C. App. 632, 638, 592 S.E.2d 567, 572 (2004) (holding that "[a]ssault by pointing a gun is not a lesser-included offense of assault with a firearm on a law enforcement officer because the latter offense *does not include the element of pointing a gun at a person*." (emphasis added)). Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*. At best, an admission by Defendant's trial counsel that Defendant pointed a gun at Mr. Lynch, while still maintaining Defendant's innocence of attempted first-degree murder, would appear to place counsel's statements within the rule in *Fisher*, and thus still outside of *Harbison*. *See Fisher* at 533, 350 S.E.2d at 346 (finding no *Harbison* error where the defendant's counsel admitted an element of first-degree murder at trial but still maintained the defendant's innocence).

Also, the declaration by Defendant's trial counsel that "[p]ointing the gun with what was some sort of guilt in mind, some intent to use the gun, that *can* be a crime: Assault with a deadly weapon, intent to kill" was merely a hypothetical statement, not an admission. (emphasis added). Next, counsel described the crime with which Defendant had been charged: "Attempted first-degree murder, intent to kill, pointing the weapon at Timothy Lynch" and then contrasted this to Defendant's theory of the case that Defendant's acts during the incident with Mr. Lynch amounted to "mere preparation; moving the slide. Moving the slide is mere preparation." Here, too, Defendant himself testified that he tried to move the slide on the gun after pointing it at the crowd.

Defendant's counsel concluded by highlighting the key point: "Guilty mind, intent to kill Timothy Lynch by my client pointing the weapon at Timothy Lynch. Not moving the slide; [but] pointing, clicking the trigger. . . . [Y]ou'll need to decide if that has been proven beyond a reasonable doubt."

In total, and despite Defendant's contention that his trial counsel admitted Defendant "pointed a gun at Timothy Lynch with the intent to kill him," we find no such admission in the record before us. Although Defendant's counsel's statements were less than clear at closing, none of his statements amount to *Harbison* error.

We find no other basis for supporting Defendant's claim of ineffective assistance of counsel.

Judgment arrested on attempted first-degree murder; remanded for sentencing and entry of judgment on attempted voluntary manslaughter.

Judges BRYANT and STROUD concur.

TRILLIUM RIDGE CONDOMINIUM ASSOCIATION, INC., PLAINTIFF
v.
TRILLIUM LINKS & VILLAGE, LLC; TRILLIUM CONSTRUCTION COMPANY LLC; SHAMBURGER DESIGN STUDIO, P.C., SHAMBURGER DESIGN, INC. (FKA SHAMBURGER DESIGN STUDIO, INC.), S.C. CULBRETH JR., GREGORY A. WARD, DEFENDANTS

No. COA14-183

Filed 16 September 2014

1. Appeal and Error—preservation of issues—notice of summary judgment motion not given—objection waived

Plaintiff waived the right to object to the lack of timely notice of defendant's effort to obtain summary judgment. Plaintiff failed to object to the adequacy of the notice or request additional time, participated in the hearing, and addressed the issues raised by defendant's motion on the merits.

2. Construction Claims—negligent construction—developer's liability—supervision of construction—summary judgment

The trial court erred by granting summary judgment in favor of defendant and developer Trillium Links with respect to a claim for negligent construction of condominiums. Although Trillium Links argued that a developer does not owe a legal duty to a condominium unit purchaser, the persons responsible for supervising construction are obligated to comply with the Building Code and there was of a genuine issue of material fact concerning the extent to which Trillium Links supervised the construction project.

3. Construction Claims—gross negligence—summary judgment—no specific acts or omissions alleged

The trial court did not err by granting summary judgment in favor of developer and defendant Trillium Links on plaintiff's gross negligence claim arising from the construction of condominiums. Aside from simply asserting that Trillium Links acted in a grossly negligent fashion, plaintiff did not point to any specific act or omission by Trillium Links which it contended was grossly negligent.

4. Construction Claims—summary judgment—notice of construction defects—issue of material fact

The trial court erred by granting summary judgment for defendant Trillium Links (the developer) and Trillium Construction (the general contractor) on statute of limitations grounds on plaintiff's negligent construction claims. The evidence demonstrated the existence of a genuine issue of material fact concerning the accrual of the negligent construction claim more than three years before the date upon which the complaint was filed.

5. Construction Claims—unsafe improvement to real property—statute of repose

Plaintiff's negligent construction claims against a developer and a builder sought recovery arising from an allegedly defective or unsafe improvement to real property, and those claims were within the ambit of the statute of repose in N.C.G.S. § 1-50(a)(5)(a).

6. Construction Claims—substantial completion of building—certificate of occupancy

Plaintiff failed to assert its negligent construction claim within the six year statute of repose for two buildings in a condominium complex where certificates of occupancy were issued seven years before the certificates of occupancy were issued. A building is substantially complete when a certificate of occupancy is issued.

7. Construction Claims—negligent construction claim—last act—repair to deck—original contract not produced

In a negligent construction claim involving a statute of repose issue, there was no basis for determining that the "last act" occurred later than the date of substantial completion where plaintiff argued that repairs to a deck might have been required under the original contract, which was never produced. Plaintiff had the burden of proof.

8. Construction Claims—negligent construction—possession of control exception—developer and contractor

Although defendant Trillium Construction (the general contractor) was entitled to rely on the statute of repose as a defense to plaintiff's negligent construction claims relating to two condominium buildings, the extent to which the "possession or control" exception to the statute of repose defense applies to Trillium Links (the developer) was a question for the jury.

9. Estoppel—equitable—statutes of limitation and repose—property damage report—information not hidden

Trillium Links, a developer, was not equitably estopped from asserting the statute of limitations or statute of repose in opposition to plaintiff's negligent construction claims. Although plaintiff argued that defendants were equitably estopped from asserting either the statute of limitations or the statute of repose because plaintiff's property manager reviewed a consultant's report and advised the homeowners association (plaintiff) that he believed that further investigation would not be necessary, plaintiff's entire board received the consultant's report. Additionally, the record was devoid of information tending showing that plaintiff was induced to delay the filing of its action by misrepresentations of Trillium Links.

10. Estoppel—equitable—negligent construction—concealment of defects—plaintiff's notice of defects—summary judgment

The trial court erred by granting summary judgment for defendant Trillium Construction (a general contractor) with respect to whether it was estopped from asserting the statute of limitations or the statute of repose in a negligent building claim where plaintiff argued that Trillium Construction had actively concealed its defective work. However, given the determination elsewhere in this opinion that there were issues of fact as to whether a consultant's report put plaintiff on notice of the defects, issues of fact existed as to whether plaintiff lacked knowledge and the means of knowledge sufficient to bar either defense.

11. Associations—homeowners—fiduciary duties—overlapping board members and development principals

The trial court erred by granting summary judgment on breach of fiduciary duty claims against two of plaintiff homeowner's board members who were also principals in the development of the

community, in an action arising from construction defects. The evidence, viewed in the light most favorable to plaintiff, created a genuine issue of fact concerning whether and to what extent those board members breached a fiduciary duty by failing to disclose relevant information in their possession.

12. Construction Claims—building defects—fiduciary duty of developer—summary judgment

The trial court erred by granting summary judgment for defendant Trillium Links on breach of fiduciary claims arising from building defects in condos where Trillium Links was the developer of the community in which the affected condos were located. The record contained sufficient evidence from which the existence of a fiduciary duty between the developer and the homeowners association could be established in that Trillium Links had a position of dominance over plaintiff homeowners association and that individual unit owners or prospective unit owners had little choice but to rely upon Trillium Links to protect their interests during the period of developer control.

13. Statutes of Limitation and Repose—breach of fiduciary claims—knowledge of building defects—summary judgment

The trial court erred by granting summary judgment on statute of limitations grounds for two of the principals in the development of a community and their company, Trillium Links, concerning breach of fiduciary duty claims arising from construction defects. There were issues of fact concerning the date upon which plaintiff homeowners association knew or had reason to believe that extensive defects existed in the condominium buildings.

14. Fraud—constructive—building defects—no evidence of intent to benefit

Plaintiff homeowners association failed to forecast sufficient evidence to establish a constructive fraud claim governed by a ten year statute of limitations rather than a breach of fiduciary duty governed by a three year statute of limitations where it did not adduce any evidence tending to show that defendants sought to benefit themselves in the transaction.

15. Warranties—construction defects—knowledge of defects—issue of fact—statutes of limitation and repose

Trillium Links (the developer of a community) was not entitled to summary judgment in its favor on plaintiff's breach of warranty

claims based on the statute of limitations or the statute of repose. There was an issue of material fact about the date when plaintiff knew or should have known of construction defects.

HUNTER, JR., Robert N., Judge, concurring in part and concurring in result only in part in separate opinion prior to 6 September 2014.

Appeal by plaintiff from orders entered 20 August 2013 and amended orders entered 12 September 2013 by Judge Marvin P. Pope, Jr., in Jackson County Superior Court. Heard in the Court of Appeals 5 June 2014.

Kilpatrick Townsend & Stockton LLP, by Dustin T. Greene, David C. Smith, and Richard D. Dietz, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Luke Sbarra, for Defendant Trillium Links & Village, LLC.

Marc J. Meister, PLLC, by Marc J. Meister, for Defendant Trillium Construction Company, LLC.

Northup, McConnell & Sizemore, P.L.L.C., by Robert E. Allen, for Defendants Ward and Culbreth.

ERVIN, Judge.

Plaintiff Trillium Ridge Condominium Association, Inc., appeals from orders and amended orders granting summary judgment in favor of Defendants Trillium Construction Company, LLC; Trillium Links & Village, LLC; and S.C. Culbreth, Jr., and Gregory A. Ward. On appeal, Plaintiff argues that Defendants' motions for summary judgment should have been denied for the following reasons: (1) Trillium Construction's motion for summary judgment was filed in an untimely manner; (2) Plaintiff's claims are not time-barred; (3) Mr. Culbreth and Mr. Ward breached the fiduciary duty that they owed to Plaintiff; (4) Trillium Links breached the fiduciary duties that it owed to Plaintiff; (5) Trillium Construction and Trillium Links constructed the condominiums in a negligent manner; (6) Trillium Links is liable for breach of warranty; (7) claims based on defects in buildings 100 and 200 are not barred by the applicable statute of repose; (8) summary judgment based on contributory negligence was improper; and (9) Trillium Construction's failure to

mitigate its damages does not support an award of summary judgment.[1] After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders and amended orders should be affirmed in part and reversed in part and that this case should be remanded to the Jackson County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

The Trillium Development is a private residential, lake, and golf community located in Cashiers. The Trillium Development was founded in 1996 and consists of approximately 270 private residences, including homes, townhouses, and condominiums. Trillium Ridge Condominiums, the subject of this appeal, is one of several condominium complexes located in the Trillium Development. The Trillium Ridge Condominiums consist of 22 individual units contained in six buildings identified as Building Nos. 100, 200, 300, 400, 500, and 600 and multiple common elements. The Trillium Ridge Condominiums were constructed in two phases, with Building Nos. 100 and 200 having been constructed during the first phase and Buildings Nos. 300 through 600 having been constructed during the second phase.

Trillium Links, the developer of Trillium Ridge, filed a Declaration for the Trillium Ridge Condominiums on 12 February 2004. Trillium Links was owned and controlled by Mr. Culbreth and Mr. Ward along with two other individuals, Dan Rice and Morris Hatalsky.[2] During the period of construction, Mr. Culbreth and Mr. Ward held the principal ownership interests in Trillium Links. The Declaration allowed Trillium Links, as developer-declarant, the right to appoint officers to Plaintiff's executive board. As a result, Trillium Links appointed Mr. Culbreth and Mr. Ward to serve as Plaintiff's sole initial officers and directors, and

1. Trillium Construction has not defended any rulings that the trial court may have made in its favor based on contributory negligence and failure to mitigate damages for purposes of this appeal. As a result of the fact that the record does not support a determination that Plaintiff was contributorily negligent as a matter of law and the fact that a failure to mitigate damages is a defense to the size of a damage award rather than a bar to liability, the trial court's decision to grant summary judgment in favor of Trillium Construction cannot be affirmed on the basis of either contributory negligence or any failure on Plaintiff's part to take appropriate steps to mitigate its damages.

2. Mr. Rice was a building contractor who served as the sole member and manager of Trillium Construction. Mr. Hatalsky is a golf course designer.

they continued to act in that capacity until Trillium Links turned control of Plaintiff over to the unit owners on 24 February 2007.

Trillium Construction was solely owned by Mr. Rice, who also owned a minority interest in Trillium Links.[3] Trillium Links and Trillium Construction operated out of the same offices and used the same mailing address, phone number, and website. In 2003, Trillium Links hired Trillium Construction to serve as the general contractor for the construction of the Trillium Ridge Condominiums. Although Trillium Links and Trillium Construction executed a contract providing for the construction of each building, the contract documents have not been located and are presumed to have been destroyed as a result of water damage.

In October 2004, a report from Structural Integrity Engineering, P.A., was delivered to Trillium Construction and to Mr. Culbreth and Mr. Ward individually. According to the Structural Integrity report, a failure to install two foundation piers in Building No. 100 had resulted in a sagging floor. Although Structural Integrity confirmed that these piers were replaced in 2005, it noted that its report "should not be construed as an implication that there are no deficiencies or defects at other locations in this structure."

On 24 February 2007, Trillium Links turned over control of Plaintiff to the unit owners. No information regarding the foundation problems in Building No. 100 or the Structural Integrity report was disclosed to the new board. After control had been transferred to the unit owners, Plaintiff decided to study future maintenance requirements and commissioned Miller+Dodson to perform a reserve study for the condominiums. According to the Miller+Dodson report, the condominiums' wooden siding had a shorter remaining economic life than Plaintiff had anticipated given the type of siding that had been installed.

After receiving the Miller+Dodson report, Plaintiff asked Freddie Boan, the Association's secretary and a Trillium Links employee, to retain an expert for the purpose of providing a second opinion concerning the expected useful life of the wooden siding. As a result, Mr. Boan hired Andy Lee, a professor of forest products at Clemson University, to inspect the siding. On 5 November 2007, Professor Lee delivered a report to Plaintiff in which he discussed certain siding-related issues, including the fact that "some metal flashings are either too narrow or missing, which require immediate corrections." In addition, Professor Lee noted

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3. Mr. Rice died in May 2008, leaving Trillium Construction without a member or manager. As of April 2013, Trillium Construction had been dissolved.

that, at many locations, the bottoms of the siding pieces either touched or were too close to the ground and recommended that this problem be corrected. Finally, Professor Lee concluded that, if the problems were corrected, the wood sidings should last "thirty (30) years or longer."

According to Mr. Boan, all of the members of Plaintiff's board received the Lee Report and were made aware of the flashing defects. Upon receiving the Lee Report, James Tenney, who had been elected to the board after control of the development had been transferred to Plaintiff, talked about the situation with Mr. Boan. After discussing the available options with Professor Lee, Mr. Boan decided that the existing problems could be remedied by continuously caulking over the problematic flashings. In addition, Mr. Boan reached the conclusion that Plaintiff did not need to procure additional inspections of the buildings. As a result, Plaintiff had the problematic flashings caulked over "either prior to or at the time we did the painting in March of 2008."

In approximately October 2010, leaks were discovered in Building Nos. 100 and 300. Upon further investigation, extensive water damage and rotting was discovered. The similarity between the leaks in the two buildings led Mr. Boan to advise Mr. Tenney that the problem might not be a localized one. As a result, Mr. Tenney hired an engineer to inspect the property. On 19 October 2010, Sydney E. Chipman, P.E., submitted a report detailing his findings concerning the condition of Building No. 100. In his report, Mr. Chipman indicated that "[i]mproper flashing details at the doors, windows, and horizontal transitions" had caused serious water damage and that these defects were "probably endemic throughout the community." Subsequent inspections disclosed the existence of numerous defects in the original construction of the condominium buildings.

B. Procedural History

On 3 August 2011, Plaintiff filed a complaint against Trillium Links; Trillium Construction; Mr. Culbreth; Mr. Ward; Shamburger Design Studio, P.C.; and Shamburger Design, Inc.[4] In its complaint, Plaintiff asserted claims for breach of warranty against Trillium Links; negligent construction against Trillium Links, Trillium Construction, and the Shamburger Defendants; gross negligence against Trillium Links; and breach of fiduciary duty against Mr. Culbreth, Mr. Ward, and Trillium Links. On 6 October 2011, 10 October 2011, and 12 December 2011,

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4. The Shamburger defendants were involved in designing the condominium buildings. Shamburger Design Studio was never served and an entry of default was made against Shamburger Design on 9 January 2012.

respectively, Mr. Culbreth and Mr. Ward, Trillium Links, and Trillium Construction filed answers in which they denied the material allegations of Plaintiff's complaint and asserted various affirmative defenses.

On 9 October 2012, Trillium Construction filed a motion seeking partial summary judgment in its favor with respect to all negligent construction claims relating to Building Nos. 100 and 200. On 18 January 2013, Trillium Construction withdrew its partial summary judgment motion based upon the expectation that the Chief Justice would designate this case as exceptional pursuant to Rule 2.1 of the General Rules of Practice. On 8 March 2013, the Chief Justice designated this case as exceptional and transferred responsibility for it to the trial court.

On 1 July 2013, Mr. Culbreth and Mr. Ward filed motions for summary judgment, or in the alternative, partial summary judgment. On 22 July 2013, Trillium Links filed a motion for summary judgment. On 9 August 2013, Trillium Construction filed a revised motion for summary judgment. On 14 August 2013, Plaintiff filed materials in opposition to these summary judgment motions. On 16 August 2013, Plaintiff filed a response to Trillium Construction's summary judgment motion.

The pending summary judgment motions came on for hearing before the trial court at the 19 August 2013 civil session of the Jackson County Superior Court. On 20 August 2013, the trial court entered orders granting summary judgment in favor of Mr. Culbreath, Mr. Ward, Trillium Construction, and Trillium Links with respect to all of Plaintiff's claims and granting partial summary judgment in favor of Trillium Construction with respect to Plaintiff's claims relating to Building Nos. 100 and 200. On 12 September 2013, the trial court entered amended orders granting summary judgment in favor of Mr. Culbreath, Mr. Ward, Trillium Construction, and Trillium Links, granting partial summary judgment in favor of Trillium Construction, and certifying its order for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). On 18 September 2013, Plaintiff noted an appeal to this Court from the trial court's orders and amended orders.[5]

II. Substantive Legal Analysis

On appeal, Plaintiff argues that the trial court erred by granting Defendants' summary judgment motions. More specifically, Plaintiff

5. As a result of the fact the trial court properly certified its orders for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the fact that Plaintiff's appeal has been taken from an interlocutory order is no bar to our consideration of this case on the merits.

argues that Trillium Construction's motion for summary judgment was untimely; that Plaintiff's claims are not barred by the applicable statute of limitations or statute of repose; and that the evidentiary forecast presented for the trial court's consideration established that Mr. Culbreth and Mr. Ward had breached a fiduciary duty owed to Plaintiff, that Trillium Links had breached a fiduciary duty owed to Plaintiff, and that Trillium Construction and Trillium Links had negligently constructed the condominium buildings. We will address each of Plaintiff's arguments in turn.

A. Standard of Review

"A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 3, 714 S.E.2d 438, 440 (2011). As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004). "Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). " 'When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate.' " *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P'ship*, 134 N.C. App. 391, 394, 518 S.E.2d 17, 21 (1999) (quoting *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 391 (1985), *overruled in part on other grounds in N.C. Dept. of Transp. v. Rowe*, 351 N.C. 172, 177, 521 S.E.2d 707, 710 (1999)), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000). We review orders granting or denying summary judgment using a *de novo* standard of review, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), under which "this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Burgess v. Burgess*,

205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Timeliness

[1] As an initial matter, Plaintiff contends that Trillium Construction's summary judgment motion was untimely. Although Trillium Construction acknowledges having failed to provide notice of its effort to obtain summary judgment in its favor in a timely manner, it contends that Plaintiff has waived the right to object to the lack of timely notice. Trillium Construction's argument is persuasive.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c), a motion for summary judgment must be served at least ten days before the time fixed for hearing. N.C. Gen. Stat. § 1A-1, Rule 56(c). In the event that service is effectuated by mail, three days must be added to the prescribed notice period. N.C. Gen. Stat. § 1A-1, Rule 6(e). However, "[t]he notice required by [N.C. Gen. Stat. § 1A-1,] Rule 56(c) of the North Carolina Rules of Civil Procedure may be waived 'by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party.' " *Patrick v. Ronald Williams*, *Prof'l Ass'n*, 102 N.C. App. 355, 367, 402 S.E.2d 452, 459 (1991) (quoting *Westover Products v. Gateway Roofing*, 94 N.C. App. 163, 166, 380 S.E.2d 375, 377 (1989)).

As a result of the fact that Trillium Construction mailed its summary judgment motion on 9 August 2013 and the fact that the hearing on that motion was scheduled for 19 August 2013, Trillium Construction concedes, as it must, that it failed to serve its summary judgment motion in a timely manner. At the beginning of the summary judgment hearing, Plaintiff informed the trial court that Trillium Construction had failed to serve its summary judgment motion in accordance with the statutorily prescribed deadline. However, Plaintiff did not object to the adequacy of the notice that it had received or request additional time within which to respond to Trillium Construction's motion, participated in the hearing, and addressed the issues raised by Trillium Construction's motion on the merits.[6] As a result of Plaintiff's failure to object to the lack of notice or to request additional time and its decision to participate in the hearing, *Patrick*, 102 N.C. App. at 367, 402 S.E.2d at 459, Plaintiff waived the right to object to Trillium Construction's summary judgment motion on notice-related grounds. As a result, the trial court's decision to grant

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6. Although Plaintiff mentioned the timeliness issue in its rebuttal argument before the trial court, it conceded that "we've addressed the issues."

summary judgment in Trillium Construction's favor should not be disturbed on timeliness grounds.

C. Negligent Construction Claims

Next, Plaintiff argues that the trial court erred by granting summary judgment in favor of Trillium Links and Trillium Construction on the grounds that Trillium Links and Trillium Construction were negligent, and that Trillium Links was grossly negligent, during the construction of the condominiums. Although Plaintiff's gross negligence claim lacks merit, the trial court erred by granting summary judgment in favor of Trillium Links and Trillium Construction with respect to Plaintiff's negligent construction claims.

1. Finding of Liability

a. Negligence

[2] "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). " 'In the absence of a legal duty owed to the plaintiff by [the defendant], [the defendant] cannot be liable for negligence.' " *Id.* (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 631-32, 507 S.E.2d 882, 892 (1998)).

According to Trillium Links, a developer does not owe a legal duty to a condominium unit purchaser and cannot, for that reason, be held liable for negligence. In support of this assertion, Trillium Links notes that Plaintiff has not cited any support for its contention that such a duty exists. On the other hand, Plaintiff points out that the Building Code " 'imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the Code such that the violation proximately causes injury or damage,' " *Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (quoting *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 863 (1988)), *disc. review denied*, 354 N.C. 363, 556 S.E.2d 302 (2001), and that a violation of the Building Code constitutes negligence *per se*. *Oates v. Jag, Inc.*, 314 N.C. 276, 280, 333 S.E.2d 222, 225 (1985). As a result, any person responsible for supervising a construction project is subject to being held liable on a negligent construction theory.

According to Plaintiff, the record contains evidence tending to show that Trillium Links supervised the construction of the Trillium Ridge

condominiums. More specifically, Plaintiff notes that Trillium Links hired Neill Dalrymple to work on the Trillium Ridge condominium construction project; that Mr. Dalrymple's "Construction duties & responsibilities" made him "[r]esponsible & accountable" for the Trillium Ridge project, among others; and that Mr. Dalrymple "ha[d] the authority to stop any construction activity at any time to clear up any misunderstandings or expectations or under other terms when he acts on behalf of [Trillium Links]." According to Mr. Culbreth, if Mr. Dalyrmple "knowingly saw something that was wrong[,] he could stop it just like a QA, QC officer." In addition, Trillium Links charged Trillium Construction more than $80,000.00 for acting as an "Asst Project Manager" during the construction of Buildings 100 and 200. As Plaintiff suggests, this evidence, when viewed in the light most favorable to Plaintiff, is sufficient to establish the existence of a genuine issue of material fact concerning the extent to which Trillium Links supervised the construction project and whether Trillium Links could lawfully be held liable for negligent construction based upon alleged Building Code violations.

In seeking to persuade us to reach a different result, Trillium Links argues, in reliance upon *Lassiter*, that, even if it were required to adhere to the Building Code, the fact that a Code violation occurred did not establish the existence of a legally effective duty of care. *Lassiter* does not, however, control the present issue given that the plaintiffs in that case never came under the protection of the Building Code because their house was never completed. *Lassiter*, 145 N.C. App. at 684, 551 S.E.2d at 223-24. As a result, since persons responsible for supervising construction are obligated to comply with the Building Code and since the necessity for compliance with the Building Code clearly creates a compliance obligation applicable to supervisory personnel, we hold that the trial court erred by granting summary judgment in Trillium Links' favor with respect to the negligent construction issue.

b. Gross Negligence

[3] In addition, Plaintiff argues that Trillium Links is liable for gross negligence, which consists of "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551 (1999). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (citations omitted). Aside from simply asserting that Trillium Links acted in a grossly negligent fashion, however, Plaintiff has not pointed to any specific act or omission on the part of Trillium Links which it contends to have been grossly negligent. As a

result, given Plaintiff's failure to identify any act or omission on the part of Trillium Links that was "done with conscious or reckless disregard for the rights and safety of others," *Parish*, 350 N.C. at 239, 513 S.E.2d at 551, we conclude that the trial court did not err by granting summary judgment in favor of Trillium Links with respect to Plaintiff's gross negligence claim.

2. Statute of Limitations and Repose

a. Statute of Limitations

[4] Next, Trillium Links and Trillium Construction argue that, even if they owed a legally recognized duty to Plaintiff, Plaintiff's negligent construction claim was barred by the applicable statute of limitations. Plaintiff, on the other hand, contends that the record reflects the existence of genuine issues of material fact concerning the date upon which its negligent construction claims against Trillium Links and Trillium Construction accrued for purposes of the statute of limitations. We believe that Plaintiff has the better of this disagreement.

"The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Crawford v. Boyette*, 121 N.C. App. 67, 70, 464 S.E.2d 301, 303 (1995), *cert. denied*, 342 N.C. 894, 467 S.E.2d 902 (1996). "As a general proposition, an order [granting summary judgment] based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Williams*, 213 N.C. App. at 4, 714 S.E.2d at 440 (internal quotations omitted). On the other hand, when the evidence "is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Hatem v. Bryan*, 117 N.C. App. 722, 724, 453 S.E.2d 199, 201 (1995).

Negligent construction claims resulting from physical damage to the plaintiff's property are subject to the three year statute of limitations set out in N.C. Gen. Stat. § 1-52(16), with such claims accruing when "bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643, 643 S.E.2d 28, 33 (quoting N.C. Gen. Stat. § 1-52(16)), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). In support of their contention that Plaintiff's negligent construction claims are time-barred, Trillium Links and Trillium Construction argue that Plaintiff had actual notice of the existence of

construction defects, consisting of missing or inadequate flashings, in the condominium buildings as of 5 November 2007, when the Lee Report was delivered.

As we have already noted, the Lee Report pointed out that "[s]ome metal flashings are either too narrow or missing, which require immediate corrections" and that "some bottom pieces of wood sidings in many locations either touched the ground or are too close to the ground." On the other hand, Dr. Lee expressed the "opinion that these wood sidings are in good to excellent condition, with the exceptions of the problems outlined in the above observations," and stated that, in the event that the problems delineated in the report were to be corrected, the sidings should last "thirty (30) years or longer." According to Trillium Links and Trillium Construction, this information provided Plaintiff with notice that the Trillium Ridge condominiums suffered from construction defects sufficient to put Plaintiff on notice of the negligent construction claims that have been asserted in this case and triggering the running of the applicable statute of limitations with respect to those claims.

On the other hand, Plaintiff argues that the problems outlined in the Lee Report were corrected and that it did not have notice of the problems that prompted the assertion of the present claims until 2010, at which point Plaintiff hired an engineer and discovered the existence of extensive problems in other condominium buildings. According to the evidentiary forecast upon which Plaintiff relies in support of this contention, Mr. Tenney, acting in his capacity as President of Plaintiff's board, reviewed the Lee Report, informed his colleagues about the flashing problems outlined in that document, and obtained their agreement that the continuous caulking approach recommended by Professor Lee should be adopted. In addition, the record reflects that Mr. Boan did not believe, after learning of the flashing-related defects, that any additional investigation was necessary. Mr. Tenney testified that neither Mr. Boan nor Mr. Lee ever advised Plaintiff that there was any reason to conduct a more extensive investigation concerning the possibility that there were defects in the other buildings at that time. Finally, Plaintiff notes that multiple construction defects outlined in its complaint bore no relation to the flashing problems discussed in the Lee Report. We believe that this evidence, when viewed in the light most favorable to Plaintiff, demonstrates the existence of a genuine issue of material fact concerning the extent, if any, to which the negligent construction claim that Plaintiff seeks to assert against Trillium Links and Trillium Construction accrued more than three years before the date upon which the complaint was filed. As a result, the trial court erred by granting summary judgment with

respect to Plaintiff's negligent construction claims in favor of Trillium Links and Trillium Construction on statute of limitations grounds.

b. Statute of Repose

[5] Next, Plaintiff argues that the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5)(a) does not bar Plaintiff's negligent construction claims relating to Building Nos. 100 and 200 against Trillium Construction and Trillium Links.[7] N.C. Gen. Stat. § 1-50(a)(5)(a) provides that "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement," N.C. Gen. Stat. § 1-50(a)(5)(a), with an action based upon or arising out of the defective or unsafe condition of an improvement to real property "[f]or purposes of this subdivision" having been defined to include an "[a]ction[] to recover damages for negligent construction or repair of an improvement to real property." N.C. Gen. Stat. § 1-50(a)(5)(b)(2). " '[N.C. Gen. Stat. § 1-50(a)(5)(a)] is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms.' " *Roemer v. Preferred Roofing, Inc.*, 190 N.C. App. 813, 815, 660 S.E.2d 920, 923 (2008) (quoting *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861, *disc. rev. denied*, 360 N.C. 545, 635 S.E.2d 62 (2006)). A statute of repose "is a substantive limitation that establishes a time frame in which an action must be brought to be recognized." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). As a result, given that the negligent construction claims that Plaintiff has asserted against Trillium Links and Trillium Construction seek recovery arising from an allegedly defective or unsafe improvement to real property, those claims come within the ambit of N.C. Gen. Stat. § 1-50(a)(5)(a).

"Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (internal citations omitted). "Under the statute, a plaintiff has the burden of showing that he or she brought the action within six years of either (1) the substantial completion of the house or (2) the specific last act or omission of defendant

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7. As a result of the fact that the claims that Plaintiff has asserted against them sound in breach of fiduciary duty rather than defective construction, Mr. Culbreth and Mr. Ward have not asserted a statute of repose defense in their brief.

giving rise to the cause of action." *Boor v. Spectrum Homes, Inc.*, 196 N.C. App. 699, 705, 675 S.E.2d 712, 716 (2009). In the event that Plaintiff fails to establish that it had asserted its claim before the expiration of the statute of repose, its claim is "insufficient as a matter of law." *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990).

i. Substantial Completion

[6] As an initial matter, Trillium Links and Trillium Construction contend that Plaintiff has failed to bring its claim related to Building Nos. 100 and 200 within six years of the date upon which those buildings were substantially completed. N.C. Gen. Stat. § 1–50(a)(5(c) defines "substantial completion" as being "that degree of completion of a project, improvement or specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended." N.C. Gen. Stat. § 1-50(a)(5)(c). As this Court had previously held, a building is "substantially complete" on the date upon which a certificate of occupancy has been issued. *Boor*, 196 N.C. App. at 705, 675 S.E.2d at 716 (finding that the date of substantial completion for purposes of N.C. Gen. Stat. § 1–50(a)(5) was the date upon which the certificate of occupancy was issued); *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999) (holding that a house was substantially completed for purposes of N.C. Gen. Stat. § 1–50(a)(5) upon the issuance of a certificate of compliance), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). According to the record developed before the trial court, certificates of occupancy were issued for Building No. 100 between 17 August and 23 August 2004 and for Building No. 200 between 11 February and 30 March 2004. As a result of the fact that Building Nos. 100 and 200 were substantially completed nearly seven years before Plaintiff commenced this action on 3 August 2011, Plaintiff failed to assert its negligent construction claim within six years of the date upon which Building Nos. 100 and 200 were substantially completed.

ii. Last Act or Omission

[7] According to Plaintiff, Trillium Construction's last act with respect to Building No. 200 occurred when it repaired Mr. Tenney's deck in 2006. Although the expression "last act or omission" has not been statutorily defined, this Court has stated that, "[i]n order to constitute a last act or omission, that act or omission must give rise to the cause of action." *Nolan*, 135 N.C. App. at 79, 518 S.E.2d at 793. As a result, although an act sufficient to affect the running of the statute of repose may occur after the date of substantial completion, "a 'repair' does not qualify as a

'last act' under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties" given that "allow[ing] the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240-41, 515 S.E.2d 445, 449-50 (1999). Even so, Plaintiff argues that, since the original construction contract was never produced, the repairs to Mr. Tenney's deck might have been required as part of the original contract and, therefore, could qualify as a "last act" for statute of repose purposes. However, given that Plaintiff "has the burden of showing that he or she brought the action within six years of . . . the specific last act or omission of defendant giving rise to the cause of action," *Boor*, 196 N.C. App. at 705, 675 S.E.2d at 716, we are unable to accept this contention. As a result, we have no basis for determining that the "last act" underlying Plaintiff's negligent construction claims occurred later than the date of substantial completion.

iii. Possession or Control

[8] Finally, Plaintiff argues that Trillium Links and Trillium Construction are not entitled to rely upon N.C. Gen. Stat. § 1-50(a)(5)(a) on the grounds that they retained "possession or control" over the condominium buildings. According to N.C. Gen. Stat. § 1-50(a)(5)(d), the statute of repose "shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition." N.C. Gen. Stat. § 1-50(a)(5)(d). As the Supreme Court has stated, "the purpose of the exclusion" is to impose a continuing duty "to inspect and maintain" on persons who, after having constructed an improvement, remain in possession of and control over that improvement. *Cage v. Colonial Bldg. Co., Inc. of Raleigh*, 337 N.C. 682, 685, 448 S.E.2d 115, 117 (1994). In support of this assertion, Plaintiff argues that Trillium Construction remained in "possession or control" of the condominiums by virtue of its "intermingled existence" with Trillium Links and that Trillium Links, as the declarant, had actual control over Plaintiff based upon its board appointment authority until the Association came under the control of the unit owners on 24 February 2007. On the one hand, we are unable to see how the fact that Trillium Construction had an "intermingled existence" has any tendency to show that it had possession of

or control over the condominium buildings after the completion of the construction process given the absence of any attempt on Plaintiff's part to pierce the corporate veil. On the other hand, while Trillium Links did, arguably, have possession of or control over the condominium buildings, the record discloses the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links knew or should have known of the existence of the defects upon which Plaintiff's claim rests. As a result, although we conclude that Trillium Construction is entitled to rely on the statute of repose as a defense to Plaintiff's negligent construction claims relating to Building Nos. 100 and 200, we further conclude that the extent to which the "possession or control" exception to the statute of repose defense applies to Trillium Links is a question for the jury. As a result, although Trillium Construction is entitled to rely on the statute of repose to the extent that it is not equitably estopped from doing so, there is a jury question concerning the extent to which Trillium Links is entitled to rely on the statute of repose.

c. Equitable Estoppel

[9] Next, Plaintiff argues that Defendants are equitably estopped from asserting either the statute of limitations or the statute of repose. Equitable estoppel may be invoked, in proper cases, to bar a defendant from relying upon the statute of limitations or statute of repose. *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987); *see also Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 209 N.C. App. 310, 319, 703 S.E.2d 883, 889, *disc. review denied*, 365 N.C. 202, 710 S.E.2d 21 (2011). "North Carolina courts 'have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against "stale" claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit.' " *White*, 166 N.C. App. at 305, 603 S.E.2d at 162 (quoting *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998)).

"The essential elements of equitable estoppel are: '(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.' " *Id.* (quoting *Friedland*, 131 N.C. App. at 807, 509 S.E.2d at 796-97). " 'The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.' " *Id.* (quoting *Friedland*, 131 N.C. App. at 807, 509 S.E.2d at 796-97). "In order for equitable estoppel to bar application

of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997).

In its brief, Plaintiff argues that Trillium Links should be estopped from asserting a statute of limitations or repose defense because its property manager, Mr. Boan, reviewed the Lee Report and advised the Association that he believed that further investigation would not be necessary. However, given that Plaintiff's entire board received the Lee Report and, for that reason, had the same information that was available to Trillium Links, we are unable to see how Trillium Links concealed any information that should have been made available to Plaintiff with respect to the Lee Report. In addition, the record is totally devoid of any information tending to show that Plaintiff was "induced to delay filing of the action by the misrepresentations of" Trillium Links. *Jordan*, 125 N.C. App. at 720, 482 S.E.2d at 739. As a result, Trillium Links is not equitably estopped from asserting the statute of limitations or statute of repose in opposition to Plaintiff's negligent construction claims.

[10] Similarly, Plaintiff argues that Trillium Construction should be estopped from asserting the statute of limitations or the statute of repose against Plaintiff on the grounds that Trillium Construction actively concealed its defective work from Plaintiff. In support of this assertion, Plaintiff points to evidence tending to show that Trillium Construction placed other building materials over subsurface construction defects before these defects could be observed. In addition, Plaintiff asserts that, on occasion, Trillium Construction learned that various defects needed to be repaired without either passing this information along to Plaintiff or ensuring that the defects in question were fixed. According to Plaintiff, this conduct deprived it of the opportunity to discover the defects in a more timely manner and, thus, delayed the filing of Plaintiff's action. Trillium Construction, on the other hand, argues that the Lee Report put Plaintiff on notice of the construction defects in 2007 and is, for that reason, precluded from asserting that it is equitably estopped from asserting the statute of limitations or statute of repose.

Given our determination that genuine issues of material fact exist as to whether or not the Lee Report put Plaintiff on notice of the existence of the construction-related defects described in its complaint, it follows that issues of fact exist as to whether Plaintiff lacked "knowledge and the means of knowledge as to the real facts in question" sufficient to establish that Trillium Construction is equitably estopped from asserting the statute of limitations or statute of repose in opposition to the negligent

construction claim that it has asserted against Trillium Construction. *White*, 166 N.C. App. at 305, 603 S.E.2d at 162. As a result, given that the record discloses the existence of a genuine issue of material fact concerning the extent to which Trillium Construction is estopped from asserting the statute of limitations or the statute of repose in opposition to Defendant's negligent construction claim, the trial court erred by granting summary judgment in favor of Trillium Construction with respect to this issue.

D. Breach of Fiduciary Duty

1. Individual Directors

[11] The only claim asserted against Mr. Culbreth and Mr. Ward in Plaintiff's complaint rests upon an alleged breach of the fiduciary duty that they owed to Plaintiff during their service as members of Plaintiff's board. "A fiduciary duty arises when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 60, 418 S.E.2d 694, 699 (internal quotation omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). According to N.C. Gen. Stat. § 47C-3-103(a), "[i]n the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions[,]" N.C. Gen. Stat. § 47C-3-103(a), with the duties imposed upon members of Plaintiff's board by the Declaration having included the "management, replacement, maintenance, repair, alteration, and improvement of the Common Elements."

Trillium Links, acting as declarant, appointed Mr. Culbreth and Mr. Ward to Plaintiff's board.[8] Mr. Culbreth and Mr. Ward argue that, given that Plaintiff had no role in the construction of the condominium buildings, they had no responsibility for the construction of those buildings or any obligation to hire inspectors or to otherwise oversee the construction process. In support of this position, Mr. Culbreth and Mr. Ward point to the testimony of Mr. Gentry, who indicated that, in his experience,

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8. Although Plaintiff argues that, since Mr. Culbreth and Mr. Ward were also members of Trillium Links, this arrangement was "presumptively fraudulent," Plaintiff's expert, Marvin Gentry, testified that it is not improper for a developer or declarant to appoint its principals to serve on the board of a condominium association during the period of declarant control.

condominium associations do not typically participate in the original construction of the condominium buildings, and the absence of any evidence tending to show that Plaintiff had anything to do with the construction of the buildings during the period when the declarant retained control over Plaintiff.

In spite of the fact that Mr. Culbreth and Mr. Ward had no direct involvement in the construction of the condominium buildings, they did, as directors, have an obligation to disclose material facts regarding the existence of any construction defects of which they were aware to Plaintiff. *King v. Bryant*, __ N.C. App. __, __, 737 S.E.2d 802, 809 (2013) (stating that an affirmative duty "to disclose all facts material to a transaction" is inherent in any fiduciary relationship); *Searcy v. Searcy*, 215 N.C. App. 568, 572, 715 S.E.2d 853, 857 (2011) (stating that "[a] duty to disclose arises where a fiduciary relationship exists between the parties to [a] transaction"). Although Mr. Culbreth and Mr. Ward do not dispute the existence of such a duty to disclose, they do argue that the record does not contain any evidence tending to show that they possessed any information concerning the existence of construction-related defects in the condominium buildings of the type alleged in the complaint. On the other hand, Plaintiff argues that Mr. Culbreth and Mr. Ward actually knew of material defects in the foundation of Building No. 100 and failed to disclose the existence of these problems to Plaintiff. For example, Mr. Culbreth and Mr. Ward acknowledge that they had received the Structural Integrity report, which noted that two foundation piers had not been installed in Building No. 100 and that a sagging floor had resulted from this omission. In addition, Mr. Tenney stated that the unit owner-controlled board was never informed by either of the prior directors that foundation problems had been discovered beneath one of the buildings. As a result of the fact that this evidence, when viewed in the light most favorable to Plaintiff, creates a genuine issue of material fact concerning the extent, if any, to which Mr. Culbreth and Mr. Ward breached a fiduciary duty that they owed to Plaintiff by failing to disclose relevant information in their possession,[9] the trial court erred by granting summary judgment in their favor with respect to this claim.

2. Trillium Links

[12] Next, Plaintiff argues that the trial court erroneously granted summary judgment in favor of Trillium Links on the grounds that the same

9. Although Mr. Culbreth and Mr. Ward stated that the foundation pier problem was corrected and that no one had ever described the sagging floor as a construction defect, these facts go to the weight and credibility of the evidence rather than its sufficiency to support a breach of fiduciary duty claim.

facts that support a determination that Mr. Culbreth and Mr. Ward violated a fiduciary duty establish a breach of fiduciary duty by Trillium Links as well. Trillium Links, on the other hand, argues that a condominium developer does not, as a matter of North Carolina law, owe a fiduciary duty to the property owner's association during the period of declarant control. Although N.C. Gen. Stat. § 47C-3-103(a) expressly provides that the members of a condominium association board owe a fiduciary duty to the association, N.C. Gen. Stat. § 47C-3-103(a), the Condominium Act is silent with respect to the issue of whether such a duty is owed to the condominium association by a developer or declarant. However, N.C. Gen. Stat. § 47C-1-108 states that, "[t]he principles of law and equity supplement the provisions of this chapter, except to the extent inconsistent with this chapter." N.C. Gen. Stat. § 47C-1-108. Thus, the extent to which Trillium Links owed a fiduciary duty to Plaintiff during the period of declarant control must necessarily be governed by common law principles.

" 'Generally, in North Carolina . . . there are two types of fiduciary relationships: (1) those that arise from legal relations such as attorney and client, broker and client . . . partners, principal and agent, trustee and cestui que trust, and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.' " *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quoting *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 540, 546 (M.D.N.C.1999) (internal quotations omitted)). As a result of the fact that Plaintiff has not asserted that any fiduciary duty arose from a "legal" relationship between Plaintiff and Trillium Links, we must determine whether a fiduciary relationship existed between Plaintiff and Trillium Links as a matter of fact.

The undisputed record evidence establishes, during the period of declarant control, "the Declarant [Trillium Links had] control of the Association through its power to appoint and remove Board Members." Trillium Links remained in control of Plaintiff until 24 February 2007, when authority over the Association was transferred to the unit owners. As a result of the fact that Trillium Links had a position of dominance over Plaintiff and the fact that individual unit owners or prospective unit owners had little choice except to rely upon Trillium Links to protect their interests during the period of developer control, we hold that the record contains sufficient evidence from which the existence of a fiduciary duty between the two entities could be established. In addition, for the reasons set forth above in connection with our discussion

of the breach of fiduciary duty claim that Plaintiff asserted against Mr. Culbreth and Mr. Ward, we further conclude that the record evidence, when considered in the light most favorable to Plaintiff, evidences the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links breached a fiduciary duty that it owed to Plaintiff. As a result, the trial court erred by granting summary judgment in favor of Trillium Links with respect to this issue.

3. Statute of Limitations

[13] Mr. Culbreth, Mr. Ward, and Trillium Links argue that Plaintiff's fiduciary duty claims are barred by the statute of limitations on the grounds that the Lee Report sufficed to put Plaintiff on notice of the facts upon which their breach of fiduciary duty claims rely. Breach of fiduciary duty claims accrue upon the date when the breach is discovered and are subject to a three year statute of limitations. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (stating that "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1)"), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). As a result of our determination that the trial court erred by granting summary judgment with respect to the issue of whether Plaintiff's negligent construction claims were time-barred given the existence of genuine issues of material fact concerning the date upon which Plaintiff knew or had reason to believe that extensive defects existed in the condominium buildings and the fact that the same principles are applicable to the present issue, we conclude that the trial court erred by granting summary judgment in favor of Mr. Culbreth, Mr. Ward, and Trillium Links with respect to Plaintiff's breach of fiduciary duty claims on statute of limitations grounds.

E. Constructive Fraud

[14] Next, Plaintiff contends that the record evidence tends to show the existence of a valid claim for constructive fraud against Mr. Culbreth, Mr. Ward, and Trillium Links. For that reason, Plaintiff further contends that the trial court erred by granting summary judgment in favor of Mr. Culbreth, Mr. Ward, and Trillium Links on the grounds that a ten-year statute of limitations applies to this claim.[10] Plaintiff's argument lacks merit.

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10. "A claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations[.]" *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

Although the showing necessary to establish the existence of a breach of fiduciary duty and constructive fraud involves overlapping elements, the two claims are separate under North Carolina law. *White*, 166 N.C. App. at 293, 603 S.E.2d at 155. In order to recover for constructive fraud, a plaintiff must establish the existence of circumstances "(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust[.]" *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)), *disc. review dismissed*, 349 N.C. 240, 558 S.E.2d 190 (1998). "Further, an essential element of constructive fraud is that defendants sought to benefit themselves in the transaction." *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007) (quotation omitted), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *White*, 166 N.C. App. at 294, 603 S.E.2d at 156. In order to satisfy this requirement, "Plaintiff's evidence must prove defendants sought to benefit themselves or to take advantage of the confidential relationship." *Wilkins v. Safran*, 185 N.C. App. 668, 675, 649 S.E.2d 658, 663 (2007) (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997)).

In its complaint, Plaintiff alleged in support of its constructive fraud claim that:

> 70. By virtue of their positions as officers and directors of the Association and their control over the Association, Defendants Trillium Links, Culbreth and Ward stood in a relationship of special faith, confidence and trust with respect to the Plaintiff Association. These Defendants therefore owed fiduciary duties to the Association under North Carolina law.
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> . . . .
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> 72. These Defendants breached their fiduciary duties and acted in their own interests instead of those of the Association by hiring Trillium Construction, which shared common ownership and control with Trillium Links, to build the Trillium Ridge Condos. Upon information and belief, these Defendants benefited from this transaction at the expense of the Association.

. . . .

> 74. These Defendants also breached their fiduciary duties by failing to disclose material facts regarding the defects and their own negligence and conflict of interest actions to the unit owners and the new members of the Association's Executive Board when control of the Association was transferred in February, 2007.

Although Plaintiff alleged that Mr. Culbreth, Mr. Ward, and Trillium Links "benefitted from this transaction at the expense of the Association," Plaintiff has not directed our attention to any evidence tending to show that Defendants sought or gained any personal benefit by taking unfair advantage of their relationship with Plaintiff. Simply put, given that Plaintiff has failed to adduce any evidence tending to show that "defendants sought to benefit themselves in the transaction," *Piles*, 187 N.C. App. at 406, 653 S.E.2d at 186, it has failed to forecast sufficient evidence to establish a constructive fraud claim governed by a ten year statute of limitations rather than a breach of fiduciary duty governed by a three year statute of limitations.[11]

F. Breach of Warranty

[15] Finally, Plaintiff argues that the trial court erred by granting summary judgment in favor of Trillium Links with respect to its breach of warranty claim. More specifically, Plaintiff argues that Trillium Links breached the implied warranty applicable to condominium units to the effect that "the premises are free from defective materials, constructed in a workmanlike manner, [and] constructed according to sound engineering and construction standards[.]" N.C. Gen. Stat. § 47C-4-114. However, "a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain." N.C. Gen. Stat. § 47C-4-115(b). Although Trillium Links does not contest the existence of the warranty upon which Plaintiff's claim relies or argue that the record does not contain any evidence tending to show that a breach of this warranty occurred, it does argue that Plaintiff's breach of warranty claim is barred by the applicable statute of limitations or statute of repose.

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11. However, for the reasons set forth above, Plaintiff's breach of fiduciary duty claims survive the summary judgment stage of this case.

Plaintiff's claim for breach of warranty is subject to a three year statute of limitations, with this claim accruing upon discovery of the breach. *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 44, 587 S.E.2d 470, 477 (2003) (the statute of limitations for breach of warranty is three years from the date of the breach), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004). As a result of our earlier determination that the record reflects the existence of a genuine issue of material fact concerning the date upon which Plaintiff knew or reasonably should have known of the existence of the construction defects upon which its claim relies, we hold that Trillium Links was not entitled to the entry of summary judgment in its favor with respect to Plaintiff's breach of warranty claims on statute of limitations grounds. Similarly, given the existence of a genuine issue of material fact concerning the extent, if any, to which Trillium Links knew, or had reasonable grounds to know, of the existence of the defects in the construction of the Trillium Ridge condominiums, Trillium Links was not entitled to summary judgment in its favor on statute of repose grounds. As a result, to the extent to that the trial court granted summary judgment in favor of Trillium Links with respect to Plaintiff's breach of warranty on the basis of the applicable statute of limitations or the statute of repose, the trial court erred.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly granted summary judgment with respect to some issues and erred by granting summary judgment with respect to other issues. As a result, the trial court's orders and amended orders should be, and hereby are, affirmed in part and reversed in part and this case should be, and hereby is, remanded to the Jackson County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge STROUD concurs.

Judge ROBERT N. HUNTER, JR. concurring in part and concurring in result only in part in separate opinion prior to 6 September 2014.

I concur in the opinion of the majority in all respects except for the analysis of the constructive fraud claim. For the reasons discussed in *Orr v. Calvert*, 212 N.C. App. 254, 270, 713 S.E.2d 39, 50 (Hunter, Jr., J., dissenting), *rev'd for reasons stated in dissenting opinion*, 365 N.C. 320, 720 S.E.2d 387 (2011), I only concur in the results as to this issue.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2014)

STATE v. BEST No. 14-198	Wayne (11CRS54080) (11CRS55932) (11CRS55933) (12CRS4460)	No Error
STATE v. DUBLIN No. 14-84	Johnston (11CRS51511) (12CRS2080)	No Error
SWAIN v. SWAIN No. 14-181	Craven (10CVD888)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 16 September 2014)

Case	County	Disposition
CASOLA v. CALDWELL CNTY. No. 14-177	Caldwell (12CVS839)	Affirmed
COUNTRY CAFAYE, INC. v. TRAVELERS CAS. INS. CO. OF AM. No. 14-226	Stokes (12CVS508)	Reversed in part; affirmed in part
CUT N UP HAIR SALON OF CAROLINA BEACH, LLC v. BENNETT No. 13-1417	New Hanover (12CVS3023)	Affirmed
GREGORY v. OLD REPUBLIC HOME PROT. CO. No. 13-1439	Forsyth (10CVS8267)	No Error
IN RE ALDRIDGE No. 14-275	Union (11SP578)	Affirmed
IN RE C.V.M. No. 14-205	Surry (13JT63)	Affirmed
IN RE J.V. No. 14-300	Currituck (12JB30)	Dismissed in Part, Affirmed in Part
IN RE K.A.D. No. 14-407	Jackson (05JT28)	Affirmed
IN RE L.N.P.H. No. 14-373	New Hanover (11JT201-202)	Affirmed
IN RE M.J.C. No. 14-367	Robeson (08JT263-266)	Reversed and Remanded
IN RE P.M.N No. 14-431	Randolph (10JA56)	Affirmed
IN RE R.J.C.M. No. 14-358	Randolph (12JT33-36)	Affirmed
PRICE v. JONES No. 14-128	Cumberland (12CVS2720)	Reversed in part; dismissed in part
ROBBINS v. HUNT No. 14-243	New Hanover (10CVD5691)	Affirmed in Part, Reversed and Remanded in Part, Dismissed in Part

SEC. CREDIT CORP., INC. v. BAREFOOT No. 14-250	Johnston (13CVS2155)	Dismissed
SPAIN v. SPAIN No. 14-312	N.C. Industrial Commission (W28283)	Affirmed
STATE v. BARNETTE No. 14-308	Gaston (13CRS55426) (13CRS55428) (13CRS55430) (13CRS7708)	Dismissed in Part, No Error in Part
STATE v. BRYANT No. 13-1384	Brunswick (08CRS3040) (08CRS52588) (11CRS1781)	No Error
STATE v. CELLENT No. 14-207	Mecklenburg (11CRS246140)	No Prejudicial Error
STATE v. CHAVEZ No. 14-341	Guilford (03CRS70577)	Dismissed
STATE v. GRAHAM No. 14-157	Sampson (11CRS52998) (11CRS53012)	No error; Remand for resentencing.
STATE v. LUKE No. 13-1261	Mecklenburg (11CRS250932)	No Error
STATE v. MATTHEWS No. 14-174	Mecklenburg (09CRS237810) (09CRS237821) (10CRS17532)	No Error in Part, Dismissed in Part
STATE v. SMITH No. 14-193	Durham (12CRS55506)	Affirmed
STATE v. THOMAS No. 13-1298	Wake (11CRS221410) (12CRS11048) (12CRS8966)	No Error in Part, Vacated in Part, and Remanded for Resentencing in Part
STATE v. WILLIS No. 14-111	Sampson (12CRS50372-73)	Vacated and Remanded
SWAPS, LLC v. ASL PROPS., INC. No. 14-234	Union (09CVS674)	Affirmed

HRISTOS BASMAS AND MARIA BASMAS, PLAINTIFFS
v.
WELLS FARGO BANK NATIONAL ASSOCIATION, CARRINGTON MORTGAGE SERVICES, LLC AND NATIONWIDE TRUSTEE SERVICES, INC., AS SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA13-464

Filed 7 October 2014

1. Collateral Estoppel and Res Judicata—foreclosure action—new or changed circumstances

A trial court's order vacating defendant's first foreclosure action did not bar a subsequent foreclosure action under the doctrine of res judicata. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and the trial court in the subsequent action found two separate instances of new or changed circumstances.

2. Appeal and Error—preservation of issues—mortgage debt discharged in bankruptcy—not raised at trial

Plaintiffs failed to preserve for appellate review their argument that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court and plaintiffs failed to support their argument with citation to record evidence.

Appeal by plaintiffs from order entered 5 December 2012 by Judge Hugh B. Lewis in Iredell County Superior Court. Heard in the Court of Appeals 11 August 2014.

Elliott Law Firm, PC, by Michael K. Elliott for plaintiff-appellants.

RCO Legal, P.S., by Susan B. Shaw, for defendant-appellee.

STEELMAN, Judge.

The effect of plaintiffs' discharge in bankruptcy on foreclosure proceedings was not preserved for appellate review. The trial court's order allowing foreclosure is affirmed.

I. Factual and Procedural Background

On 29 September 2006 Hristos and Maria Basmas (plaintiffs) borrowed $304,056.00 from New Century Mortgage Corporation for the purpose of purchasing residential property located in Iredell County, North Carolina. The loan was secured by a deed of trust on plaintiffs' property, which was recorded in the Iredell County Registry of Deeds. On 19 December 2006, the loan was sold to Wells Fargo (defendant). In conjunction with the sale of the loan, the original Note was "indorsed in blank by New Century" and transferred to Wells Fargo, with Deutsche Bank being the custodian of the original Note for Wells Fargo.

In 2009 plaintiffs became delinquent in their mortgage payments; they failed to make the payment due on 1 March 2009, and have made no payments towards their debt since that time. On 9 September 2010 the substitute trustee filed a petition in Iredell County case No. 10 SP 1503, seeking to foreclose on the note and deed of trust. On 6 September 2011 the Iredell County Clerk of Court entered an order allowing defendant to proceed with foreclosure. Plaintiffs appealed to the Superior Court of Iredell County, and on 2 November 2011 Judge Theodore S. Royster, Jr., entered an order stating in relevant part that:

> 1. On or about September 29, 2006, a Promissory Note ('the Note') was executed in favor of New Century Mortgage Corporation in the principal sum of $304,056 which Note was secured by a Deed of Trust on real estate located in Iredell County, North Carolina, and recorded in . . . the Iredell County Registry.
>
> 2. The Respondents did not produce an original Indorsement of the Note, nor a copy of the Indorsed Note.
>
> 3. The Respondent claims to be the holder of the Note.
>
> 4. Since the Respondent failed to produce sufficient competent evidence of Indorsement of the Note, . . . at the time of this hearing the Respondent does not qualify as the 'holder' under the North Carolina Uniform Commercial Code, and is thus not the 'holder' of the Promissory Note as the term is used in N.C.G.S. § 45-21-16 for foreclosures under power of sale.

Judge Royster concluded that "[t]he Respondent has failed to prove that it is the owner and holder of a valid indebtedness of [plaintiffs] as required pursuant to N.C.G.S. 45-21.16(d) and therefore cannot foreclose

on the subject property under the current case (10-SP-1503)." The court ordered that the "Order of Sale entered by the Iredell Clerk of Court on September 6, 2011 is hereby vacated" and that the substitute trustee "shall not proceed under the current case (10-SP-1503) with any foreclosure of the real estate described in that certain Deed of Trust recorded in Book 1789, Page 2079 in the Iredell County Public Registry."

On 14 March 2012 defendant filed a new petition, in Iredell County case No. 12 SP 292, seeking to foreclose on the note and deed of trust. On 10 July 2012 plaintiffs filed a complaint in the instant case, seeking a permanent injunction barring foreclosure, a declaratory judgment that foreclosure was barred by the doctrine of *res judicata* on the basis of Judge Royster's order, and alleging claims for abuse of process, unfair and deceptive trade practices, and misrepresentation. A hearing was conducted on 5 November 2012 before the trial court and on 5 December 2012 the court denied plaintiffs' claim for declaratory judgment in an order that stated in relevant part:

> [This matter] came on for hearing . . . on Plaintiffs' motion for declaratory judgment that the doctrine of *res judicata* bars the Defendants from pursuing foreclosure in . . . Iredell County, N.C., 12-SP-0292 . . . or any other subsequent foreclosure proceeding. Having considered the briefs, supporting affidavits, and case law submitted by the parties . . . the Court hereby finds and concludes as follows:
>
> 1. Since November 2011, no payment has been made by the Plaintiffs under that certain adjustable rate promissory note . . . secured by the deed of trust . . . that is the subject of the current foreclosure [proceeding] and the loan . . . is, accordingly, in default at this time;
>
> 2. Subsequent to the entry by Judge Theodore S. Royster, Jr. on November 2, 2011 of the order vacating the . . . order of foreclosure entered by the Iredell County Clerk of Court in [10-SP-1503] . . . Defendant Wells Fargo obtained physical possession of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), which Note was presented to the Court at the November 5th hearing;
>
> . . .

> 4. New facts have occurred since Judge Royster's November 2, 2011 order in the initial foreclosure [proceeding], by way of subsequent default and Defendants' presentation of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), creating a change in circumstances that would preclude any *res judicata* effect of said order upon the current foreclosure [proceeding] and/or any other subsequent foreclosure proceeding;
>
> 5. Issues as to the *res judicata* effect, if any, upon past due moneys owed by the Plaintiffs upon the Note shall remain pending as the Court, by the entry of this Order, is not determining such issues at this point in time and such issues are hereby reserved for a later date, if so necessary.

The order denied plaintiffs' claim for declaratory judgment and ruled that plaintiffs' "other prayers for relief are hereby deemed to be moot[.]"

Plaintiffs appeal.

II. Standard of Review

"Our standard of review of a declaratory judgment is the same as in other cases. N.C. Gen. Stat. § 1-258[.]" *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596, 632 S.E.2d 563, 571 (2006). " 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (quoting *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 7, 657 S.E.2d 673, 678, *affirmed in part, review improvidently granted in part on other grounds*, 362 N.C. 675, 669 S.E.2d 320 (2008)). Findings of fact not challenged on appeal are binding on this Court. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Cross*, 191 N.C. App. at 117, 661 S.E.2d at 780 (quoting *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)).

III. Doctrine of *Res Judicata*

[1] Plaintiffs' primary argument is that Judge Royster's entry of an order vacating defendant's first foreclosure action barred the subsequent

foreclosure action under the doctrine of *res judicata*. " 'Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.' The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. 'When a court of competent jurisdiction has reached a decision on facts in issue, neither of the parties are allowed to call that decision into question and have it tried again.' " *Nicholson v. Jackson Cty. School Bd.*, 170 N.C. App. 650, 654-55, 614 S.E.2d 319, 322 (2005) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993), and *Green v. Dixon*, 137 N.C. App. 305, 308, 528 S.E.2d 51, 53 (2000) (other citations omitted).

However, "[i]t is well settled that the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953) (citation omitted). In this case, the trial court found two separate instances of new or changed circumstances: plaintiffs' default on their loan after entry of Judge Royster's order, and defendant's production of documentation of its status as holder of the note.

IV. Effect of Discharge in Bankruptcy

[2] Plaintiffs argue that the trial court erred by finding that their default on the loan after entry of Judge Royster's order constituted new facts or circumstances that rendered the doctrine of *res judicata* inapplicable. Plaintiffs assert that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. We do not reach the merits of this issue, because plaintiffs failed to preserve for appellate review the effect of a discharge in bankruptcy on the foreclosure action.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court.

Moreover, plaintiffs' argument is premised in part on their assertion that there was "no reaffirmation agreement entered" during the bankruptcy case. Plaintiffs fail to support this contention by citation to sworn testimony, affidavit, documentary evidence, or any other record evidence. It " 'is axiomatic that the arguments of counsel are not evidence.' " *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (quoting *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996)).

Plaintiffs failed to preserve for appellate review any issues pertaining to the effect of their bankruptcy proceeding on the foreclosure action, and have not supported their argument with citation to record evidence. Accordingly, we do not reach the merits of this argument.

As discussed above, the trial court found and concluded in relevant part that:

> New facts have occurred since Judge Royster's November 2, 2011 order in the initial foreclosure [special proceeding], by way of subsequent default and Defendants' presentation of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), creating a change in circumstances that would preclude any *res judicata* effect of said order upon the current foreclosure [special proceeding] and/or any other subsequent foreclosure proceeding.

Plaintiffs' appellate challenge is restricted to the trial court's finding that their continued default subsequent to entry of Judge Royster's order constituted new facts. Plaintiffs do not challenge the trial court's finding that defendant's production of proper documentation of its status as holder of the note separately established that "[n]ew facts have occurred . . . creating a change in circumstances" that precluded application of *res judicata* to defendant's second foreclosure proceeding. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). Given that plaintiffs failed to preserve this challenge to the trial court's order, the order must be affirmed.

V. Public Policy Considerations

Plaintiffs also argue that we should reverse the trial court's order based upon various public policy concerns. "Weighing . . . public policy considerations is the province of our General Assembly, not this Court." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008). This argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED.

Judges ERVIN and McCULLOUGH concur.

GREEN TREE SERVICING LLC, Plaintiff
v.
JIMMY LOCKLEAR and TRUDY LOCKLEAR, Defendants

No. COA13-1287

Filed 7 October 2014

Consumer Protection—North Carolina Debt Collection Act—manufactured home—individual alleged by debt collector to be liable for debt

The trial court erred by concluding that defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act in an action seeking to recover a manufactured home and its contents based upon the fact that required payments against the underlying debt had not been made. The trial court's order was reversed and the case was remanded to the superior court for further proceedings.

Appeal by defendants from orders entered 23 April 2013 and 5 August 2013 by Judge Thomas H. Lock in Robeson County Superior Court. Heard in the Court of Appeals 4 March 2014.

Jordan Price Wall Gray Jones & Carlton, by Paul T. Flick and Lori P. Jones, for Plaintiff.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for Defendants.

ERVIN, Judge.

Defendants Jimmie and Trudy Locklear appeal from orders dismissing the counterclaims that they had attempted to assert against Plaintiff and denying their motion seeking to have the order dismissing

their counterclaims set aside.[1] On appeal, Defendants contend that they have standing to pursue their claims under the North Carolina Debt Collection Act on the grounds that they occupy the status of "consumers" as that term is used in the relevant statutory provisions. After careful consideration of Defendants' challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Robeson County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts[2]

On 28 February 1998, Marvin and Mertice Locklear executed a Manufactured Home Retail Installment Contract and Security Agreement under which they purchased a manufactured home from Ted Parker Home Sales, Inc. According to the provisions of the contract between the parties, Ted Parker was authorized to repossess the manufactured home in the event that any act constituting a default as defined in the agreement occurred, including any failure to make the required monthly payments in a timely manner. Subsequently, Ted Parker assigned its rights under the contract to a pool serviced by Plaintiff.

By November 2004, Marvin and Mertice Locklear had both died, with Mertice Locklear having survived Marvin Locklear by approximately five years. Defendant Jimmie Locklear received a partial interest in the manufactured home that Marvin and Mertice Locklear had purchased from Ted Parker by virtue of the residuary clause contained in Mertice Locklear's will. Although Mertice Locklear's will was admitted to probate, the estate administration process was never completed. On 31 October 2012, Defendant Jimmie Locklear qualified as the collector of Mertice Locklear's estate.

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1. Although the notice of appeal that Defendants filed made reference to both of the orders mentioned in the text of this opinion, Defendants have not, as Plaintiff correctly notes, made any argument challenging the denial of their motion for a new trial. As such, the validity of the trial court's order denying Defendant's motion for a new trial is not properly before us.

2. The facts set forth in the text of this opinion are derived from an examination of the allegations set out in Defendants' amended counterclaim as compared to the allegations contained in their original pleading. *See Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (holding that, "[w]hile the excerpt from the original complaint was competent as evidence, as a pleading it was superseded by the amended complaint").

Defendants took possession of the manufactured home used to secure the original debt in 2004 and used it as their principal residence. Although Plaintiff was aware that Defendants had begun to occupy the manufactured home, it did not provide Defendants with an opportunity to assume the underlying debt or take any other action to make Defendants liable on the obligation created under the original contract between Marvin and Mertice Locklear and Ted Parker and knew that Defendants, as compared to Mertice Locklear's estate, were not personally obligated to make the payments required under the original contract. As a result, the monthly statements that Plaintiff sent to the residence were addressed to "Mertice Locklear C/O Jim and Trudy Locklear."

On or about 12 September 2011, Plaintiff sent Defendants a document discussing a deferral of the monthly payments required under the original agreement that included language to the effect that the document had been transmitted to Defendants as part of "an attempt to collect a debt." After entering into a deferral agreement with Plaintiff, Defendants made the required payments prior to the payment applicable to January 2012 in a timely manner.

On or about 12 June 2012, an agent of Plaintiff called Defendant Jimmie Locklear on his cell phone during work hours despite the fact that Plaintiff had previously been advised not to attempt to contact Defendant Jimmie Locklear while he was at work. Instead of answering this phone call, Defendant Jimmie Locklear immediately terminated the call in compliance with his employer's strict prohibition against engaging in cell phone conversations during work hours. As a result, Plaintiff's agent called Defendant Jimmie Locklear again and left him a message to the effect that Defendant Jimmie Locklear had "just hung up on your account manager," that "[i]t's probably not going to go well" for Defendant Jimmie Locklear, and that Defendant Jimmie Locklear should expect to receive a legal notice in the mail. Although Defendant Trudy Locklear called Plaintiff's agent and informed him that she would be willing to make two payments of $1,000 each by a certain date in order to bring the payments required under the original purchase contract current, Plaintiff's agent responded by telling Defendant Trudy Locklear that Defendants would need to make the required payments before the date that Defendant Trudy Locklear had mentioned and suggested that she pawn her jewelry and lawnmower in order to make the required payment. As a result, Defendant Trudy Locklear borrowed money from an unknown source or sources and used the money that she borrowed on this occasion to send a payment to Plaintiff on 15 June 2012.

Subsequently, Defendant Trudy Locklear called Plaintiff to confirm that the payment that she had made had been received and was told that Defendants had been granted a deferral for June and July, so that their next payment was not due until 5 August 2012. In spite of this understanding, Plaintiff sent a letter to Defendants on or about 18 June 2012 indicating that Plaintiff had begun to take the steps necessary to obtain possession of the collateral, with this letter containing the statement that the "communication [was] from a debt collector" and represented an "attempt to collect a debt."

On 20 July 2012, another of Plaintiff's agents told Defendant Trudy Locklear that the oral agreement that she had made with Plaintiff in June 2012 had not been entered into Plaintiff's recordkeeping system, that there would be no deferral of the June and July payments, and that the overdue payments were due immediately. Although Defendant Trudy Locklear offered to pay $1,000 for the months of September and October, her offer was rejected. Instead, Plaintiff's agent asked Defendant Trudy Locklear where her husband's money was going. In response to Defendant Trudy Locklear's assertion that Defendants had other financial obligations in addition to those associated with the manufactured home that Marvin and Mertice Locklear had purchased from Ted Parker, Plaintiff's agent suggested that Defendants defer payments on their van in order to ensure that Plaintiff received payment.

On 24 July 2012, Defendant Trudy Locklear spoke with another of Plaintiff's agents, who asked her, in response to Defendant Trudy Locklear's inquiry concerning the amount of time that would be available before Defendants had to vacate the manufactured home, "What are you going to do, live in your van?" After making that statement, Plaintiff's agent hung up on Defendant Trudy Locklear. Subsequently, another of Plaintiff's agents called Defendant Trudy Locklear and stated that Defendants would not be forced to vacate the manufactured home in the event that the required monthly payment was automatically drafted from their bank account. In response to Defendant Trudy Locklear's comment that Defendants' account did not contain sufficient funds to support the making of the required payments, Plaintiff's agent stated that Plaintiff would refund the resulting overdraft fee as long as a draft was scheduled. Although Defendant Trudy Locklear agreed to enter into the proposed arrangement based upon her belief that Defendants would be forced to vacate the manufactured home in the event that she acted otherwise, Defendants later closed the account in question before any draft was actually made against that account.

On or about 30 August 2012, Defendants notified Plaintiff that they were represented by counsel. On 12 September 2012, Plaintiff contacted counsel for Defendants and agreed to stop contacting Defendants by telephone. Even so, Plaintiff's agents contacted Defendant Jimmie Locklear on or about 26 November 2012 using a work number that he had requested that Plaintiff refrain from using. In the course of the ensuing conversation, Plaintiff's agent indicated that Plaintiff was attempting to collect a debt. The same agent contacted Defendant Trudy Locklear on the same date for the same purpose.

B. Procedural Facts

On 7 November 2012, Plaintiff filed a complaint against Defendants seeking to recover the manufactured home and certain of its contents based upon the fact that required payments against the underlying debt had not been made. On 4 December 2012, Defendants filed a responsive pleading in which they responded to the material allegations contained in Plaintiff's complaint, moved to dismiss Plaintiff's complaint, and asserted a number of counterclaims against Plaintiff, including claims based upon alleged violations of the North Carolina Debt Collection Act and the equivalent provisions of federal law.

On 22 January 2013, the trial court entered an order denying Defendants' dismissal motion. On 29 January 2013, Plaintiff filed a motion to dismiss Defendants' counterclaims. On 4 March 2013, Defendants filed a response to Plaintiff's dismissal motion. On 18 March 2013, Defendants filed an amended counterclaim that sought relief from Plaintiff on the same essential basis set forth in their original responsive pleading. On 22 April 2013, Plaintiff filed a motion seeking the entry of a final judgment in its favor with respect to the repossession claim asserted in its complaint. On 23 April 2013, the trial court entered an order dismissing Defendants' counterclaims.

On 2 May 2013, Defendants filed a motion seeking the entry of an order setting aside the order dismissing their counterclaims. On 20 May 2013, the trial court entered a final judgment awarding Plaintiff possession of the manufactured home. Defendants' motion to set aside the order dismissing their counterclaims was denied by the trial court on 5 August 2013. Defendants noted an appeal to this Court from the trial court's orders dismissing their counterclaims and denying their motion to set aside the order dismissing their counterclaims.[3]

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3. As a result of their failure to advance any argument challenging the dismissal of the claims that they had asserted against Plaintiff under the federal Fair Debt Collection Practices Act, Defendants have abandoned any claims that they originally asserted under federal law.

II. Legal Analysis

In their brief, Defendants argue that the trial court erred by granting Plaintiff's motion to dismiss their counterclaims, a decision that was predicated on the theory that Defendants were not "consumers" for purposes of the North Carolina Debt Collection Act. In support of this contention, Defendants argue that the plain language of the statute necessitates a conclusion that individuals, like themselves, who are alleged by a debt collector to be liable for a debt and have a sufficient connection to the underlying obligation have "consumer" status for purposes of the North Carolina Debt Collection Act. We find Defendant's argument to be persuasive.

A. Standard of Review

We have previously discussed the standard of review utilized in the course of reviewing orders addressing standing-related issues in *Slaughter v. Swicegood*, 162 N.C. App. 457, 463-64, 591 S.E.2d 577, 582 (2004), in which we stated that:

> [t]he North Carolina Rules of Civil Procedure require that "every claim shall be prosecuted in the name of the real party in interest." [N.C. Gen. Stat.] § 1A-1, Rule 17(a) (2003). "A real party in interest is 'a party who is benefited or injured by the judgment in the case' and who by substantive law has the legal right to enforce the claim in question." *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 802 (1984) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E.2d 206, 209 (1977)). A party has standing to initiate a lawsuit if he is a "real party in interest." *See Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citing *Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997)). A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003). An appellate court should review a trial court's order denying a motion for failure to state a claim "to determine 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under

> some legal theory.' " *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000) (quoting *Shell Island Homeowners Ass'n Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)).

We will now utilize this standard of review in determining whether the trial court properly dismissed Defendants' counterclaims.

B. Defendants' Standing

According to the North Carolina Debt Collection Act, entities operating as "debt collectors" are prohibited from engaging in certain activities in the course of their work, such as using obscene, profane or abusive language, N.C. Gen. Stat. § 75-52(1); calling an individual at his or her place of employment in violation of an explicit instruction to the contrary, N.C. Gen. Stat. § 75-52(4); failing to disclose that the purpose of a particular communication is to collect a debt, N.C. Gen. Stat. § 75-54(2); erroneously describing the creditor's rights or intentions, N.C. Gen. Stat. § 75-54(4); falsely representing that the debtor may be required to pay attorneys' fees, N.C. Gen. Stat. § 75-54(6); and communicating with any consumer by means other than the transmission of an account statement after having been notified that the consumer is represented by counsel, N.C. Gen. Stat. § 75-55(3). However, "before a claim for unfair debt collection can be substantiated, three threshold determinations must be satisfied. First, the obligation owed must be a 'debt'; second, the one owing the obligation must be a 'consumer'; and third, the one trying to collect the obligation must be a 'debt collector.' " *Reid v. Ayers*, 138 N.C. App. 261, 263, 531 S.E.2d 231, 233 (2000) (citing N.C. Gen. Stat. § 75-50(1)-(3)). According to the relevant statutory provisions, a "consumer" is "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes," N.C. Gen. Stat. § 75-50(1), with a "debt" being "any obligation owed or due or alleged to be owed or due from a consumer." N.C. Gen. Stat. § 75-50(2). An individual or entity is "a debt collector" if he, she, or it "engag[es], directly or indirectly, in debt collection from a consumer." N.C. Gen. Stat. § 75-50(3). As a result, the ultimate issue raised by Defendants' challenge to the dismissal of their counterclaims is the meaning of the term "consumer" as used in N.C. Gen. Stat. § 75-50(1).

"Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed

differently." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citations omitted). According to its plain language, N.C. Gen. Stat. § 75-50(1) treats individuals who have incurred both actual and alleged debts as "consumers." When this reference to an "alleged debt" is considered in conjunction with the fact that N.C. Gen. Stat. § 75-50(2) includes both "obligation[s] owed or due or alleged to be owed or due from a consumer" within the statutory definition of a "debt," it is clear that the General Assembly contemplated that the protections available under the North Carolina Debt Collection Act would be available to both those who actually owed the debt that the debt collector was seeking to collect and those whom the debt collector claimed to owe the debt even if the debtor denied the existence of the underlying obligation. Any other interpretation of the relevant statutory language would have the absurd result of making the relevant statutory protections unavailable to those who had a viable defense to the underlying claim that the debt collector was seeking to enforce. As a result of the fact that Defendants sufficiently alleged that Plaintiff sought to collect the amount owed under the original contract between Marvin and Mertice Locklear and asserted that Defendants were liable for that obligation, we believe that Defendants sufficiently alleged that they were "consumers" for purposes of N.C. Gen. Stat. § 75-50(1).

In seeking to persuade us that Defendants do not fall within the category of "consumers" as defined in N.C. Gen. Stat. § 75-50(1), Plaintiffs argues that our decision in *Holloway v. Wachovia Bank & Trust Co.*, N.A., 109 N.C. App. 403, 428 S.E.2d 453 (1993), *aff'd in part*, *rev'd in part*, 339 N.C. 338, 452 S.E.2d 233 (1994), is controlling and required the trial court to dismiss Defendants' counterclaims. In *Holloway*, one of the plaintiffs obtained a loan, on which she later defaulted, for the purpose of purchasing a car. *Holloway*, 109 N.C. App. at 406, 428 S.E.2d at 455. According to the plaintiffs' complaint, an agent for the defendant pointed a firearm at the debtor and various members of her family during the repossession process. *Id.* at 406-07, 428 S.E.2d at 455. On appeal, this Court affirmed the trial court's decision to dismiss the claims that had been asserted based upon the pointing of a gun at members of the debtor's family on the grounds that, "[a]s this definition indicates, the legislative intent of the statute is to protect the consumer, not bystanders or those who happen to accompany the consumer at the time of an alleged [N.C. Gen. Stat.] Chapter 75, Article 2 violation." *Id.* at 413, 428 S.E.2d at 459. We do not, however, believe that our decision in *Holloway* has any bearing on the proper outcome of this case given our conclusion that Defendants were not mere bystanders. Instead of simply standing around while Plaintiff engaged in efforts to collect a debt from a third

party, Defendants were the direct targets of Plaintiff's activities. As a result, the trial court's decision to dismiss Defendant's counterclaims cannot be upheld on the basis of the logic set out in *Holloway*.

In addition, Plaintiff argues that, given the fact that we cited the decision of the United States District Court for the Middle District of North Carolina in *Fisher v. Eastern Air Lines, Inc.*, 517 F. Supp. 672 (M.D.N.C. 1981), in the course of discussing the definition of a "consumer" in *Holloway*, we are obligated to utilize the rationale employed in *Fisher* in deciding the validity of Defendants' challenge to the trial court's order in this case. In *Fisher*, the plaintiff sought relief for alleged violations of the North Carolina Debt Collection Act arising from the defendant's efforts to collect a debt from the plaintiff that was, in fact, owed by an individual with a name that was similar to the plaintiff's name. *Fisher*, 517 F. Supp. at 673. In holding that the plaintiff was not a "consumer" as defined in N.C. Gen. Stat. § 75-50(1), the court stated that, in order for an individual to be a "consumer," "he must have had at least some connection with the underlying debt or alleged debt" and that the statutory reference to an "alleged debt" did not encompass "an instance in which a debt collector mistakenly identified the person who owed it money or allegedly owed it money" given the necessity that the "debt" or "alleged debt" be "incurred." *Id.* As a result, the *Fisher* court held that the relevant statutory language "does not evidence an intent by the legislature to provide protection for persons mistakenly thought to have been the one who incurred an obligation." *Id.*

We are simply unable to read *Fisher* as narrowly as Plaintiff does. As we read its decision, the *Fisher* court simply held that there must be some connection between the debt or alleged debt and the individual from whom recovery is sought. In light of that fact, a simple case of mistaken identity does not involve the sort of connection between the "consumer" and the "alleged debt" contemplated by the relevant statutory language. In this case, however, Defendants are in possession of the manufactured home that secured the original debt evidenced by the contract between Marvin and Mertice Locklear, on the one hand, and Ted Parker, on the other. As a result, even if we are bound by the logic utilized by the *Fisher* court, a subject about which we express no opinion, such a determination does not necessitate a decision to affirm the trial court's order.

After carefully reviewing the record, we believe that the facts present in this case closely resemble those underlying the decision of the United States District Court for the Eastern District of North Carolina in *Redmond v. Green Tree Servicing, LLC*, 941 F. Supp. 2d 694 (E.D.N.C.

2013), in which the debtor incurred a debt pursuant to a real estate financing agreement. *Redmond*, 941 F. Supp. 2d at 695. After the original debtor died, the property used to secure the debt was left to his wife, who rented the property to the plaintiffs. *Id.* Although the creditor knew that the plaintiffs possessed the property used to secure the original debt, it never entered into an agreement with the plaintiffs under which the plaintiffs were made liable for the underlying debt and never requested the plaintiffs to assume responsibility for paying the underlying debt. However, the defendant did attempt to collect the debt from the plaintiffs on numerous occasions. *Id.* at 695-96.

Although the defendant in *Redmond*, like Plaintiff here, argued that the plaintiffs were not "consumers" as that term is defined in N.C. Gen. Stat. § 75-50(1) on the grounds that they "did not actually incur the" debt, *id.* at 697, the court rejected that argument, reasoning that "the plain language of the statute references both *alleged* debts and *alleged* debtors" and stating that "[t]his language would be rendered superfluous if the court imposed on plaintiffs an additional requirement that they demonstrate they themselves actually incurred the debt." *Id.* at 698. In response to the defendant's argument, in reliance upon *Fisher*, "that giving weight and meaning to the statute's use of 'alleged' would render the statute's use of 'incurred' superfluous," the *Redmond* court noted that "the plaintiff [in *Fisher*] did not have standing because the debt collector had attempted to collect from him on the basis of mistaken identity," while, in this case, "there [was] a strong connection between the plaintiffs and the underlying debt" and "the defendant actively worked to perpetuate the plaintiffs' impression that they were legally bound by the debt." *Id.* As a result, given the existence of "a strong connection between the plaintiffs and the underlying debt" and the fact that the debt collector "actively worked to perpetuate the plaintiffs' impression that they were legally bound by the debt," *id.*, the *Redmond* court allowed the plaintiff's claim to proceed. We find the approach utilized in *Redmond* persuasive.

In its brief, Plaintiff argues that *Redmond* is inapplicable to the present case because no one misled Defendants into believing that they owed a debt and because, on the contrary, everyone understood that the underlying debt was owed by Mertice Locklear's estate. However, the debt collector in *Redmond*, like Plaintiff, made repeated contacts with Defendants in an attempt to collect the debt. *Id.* at 695. In addition, the defendant before the Court in *Redmond*, like Plaintiff here, threatened to lock the plaintiffs out of the home or have them evicted in the event that the plaintiffs did not make payments against the underlying

obligation. *Id.* at 696. In addition, Plaintiff's agents identified themselves to Defendant Jimmie Locklear as "your" account manager, allowed Defendants to defer making monthly payments, and engaged in other actions that were tantamount to treating Defendants as if they were liable on the underlying debt. As a result, we are persuaded by the similarity between the actions taken by the debt collector at issue in *Redmond* and the actions taken by Plaintiff in this instance and conclude that Plaintiff acted in such a manner as "to perpetuate the plaintiffs' impression that they were legally bound by the debt," *id.* at 698, despite the fact that Defendants never officially assumed the original obligation undertaken by Marvin and Mertice Locklear.

In addition, the record reflects the existence of a strong connection between Defendants and the underlying debt. The only connection between the *Redmond* plaintiffs and the underlying debt was the fact that the plaintiffs were living on the property used to secure the underlying debt. *Id.* at 695. Similarly, in this case, Defendants resided in the property that secured the underlying debt. In addition, Defendant Jimmie Locklear had an expectancy interest in the manufactured home by virtue of the residuary clause contained in Mertice Locklear's will. Although "mobile homes are considered personal property," *Patterson v. City of Gastonia*, __ N.C. App. __, __, 725 S.E.2d 82, 93, *disc. review denied*, 366 N.C. 406, 759 S.E.2d 82 (2012), and although "personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate," N.C. Gen. Stat. § 28A-15-1(a), N.C. Gen. Stat. § 28A-15-2(a) provides that, "[s]ubsequent to the death of the decedent and prior to the appointment and qualification of the personal representative or collector, the title and the right of possession of personal property of the decedent is vested in the decedent's heirs"; that, "upon the appointment and qualification of the personal representative or collector, the heirs shall be divested of such title and right of possession which shall be vested in the personal representative or collector relating back to the time of the decedent's death for purposes of administering the estate of the decedent"; and that, "if in the opinion of the personal representative, the personal representative's possession, custody and control of any item of personal property is not necessary for purposes of administration, such possession, custody and control may be left with or surrendered to the heir or devisee presumptively entitled thereto." As a result of the fact that Defendant Jimmie Locklear was in possession of the manufactured home both before and after his appointment as collector of Mertice Locklear's estate in 2012 and the fact that, in the absence of a

determination that the manufactured home needs to be sold in order to pay the debts of the estate, the property will pass to him under Mertice Locklear's will, Defendants clearly have a sufficiently "strong connection" to the property to afford them standing to maintain their claims under the North Carolina Debt Collection Act. As a result, based upon our reading of the relevant statutory language and the logic of *Redmond*, 941 F. Supp. 2d at 698 (holding that the Act "extend[s] to claims by individuals against whom a debt collector has made purposeful, targeted, and directed attempts to collect a debt alleged to be owed by the plaintiffs"), which we find to be persuasive, we hold that Defendants have alleged sufficient facts to establish their standing to maintain the claims that they have asserted against Plaintiff under the North Carolina Debt Collection Act.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by concluding that Defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Robeson County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges McGEE and STEELMAN concur.

[236 N.C. App. 526 (2014)]

MICHAEL L. GREEN, Plaintiff
v.
JANA M. GREEN, Defendant

No. COA14-150

Filed 7 October 2014

Appeal and Error—appealability—notice of appeal—interlocutory order and judgment—affected final judgment

The Court of Appeals had jurisdiction to hear an appeal from an equitable distribution (ED) judgment, a discovery order, and a sanctions judgment. Appellant timely filed notice of appeal from the ED judgment. Moreover, appellant timely objected to the discovery order and sanctions judgment; (2) the order and judgment were interlocutory and not immediately appealable; and (3) the order and judgment involved the merits and necessarily affected the ED judgment.

Appeal by defendant from judgment entered 12 July 2013 by Judge John J. Covolo in District Court, Nash County. Heard in the Court of Appeals 12 August 2014.

Teresa DeLoatch Bryant, for plaintiff-appellee.

Judith K. Guibert, for defendant-appellant.

STROUD, Judge.

Defendant Estate of Jana M. Green[1] appeals from a judgment on equitable distribution entered by the District Court, Nash County on 12 July 2013. On appeal, defendant argues, *inter alia*, that the trial court erred by imposing sanctions against her which decreed that she had "forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court." The record indicates that the order which set a deadline of 4 December 2012 for the filing of defendant's equitable distribution affidavit was entered *after* 4 December 2012, on 10 December 2012, so that

1. Defendant died during the pendency of this appeal, on 7 February 2014, and by order of this Court her estate was substituted as a party to this appeal. We will nevertheless refer to the appellant as "defendant" in this opinion.

she had no notice of the deadline until after it had passed. Due to the lack of notice and other serious procedural and legal errors, we reverse the order of 10 December 2012, the 19 December 2012 judgment, and the 12 July 2013 judgment thereafter entered.

I. Background

Plaintiff and defendant were married in 1990 and separated from one another on or about 15 October 2009. On 1 December 2009, plaintiff filed a complaint for divorce from bed and board and equitable distribution. On 28 December 2009, attorney Larry A. Manning obtained an extension of time for defendant to answer, extending the time to 30 January 2009. Through defendant's counsel Mr. Manning, defendant filed her answer and counterclaims for divorce from bed and board, post-separation support, equitable distribution, and attorney's fees on 2 February 2010. On 5 August 2010, plaintiff filed a request for production of documents regarding defendant's counterclaim for post-separation support, which had been served upon defendant, through her counsel; on the same date, plaintiff also filed a reply to defendant's counterclaims, which was also served upon defendant's counsel. At this point, the record falls silent for nearly two years.

The next document which appears in the supplement to the record is a hand-written letter, dated 3 February 2012, from defendant to the Nash County Clerk of Court, which states as follows: "Please send any documents or order in this case to [defendant's name and an address in Indiana.] Mr. Larry Manning has refused to notify or forward any court dates, motions, orders in this case so I can have a chance to protect my right." The record does not contain a motion for withdrawal by Mr. Manning, any order releasing him as the attorney of record for defendant, nor any indication of why he disappeared from the case.[2]

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2. "An attorney at law is a sworn officer of the court with an obligation to the public, as well as his clients, for the office of attorney at law is indispensable to the administration of justice. The attorney's obligation crystallizes into one of noblesse oblige. As between the attorney and his client the relationship may ordinarily be dissolved in good faith at any time, but before an attorney of record may be released from litigation he must satisfy the court that he is justified in withdrawing. The first requirement for his withdrawal is proof of timely notice to his client." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965) (citations and quotation marks omitted). Rule 16 of North Carolina's General Rules of Practice for the Superior and District Courts, entitled "Withdrawal of Appearance[,]" provides that "No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." North Carolina's General Rules of Practice for the Superior and District Courts, rule 16.

On 17 October 2012, the trial court entered the "Seventh District Judge Designation on Equitable Distribution of Property[;]" ("Judge Designation") (original in all caps), this document stated that "the parties hereby request designation of John J. Covolo as the judge to determine the equitable distribution claim." Although the "Judge Designation" document has blanks for the signatures of attorneys for both plaintiff and defendant to agree to Judge Covolo, the document was signed only by R. D. Kornegay, attorney for plaintiff; defendant's attorney's signature line is blank. The "Judge Designation" document also has a second section which states that "[t]he parties are unable to agree upon designation of a Judge to determine the equitable distribution issues. [(sic)] hereby applies to the Court for designation of a Judge." Plaintiff's attorney signed the second section of the "Judge Designation" document as well, so it is unclear whether the parties had agreed on the designation or if they did not agree. In any event, the Chief Judge of District Court in Nash County, William C. Farris, signed the "Judge Designation" document, designating Judge Covolo to determine the equitable distribution claim.

On 22 October 2012, nearly three years after plaintiff filed his equitable distribution complaint, he filed his equitable distribution affidavit ("ED Affidavit").[3] There is no certificate of service indicating that plaintiff's ED Affidavit was served upon defendant or any counsel for defendant.[4] On the same date, plaintiff filed a notice of hearing upon the equitable distribution claim, setting the hearing for 6 November 2012, and this notice of hearing was served upon defendant by mail to her at the address she provided in Indiana.[5] The record contains no indication

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3. North Carolina General Statute § 50-21(a) requires that "[w]ithin 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property." N.C. Gen. Stat. § 50-21(a) (2009). Furthermore, in District Court in Nash County, North Carolina Rule 4 of the "Rules for Trial and Settlement Procedures in Equitable Distribution and Other Family Financial Cases[,]" ("Local Rules") (original in all caps), the ED Affidavit "required by G.S. 50-21(a) shall be prepared using the form of affidavit attached to the Rules. Unless extended for good cause by the court, statutory time limits on the exchange of properly prepared affidavits are to be strictly observed. There shall be a presumption that sanctions are to be imposed upon willful non-compliance." Local Rules, rule 4.

4. According to the Cc: line of the letter from plaintiff's counsel to the Nash County Assistant Clerk of Court, requesting that the ED Affidavit be filed, he sent both plaintiff and defendant a copy of the ED Affidavit on or about 17 October 2012.

5. The notice also stated that "[t]he issuing party is ready for hearing upon the issues to be calendared, but the parties have not agreed upon the court date." (Emphasis in original.)

that plaintiff had complied with any of the requirements of North Carolina General Statute § 50-21(d), including a scheduling and discovery conference[6], possible mediation[7], and a final pretrial conference.[8]

Thereafter, the trial court entered an "ORDER OF CONTINUANCE" which continued "this matter" to 4 December 2012 ("Continuance Order"). We cannot discern exactly what was continued to when by the Continuance Order, nor could counsel at the oral argument of this case explain the meaning of the Continuance Order. Normally hearings are continued to a date in the future instead of the past, but here though the Continuance Order was filed on 6 November 2012, the trial court signed the order on 6 December 2012. To be clear, the trial court did not even abbreviate the date but wrote out "6th . . . December[.]" We assume that the clock for the Clerk of Court's office was working properly, so perhaps the trial judge inadvertently wrote the wrong month when signing the Continuance Order. But there were court dates set for both 6 November 2012 -- plaintiff's notice of hearing for the equitable distribution claim -- and 4 December 2012 – Continuance Order for "this matter[.]" Furthermore, though the Continuance Order provides numerous reasons for the trial court to check for why the matter is being continued, none are checked on this Continuance Order. Lastly, in the consent portion of the Continuance Order, only plaintiff's attorney has signed. There is no indication in the record that the Continuance Order was served upon defendant or any counsel for defendant.

On 10 December 2012, the trial court entered an order ("ED Affidavit Order") which states that it was based upon the hearing held on 6 November 2012, "upon the Plaintiff's request for the Court to structure a time frame within which any and all matters pertaining to equitable distribution or any remaining issues raised in the pleading would be disposed of . . . ." [9] Defendant was not present or represented. The ED Affidavit Order stated as follows:

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6. "Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference." N.C. Gen. Stat. § 50-21(d) (2009).

7. Mediation is required by Rule 7 of the Local Rules prior to scheduling an equitable distribution case for trial, unless the case has been exempted from mediation. *See* Local Rules, rule 7. Mediation is to "be completed within 90 days of the scheduling conference or 210 days of the filing of the complaint, whichever occurs first." Local Rules, rule 10(c).

8. Rule 10(d) of the Local Rules requires that "[a] final pre-trial conference shall be held within 60 days of the completion of mediation." Local Rules, rule 10(d).

9. We note that the Local Rules, particularly Rule 10, provide detailed "timelines" for equitable distribution cases. See Local Rules, rule 10(c). Under Rule 11, "[f]or good cause

[I]t appearing that the Plaintiff has in fact filed his equitable distribution affidavit in timely fashion but the Defendant, for whatever reason has failed or refused to do so; and it appears as if the Defendant has not appeared in court but has had some alleged reason not to be in court each occasion the case has been set for trial; and on the occasion first mentioned hereinabove, the Defendant forwarded a correspondence dated November 5, 2012, which she did not copy Plaintiff's attorney with (with the exception of the copy of a purported medical document at the bottom thereof) which was either in the file or provided to the presiding judge by the Clerk when the calendar was called; and Plaintiff's attorney indicated to the Court that they thought it was frivolous, unreasonable, and inequitable for the Defendant to be able to continually avoid a hearing in this case for reasons that cannot be substantiated when they have otherwise complied with the law and needed for the Court to take action to structure time limits within which things could happen; and the Court reviewed the medical document at the bottom of the Plaintiff's November 5 correspondence but could not decipher or understand the handwriting therein and did not find the letter or the attachment to be reasonable under the circumstances; and, based upon the pleadings in the file and the motion of Plaintiff's counsel, the Court does ORDER,

ADJUDGE, AND DECREE as follows:

1. That the Defendant shall have until December 4, 2012 in which to file her equitable distribution affidavit, which is already well passed [(sic)] the time allowed by law, and should she not have her affidavit filed by that time her right to do so shall be forfeited and she and the Court will be bound by the information set forth in the Plaintiff's Equitable Distribution Affidavit and thereafter she will not be allowed any additional time within which to file said document.

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the Presiding Judge may modify the [rule 10] timelines[,]" but the record contains no indication of any order modifying the rules. *See* Local Rules, rule 11. Perhaps the 10 December 2012 order could be considered as an order modifying the requirements of the rules except that it does not mention any statute or local rule nor does it mention any "good cause" for modification. *Id.*

> 2. That if either party desires any further discovery, it shall be completed on or before December 4.
>
> 3. That at the December 4 calendar, the Court shall determine a final date for trial in this matter.
>
> 4. For such other and further relief as the Court seems just and proper in the nature of this cause.

The record contains no indication that the ED Affidavit Order was served on defendant or any counsel for defendant.

The letter regarding a medical excuse referred to in the ED Affidavit Order was a letter from defendant, dated 5 November 2012, in which she stated that her surgeon, Dr. Benjamin Chiu, of Kokomo, Indiana, had forbidden her from traveling to the hearing on 6 November 2012. At the bottom of defendant's letter was a handwritten note, which we have no difficulty deciphering, on a prescription form for Howard Regional Health System, of Kokomo, Indiana, stating that "Pt. to be excused from travel/work until follow up visit in 1-2 weeks[.]" Defendant also stated in the letter that she had told plaintiff's attorney the dates she could attend court, and he set the 6 November 2012 date against her wishes.

Defendant's medical condition was a recurring theme throughout the case. Defendant's counterclaim alleged that she suffered "from a number of medical conditions" which made "her unable to support herself." Plaintiff replied that defendant "malingers" and would "say or do anything that she can to not work an honest day's work." But the record contains no substantive evidence regarding defendant's medical condition. In addition, despite the trial court's statement in the ED Affidavit Order that "the Defendant has not appeared in court but has had some alleged reason not to be in court each occasion the case has been set for trial[,]" our record contains no indication whatsoever that this case had ever been set for any sort of hearing before 6 November 2012.

On 4 December 2012, the matter came on for hearing again, and a judgment was filed on 19 December 2012 as a result of this hearing ("Sanctions Order"). The Sanctions Order stated as follows:

> [I]t appearing that the matter was before the Court based upon the Plaintiff's request (all of which was relayed to the Court at its last session when Judge Covolo was presiding) asking that the Defendant forfeit her right to file any further equitable distribution documents for her failure to have her equitable distribution affidavit filed with the Court the date first referenced hereinabove, and for

the Court to set this case before the undersigned Judge Presiding, who is the designated judge, for the final equitable distribution hearing on January 8, 2013; and it appearing that the Plaintiff was in court with his attorney of record, Robert D. Kornegay, Jr., and that the Defendant was not in court, although attorney Katherine Fisher informed the Court that she had been contacted by the Defendant, and had a telephone conference scheduled with her the following day (December 5) at 3:00 p.m.; and, based upon the pleadings in the file, the statement of counsel, and the proceedings, the Court does make the following FINDINGS OF FACT:

1. That all parties have had due and adequate notice of the proceedings and that the parties and the subject party are properly before the Court.

2. That the last order of the Court gave to the Defendant the right and opportunity to file her equitable distribution affidavit by the date first referenced hereinabove, but that no pleadings of any other or further type have been filed with or received by the Court. That the Defendant has had plenty [of] adequate time under all the circumstances to file her pleadings and for her lack or inability of having done so, the Court does find that it is not unreasonable that the Defendant has therefore forfeited any further right to file her equitable distribution affidavit and the identification, valuation, and classification of all said assets and debts as provided by the Plaintiff in his equitable distribution affidavit shall hereinafter be those values that shall be considered and heard by the Court.

3. That there has been discovery pending since August of 2010, whereby the Plaintiff filed discovery on the Defendant and she has not made any valid attempt to provide the information required therein by law.

4. That this matter has been pending for a long period of time and it is right, fair, and reasonable that the parties should be able to move forward with their lives and conclude the issues raised in the litigation and therefore the case will be set for trial on the issue of equitable distribution of property at the undersigned Judge's next session of court for January 8, 2013.

> NOW, THEREFORE, based upon the foregoing Findings the Court makes the following CONCLUSIONS OF LAW:
>
> 1. That all parties have had due and adequate notice of these proceedings and that the parties and the subject matter are properly before the Court.
>
> 2. That the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court.
>
> NOW, THEREFORE, based upon the foregoing Findings and Conclusions the Court does hereby ORDER, ADJUDGE AND DECREE:
>
> 1. That the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court.
>
> 2. That this case is hereby set for hearing on equitable distribution of property at the Undersigned's next session of court for January 8, 2013.
>
> 3. That this matter shall be retained for further consideration by the court.

The record contains no indication that the Sanctions Order was served upon defendant or any counsel for defendant.

The 8 January 2013 court date was continued, by consent of both plaintiff and defendant, to the March or April 2013 term of court with Judge Covolo. An order for peremptory setting for 5 March 2013 was filed on 17 January 2013, and this was served upon defendant. On 23 January 2013, plaintiff's counsel also filed a notice of hearing on equitable distribution for 5 March 2013, and this was served upon defendant.

The equitable distribution trial was held on 5 March 2013. Plaintiff was present with his attorney and defendant was present, *pro se*. The 12 July 2013 judgment ("ED Judgment") stated,

> the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to the same by virtue of a Judgment dated December 14, 2012, of record in this matter, and that as a result thereof the Plaintiff's equitable distribution affidavit, and his documentation in support thereof, in addition to the testimony of the parties, and any documentation offered by the Defendant, was the sole source of the Court's identification, valuation, and classification of marital property; and, based upon the pleadings in the file, the testimony of the parties and their documentary evidence, and the statement of counsel, the Court does make the following FINDINGS OF FACT[.]

Ultimately, the trial court made findings of fact consistent with plaintiff's ED Affidavit and evidence and awarded an unequal distribution of property in favor of plaintiff. Defendant filed a *pro se* "NOTICE OF APPEAL" appealing "the ruling and judgment of the Nash County District Court entered on July 12, 2013[.]"

II. Jurisdiction

[1] Defendant asserts on appeal that the ED Judgment of 12 July 2013 is a final, appealable order, and she also challenges the "December 10, 2012 discovery order and the December 19, 2012 sanctions Judgment" which were interlocutory orders and not immediately appealable; this is true, but defendant also failed to give notice of appeal identifying the ED Affidavit Order and the Sanctions Order, so we must first consider whether this Court has jurisdiction to consider her appeal as to these decisions.

> We note that while Rule 3(d) of the Rules of Appellate Procedure provides that the notice of appeal shall designate the judgment or order from which appeal is taken, N.C. Gen. Stat. § 1–278 (2013) provides: Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1–278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must

> have involved the merits and necessarily affected the judgment. All three conditions must be met.

Tinajero v. Balfour Beatty Infrastructure, ___ N.C. App. ___, ___, 758 S.E.2d 169, 175 (2014) (citation and quotation marks omitted).

We find that all three conditions for defendant's appeal as to the ED Affidavit Order and the Sanctions Order have been met. *See id.* As to the timeliness of defendant's objection, based upon the record before us, we cannot determine when, if ever, the ED Affidavit Order and the Sanctions Order were served upon defendant. Clearly defendant became aware of the ED Affidavit Order and the Sanctions Order at some point in time, but there is no certificate of service[10] on either document. Under North Carolina General Statute § 1A-1, Rule 58, the ED Affidavit Order and the Sanctions Order should have been served upon defendant within three days of their entry:

> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5.

N.C. Gen. Stat. § 1A-1, Rule 58 (2009). Under North Carolina Rule of Appellate Procedure Rule 3, defendant would have had 30 days to appeal from the ED Affidavit Order or Sanctions Order if she had been served with them "within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C.R. App. P. 3(c). Since we do not know when or if defendant was ever "served" with the ED Affidavit Order or the Sanctions Order, we cannot discern how she would have made any more timely objection to the ED Affidavit Order and the Sanctions Order than she has by her appeal of the ED Judgment resulting from them.

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10. North Carolina General Statute § 1A-1, Rule 5(b) requires that "[a] certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served." N.C. Gen. Stat. § 1A-1, Rule 5(b) (2009).

Next, both the ED Affidavit Order and Sanctions Order were interlocutory, as they did not make a final determination of all claims and issues. *See Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation and quotation marks omitted)).

Finally, both the ED Affidavit Order and Sanctions Order "involved the merits and necessarily affected the judgment." *Tinajero*, ___ N.C. App. at ___, 758 S.E.2d at 175. As a result of the ED Affidavit Order and Sanctions Order defendant could not challenge plaintiff's evidence as to the identification, classification, and valuation of the martial property and debts; these are the central issues in any equitable distribution claim. Thus, we have jurisdiction to consider defendant's appeal as to the ED Affidavit Order and Sanctions Order. *See Tinajero* ___ N.C. App. at ___, 758 S.E.2d at 175.

III. Imposition of Sanctions Without Notice

Defendant first argues that "the trial court erred in imposing sanctions against defendant which prohibited her from filing an equitable distribution affidavit and prevented her from presenting her case." (Original in all caps.) The sanctions were imposed in the trial court's Sanctions Order, which found that defendant had failed to comply with the ED Affidavit Order. Defendant contends that the ED Affidavit Order, which set a 4 December 2012 deadline for filing her ED Affidavit, had not yet been entered when the deadline had passed. We need not engage in any analysis to determine that defendant's argument is factually correct -- 10 December 2012 is after 4 December 2012. Even if defendant had been present in court on 6 November 2012, when it seems that the trial court addressed this issue, an order is not entered until it is signed and filed, and the ED Affidavit was signed on 24 November 2012 and filed on 10 December 2012. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2011) ("Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.")

Plaintiff does not even attempt to argue in his brief that defendant had notice of the 4 December 2012 deadline, but in his approximately two page argument which is devoid of citation of any authority, claims that defendant had "a full and fair opportunity to present her case at trial[,]" (original in all caps), because at trial the trial court did permit her to testify and asked her "broad and open-ended questions[.]" Plaintiff also contends that the 10 December 2012 order actually gave

defendant an *extension* of time to file her ED Affidavit, an argument which is directly contradicted by the order itself. Plaintiff argues that defendant "began representing herself" on 3 February 2012 — this fact is not supported by the record – and that she "was served on 17 October 2012 with the Plaintiff's Equitable Distribution Inventory Affidavit[.]" Actually, the only indication in the record of the service of plaintiff's ED Affidavit is the Cc: line at the bottom of plaintiff's counsel's transmittal letter to the Assistant Clerk of Court, asking that plaintiff's ED Affidavit be filed; there is no certificate of service on defendant. But even if we assume that plaintiff is correct, and plaintiff mailed his ED Affidavit to defendant on 17 October 2012, plaintiff argues that defendant's ED Affidavit would have been due on 19 November 2012.[11] Plaintiff claims that since the ED Affidavit Order deadline was 4 December 2012, the ED Affidavit Order actually gave defendant 15 *extra* days to file her ED Affidavit, beyond the time allowed by North Carolina General Statute § 50-21. Plaintiff's argument is inexplicable, given the finding in the ED Affidavit Order, based upon the stated hearing date of 6 November 2012, that "Defendant, for whatever reason *has* failed or refused to" file her ED Affidavit in a "timely fashion[.]" (Emphasis added.) In addition, the ED Affidavit Order decreed that "the Defendant shall have until December 4, 2012 in which to file her equitable distribution affidavit, *which is already well passed [(sic)] the time allowed by law*[.]" (Emphasis added.) That is, on 6 November 2012, despite the fact that according to plaintiff, defendant's ED Affidavit *was not due until 19 November 2012*, the trial court found that defendant has "for whatever reason . . . failed or refused to" file her ED Affidavit in a "timely fashion" and that the time for filing of her ED Affidavit was "already well passed" (sic). Plaintiff's argument is, to use the words of the trial court's ED Affidavit Order describing defendant's failure to appear in court on 6 November 2012, "frivolous [and] unreasonable[.]"

We realize that many things may have happened in this case which are not revealed by the record, despite the fact that counsel for plaintiff and defendant participated in the settlement of the record on appeal and would presumably have included all documents necessary for us to review the issues presented. In fact, several of the documents which do show various important dates were added as supplements to the record. We agree that this equitable distribution case took entirely too long, far beyond the time guidelines set by both North Carolina General Statute

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11. Plaintiff's brief actually argues that "Defendant's EDIA was due on or before 19 November 2014[;]" we assume plaintiff means 2012, as that was the year when the 10 December 2012 order was entered.

§ 50-21 and by the Local Rules. *See* N.C. Gen. Stat. § 50-21; Local Rules, rule 10. Yet we feel compelled to note that *plaintiff* filed the initial equitable distribution claim, and thus he had the obligation under North Carolina General Statute § 50-21(a) to file his ED Affidavit within 90 days. *See* N.C. Gen. Stat. § 50-21(a). Instead, plaintiff filed his ED Affidavit approximately two years and 10 months after he filed his complaint. This is not, as the ED Affidavit Order described it, "timely[.]" The trial court also found in its Sanctions Order that defendant failed to respond to the "REQUEST FOR PRODUCTION OF DOCUMENTS" served upon her in August of 2012; this is true, but essentially irrelevant to the equitable distribution claim, as this request for production included only three requests, the first of which was directed to defendant's counterclaim for post-separation support. While it is true that defendant also failed to take actions that she should and could have taken to comply with the time requirements of equitable distribution and have the case resolved sooner, both parties were complicit in the delay. Also, the record before this Court does not reveal that defendant ever failed to respond to any sort of discovery request relevant to the equitable distribution claim and does not reveal that she ever failed to appear at any court date other than the 6 November 2012 and 4 December 2012 dates previously discussed.

As we have established that defendant had no notice of the 4 December 2012 deadline before it had passed, we must now consider whether she had sufficient notice that she may face sanctions, in the form of barring her from presentation of evidence as to the identification, valuation, and classification of the property to be distributed and a decree that the trial court would determine the "identification, valuation, and classification of assets and debts" according to plaintiff's ED Affidavit. Although neither the trial court's ED Affidavit Order or Sanctions Order cite any statutory basis for imposition of sanctions against defendant, nor did plaintiff file any motion seeking relief based upon any statute or rule, it appears that the sanctions were based upon North Carolina General Statute § 50-21(e):

> (e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or

> unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
>
> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.
>
> Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted.

N.C. Gen. Stat. § 50-21(e).

This Court has determined in *Megremis v. Megremis* that the adequacy of notice of potential sanctions under North Carolina General Statute § 50-21 is a question of law which we review *de novo*:

> Notice and opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Whether a party has adequate notice is a question of law. In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of such charges. Moreover, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.

179 N.C. App. 174, 178-79, 633 S.E.2d 117, 122 (2006) (citations, quotation marks, and brackets omitted); *see also Suntrust Bank v. Bryant/Sutphin Prop., LLC*, ___ N.C. App. ___, ___, 732 S.E.2d 594, 598 (2012) ("For questions of law, we apply *de novo* review." (citation and quotation marks omitted)).

As also noted in *Megremis*, North Carolina General Statute § 50-21(e) does not set forth any specific requirements for notice, so we have looked to similar statutory provisions for guidance:

> N.C.G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. Under N.C. Gen. Stat. § 1A-1, Rule 11, a motion requesting sanctions must be served within the period prescribed by N.C. Gen. Stat. § 1A-1, Rule 6(d), not later than five days before the hearing on the Rule 11 motion. N.C.G.S. § 50-21(e) includes conduct sanctioned under N.C. Gen. Stat. § 1A-1, Rule 37, as well as a separate, more general, sanctions provision specific to an equitable distribution proceeding. Under Rule 37, a trial court may impose sanctions, including attorney's fees, upon a party for discovery violations. Our Court has held that a party sanctioned under Rule 37 had ample notice of sanctions where the moving party's written discovery motion clearly indicated the party was seeking sanctions under Rule 37. Moreover, at a hearing on the discovery motion, the sanctioned party was given the opportunity to explain to the trial court any justification for the party's delinquency in responding to discovery.

Megremis, 179 N.C. App. at 179, 732 S.E.2d at 121 (citations omitted).

As in *Megremis*, "plaintiff filed no written motion seeking sanctions." Id. at 179, 732 S.E.2d at 121. Here, the sanctions issue was initially addressed at the hearing on 6 November 2012. The notice of hearing for 6 November 2012 stated that the hearing was set for plaintiff to "make application for relief in the form of equitable distribution of property and for attorney's fees, costs and such other relief as provided in Chapter 50 of the North Carolina General Statutes and as prayed for in the pleadings." No motion to compel or motion for sanctions was filed. No scheduling or pretrial conferences were ever held, although both are required by North Carolina General Statute § 50-21(d) and by the Local Rules. *See* N.C. Gen. Stat. § 50-21(d); Local Rules, rule 10. Instead, plaintiff asked the trial court at the 6 November 2012 hearing, where defendant was not present, "to structure a time frame within which any and all matters pertaining to equitable distribution or any remaining issues raised in the pleading would be disposed of[,]" and the trial court did this by setting forth the 4 December 2012 deadline previously discussed at length.

We can safely say that the complete absence of notice of potential sanctions under North Carolina General Statute § 50-21(e) is not adequate notice. *See* N.C. Gen. Stat. § 50-21(e). We also disagree with plaintiff that the Sanctions Order "did not adversely affect [defendant] during

the hearing." Plaintiff does not dispute that the trial court's ED Judgment makes findings of fact and conclusions of law as to "the identification, valuation, and classification of assets and debts" strictly in accord with plaintiff's ED Affidavit, as the Sanctions Order decreed.

As we must reverse the ED Judgment, we will not address each of defendant's arguments about the failure of the trial court to properly classify, value, and distribute the property. But because these issues will arise again on remand, for guidance to the trial court, we will note that North Carolina § 50-20(c) creates a presumption of an equal distribution, and the trial court must make findings of fact as to the factors under North Carolina General Statute § 50-20(c) to support an unequal distribution. N.C. Gen. Stat. § 50-20(c) (2009). In its ED Judgment, the trial court based its unequal distribution on

> reasons that include but are not limited to the following:
>
> a. The Defendant's failure to work and contribute to the marital estate.
>
> b. The debt that the Defendant incurred during the marriage and the fact that Plaintiff had to pay off what he did both during the marriage and after the separation.
>
> c. The Defendant was not a stay at home mother but spent a large part of her time up and down the road and with her family and friends in Indiana, that although it appears to the Court that she was capable and able bodied, did not work substantially or materially and contribute towards the marital estate or the needs of the family.
>
> d. The fraud perpetrated on the Plaintiff to believe that the child born during their relationship was his and the fact that he was primarily responsible for that child's support to and through the age of 19.
>
> e. The fact that the Plaintiff ended up paying the educational loans for the Defendant's son by another relationship without any help or contribution from the Defendant.
>
> f. The Defendant took out a false and frivolous domestic violence action against the Plaintiff in order to better her position in court when she could not sustain the burden of proof with regards thereto.
>
> g. The fact that the Plaintiff basically raised and supported her three children from a prior marriage from the

> date they became married until the date they aged out or moved out of their home.

Most if not all of these factors except possibly (b) appear to fall under the "catch-all" provision of North Carolina General Statute § 50-20(c)(12): "Any other factor which the court finds to be just and proper[,]" but only factors which address the *economic* aspects of the marriage are relevant to the distribution.[12] *See Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985) ("Thus, under 50-20(c)(12), the only other considerations which are just and proper within the theory of equitable distribution as expressed by 50-20(c)(1)-(11) are those which are relevant to the marital economy. Therefore, we hold that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered." (quotation marks omitted)). Many of the trial court's findings of fact and conclusions of law address factors which are simply irrelevant to equitable distribution because they are not economic factors as defined by *Smith*. *See id.*

One particularly egregious example of the trial court's consideration of irrelevant evidence is the paternity of the parties' now-adult child. Plaintiff alleged in his complaint that "one child was born of the marriage who is past the age of majority[;]" defendant's answer admitted this fact. Since this fact was judicially admitted by both parties, it would appear that paternity of the child was not a disputed issue. *See Hinton v. Hinton*, 70 N.C. App. 665, 672, 321 S.E.2d 161, 165 (1984) ("It has long been established that where there is an admission in the final pleadings defining the issues and on which the case goes to trial, such admission is a judicial admission which conclusively establishes the fact for the purposes of that case and eliminates it entirely from the issues to be tried."). Furthermore, support of a child of the marriage, minor or adult, is not a proper distributional factor under North Carolina General Statute § 50-20(c). *See* N.C. Gen. Stat. § 50-20(c); *see also Godley v. Godley*, 110 N.C. App. 99, 117, 429 S.E.2d 382, 393 (1993) ("Defendant further argues that the trial court's finding that plaintiff has voluntarily taken in their 22 year old son, David, was irrelevant to the equitable distribution proceeding. We agree and hold that this factor was improperly considered as a distributional factor. The trial judge also improperly considered the fact that the minor child, Catherine, was still residing at the marital

12. In fact, the findings as to distributional factors which were disapproved by the Supreme Court in *Smith v. Smith*, bear some resemblance to those in this case, as the trial court there found that defendant generally failed in many ways in her duties as a wife and mother. 314 N.C. 80, 331 S.E.2d 682 (1985).

residence at the time of trial. North Carolina General Statutes § 50-20(f) provides that the court shall provide for equitable distribution without regard to alimony or child support."). Yet in this equitable distribution case, to which the adult son is not a party, plaintiff sought to bastardize his child.

At trial, plaintiff took the position that his son is not his biological child. Defendant had become pregnant prior to the marriage, and plaintiff was aware of the possibility that he may not be the child's father, as defendant "told the Plaintiff that she was 99.5% sure that the child was his[.]" Plaintiff testified that he had a DNA test performed on his son, on the pretense of doing a drug test, and attempted to present as evidence the results of this DNA test to prove that he was not the biological father of said son. The trial court quite properly sustained defendant's objection to the admission of this DNA evidence. Despite the exclusion of the evidence, the trial court then made finding of fact number 6 "[t]hat in the recent past the Plaintiff had DNA samples tested and established to the best of scientific means under current circumstances that the child was and is not his biological child." Based upon finding of fact number 6, the trial court concluded that this factor was one which supported the unequal distribution: "[t]he fraud perpetrated on the Plaintiff to believe that the child born during their relationship was his and the fact that he was primarily responsible for that child's support to and through the age of 19." Many of the other factors upon which the order relies are also irrelevant as they do not relate to the marital economy.[13] As the judgment must be reversed, we will not address any of the other findings of fact or conclusions of law challenged by defendant.

For the foregoing reasons, we reverse the ED Affidavit Order, the Sanctions Order, and the ED Judgment. We are particularly troubled by the need to vacate the ED Judgment, and thus prolong this case which has already been pending for over four and one-half years, especially since defendant has died during this case. In addition, an equitable distribution claim is one of the very few types of cases which has a statutory scheme which sets forth a timeline for each stage of the case. *See* N.C. Gen. Stat. § 50-21. We are concerned by the complete absence of any

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13. Factor (b) supporting the unequal distribution was "[t]he debt that the Defendant incurred during the marriage and the fact that Plaintiff had to pay off what he did both during the marriage and after the separation." Factor (b) seems to address the economy of the marriage, but was perhaps misplaced; the trial court may classify debts as marital or separate and may determine what credit should be given for payment of debts after the date of separation, but should not both give credit for payment of debts and give an unequal distribution on this basis, as this gives double credit for the debt payment.

mention of the timeline and scheduling requirements of North Carolina General Statue § 50-21 and the Local Rules; such statutory provisions and rules are intended to prevent exactly the sort of delay and waste of judicial resources which this case demonstrates. On remand, we direct the Chief District Court Judge to set a date for a scheduling conference, as directed by Rule 10(b) of the Local Rules, with proper notice of this scheduling conference to plaintiff and defendant, so that the trial court may set forth a new schedule for this case on remand in accord with North Carolina General Statute § 50-21 and the Local Rules, to the extent possible from this point forward.

IV. Conclusion

For the foregoing reasons, we reverse the ED Affidavit Order, the Sanctions Order, and the ED Judgment; and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

IN THE MATTER OF THE FORECLOSURE of a North Carolina Deed of Trust executed by L.L. Murphrey Co., f/k/a/ L.L. Murphrey Hog Co., Lois M. Barrow, Larry Barrow, Connie M. Stocks, Donald Stocks and Doris Murphrey dated April 23, 1996 and recorded April 24, 1996 in Book 489 at Page 620, as modified by those certain Modification and Extension Agreements dated August 30, 1996, Recorded October 7, 1996 in Book 493 at Page 20, dated April 4, 1997, recorded April 25, 1997 in Book 497, Page 94, dated May 26, 1998, recorded June 29, 1998 in Book 507, Page 24 and dated August 21, 1998, recorded October 2, 1998, all in the Office of the Greene County Register of Deeds, By Kluttz, Reamer, Hayes, Randolph, Adkins & Carter, L.L.P., Substitute Trustee

No. COA14-166

Filed 7 October 2014

1. Collateral Estoppel and Res Judicata—collateral estoppel—inapplicable—not an adjudication on the merits

Collateral estoppel was inapplicable where the Bankruptcy Court did not rule on the merits of D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action, and the Leonard order was not an adjudication on the merits. Further, respondents waived their right to advance the argument that Wachovia was required to execute Restated Loan Documents for the Confirmed Plan to be

valid and enforceable against respondents in the foreclosure action because the record showed that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. Findings of fact #2, #5, and #9 were supported by competent evidence.

2. Mortgages and Deeds of Trust—foreclosure—valid debt —default—notice

The trial court did not err by authorizing D.A.N. Joint Venture Properties of North Carolina, LLM (DAN) to foreclose on the subject properties. DAN presented competent evidence of: (i) a valid debt of which the party seeking to foreclose was the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled as required under N.C.G.S. § 45-21.16(d).

3. Statutes of Limitation and Repose—foreclosure—ten years after final payment

D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action was not barred by the statute of limitations set forth in N.C.G.S. § 1-47(2) and (3). The statute of limitations does not run until ten years after a final payment is made on an obligation, and L.L. Murphrey Hog Co. made payments pursuant to the terms of the Confirmed Plan through 2011.

Appeal by respondents from order entered 31 October 2013 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 27 August 2014.

Driscoll Sheedy, P.A., by Susan E. Driscoll, for appellee.

WHITE & ALLEN, P.A., by John P. Marshall and Ashley C. Fillippeli, for appellants.

ELMORE, Judge.

Lois M. Barrow, Larry Barrow, and Doris Murphrey (respondents) appeal from the Order Denying Motion to Dismiss and Authorizing Foreclosure entered by Judge Paul L. Jones on 31 October 2013. After careful consideration, we affirm.

I. Background

In the instant case, the particular real estate security interest being foreclosed was a North Carolina Deed of Trust entered into on

23 April 1996 by Doris Murphrey, Lois M. Barrow, Larry Barrow, Connie M. Stocks, Donald Stocks, and L.L. Murphrey Hog Co. (LLM), a North Carolina corporation, in favor of Wachovia Bank, N.A., predecessor in interest to D.A.N. Joint Venture Properties of North Carolina, LLM (DAN). The deed of trust was recorded in the Greene County Register of Deeds and the Lenoir County Register of Deeds and amended over time by certain modification and extension agreements. To secure the deed of trust, respondents pledged certain items of real property as collateral. Wachovia also received a security interest in LLM's fixtures and items of personal property. The deed of trust secures an indebtedness evidenced by five promissory notes (the Wachovia notes) executed by LLM, the borrower, in favor of Wachovia between July 1993 and March 1999.

LLM previously filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on 8 June 2000. At that time, LLM was in default to Wachovia for $12,790,522.36 pursuant to the Wachovia notes. In LLM's Chapter 11 case, the Bankruptcy Court entered an order confirming LLM's fourth amended plan of reorganization ("Confirmed Plan" or "the Plan"). Pursuant to class III of the Confirmed Plan, Wachovia's claims were divided into Note A and Note B. Note A is an amortizing note in the amount of $8,000,000; Note B is a cash flow note in the amount of $3,500,000. Both Notes remained secured by the collateral pledged to secure the Wachovia notes. Respondents, LLM's principals, guaranteed Note A and Note B, which both listed a maturity date of 30 September 2011. Upon maturation, the Plan provided that Note A and Note B would be recapitalized and that the obligations of the guarantors would be limited to the amount of recapitalized debt.

The Confirmed Plan also specified:

> **R. <u>Execution and Delivery of Revised Loan Documents</u>**
>
> The Debtor and Wachovia will enter into amended and restated Loan Documents (the "Wachovia Restated Loan Documents") consistent with the provisions of this Plan of Reorganization. The Debtor shall execute and deliver such agreements, instruments and documents as may be reasonably requested by Wachovia. The Wachovia Restated Loan Documents shall contain reasonably and customary warranties, covenants and other terms as the Debtor and Wachovia may agree upon. The following shall constitute events of default:
>
> (i) Nonpayment as required under [the] terms of Note A or Note B,

(ii) Material misrepresentation,

(iii) Material breach of warranties of covenants,

(iv) Subsequent voluntary or involuntary bankruptcy proceedings, or

(v) Reopening of current bankruptcy proceedings.

S. Implementation Date

The Implementation Date for Note A and Note B shall be October 1, 2001, provided that the following Conditions Precedent have been met:

(i) Cash shall be available to the Debtor in an amount sufficient to permit payment in full of all Administrative Claims,

(ii) Eleven days shall have expired since the Confirmation Date and no stay of the Confirmation Order shall be in effect, and

(iii) The Wachovia and MLLC Restated Loan Documents [referred to above as the "Wachovia Restated Loan Documents"] required by the Plan of Reorganization shall have been executed and delivered.

Wachovia did not execute the Restated Loan Documents referenced in the Confirmed Plan. Nonetheless, LLM made payments pursuant to the terms of the Confirmed Plan from 1 October 2001 through 2011. Post-confirmation, Wachovia sold the Wachovia notes to CadleRock Joint Venture, L.P., who later sold or assigned the Wachovia notes to DAN in 2008. DAN filed the necessary notices of assignment, amendments, and continuation statements with the Greene County Register of Deeds, the Lenoir County Register of Deeds, and the North Carolina Secretary of State.

Upon maturity of Note A and Note B, LLM and DAN could not agree to the amount of the recapitalized debt. Seeking a determination, LLM reopened the Chapter 11 case and filed an adversary proceeding in Bankruptcy Court. Judge J. Rich Leonard, United States Bankruptcy Judge for the Eastern District of North Carolina, ruled that LLM's total indebtedness due and owing to DAN was $6,186,362.00. Neither party appealed this judgment.

Thereafter, LLM filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on 21 May 2012. After LLM's Chapter 7 filing,

DAN filed a proof of claim in the amount of $6,056,645.26. DAN attached a copy of LLM's fourth amended plan of reorganization, copies of the requisite security agreements, and copies of the assignments it filed with the Greene and Lenoir County Register of Deeds. In January and February 2013, LLM's bankruptcy trustee filed motions requesting approval to conduct a proposed public sale of LLM's real and personal property free and clear of liens. The trustee submitted a draft of a proposed complaint that he anticipated filing in an adversary proceeding against DAN. The complaint alleged that the Wachovia notes and the deed of trust were avoidable pursuant to 11 U.S.C. § 5444(a)(3) (2013).

The real property that was the subject of the proposed public sale included five tracts of land in Greene County and one tract of land in Lenoir County. As DAN asserted liens on all but one of the tracts of real property, it filed an objection to the trustee's motion to sell free and clear of liens. DAN asserted that pursuant to 11 U.S.C. § 363(f)(4), its interest was not subject to a factual or legal dispute because LLM: (1) did not file any objection to DAN's proof of claim, and (2) because LLM's indebtedness was reaffirmed in the bankruptcy court adversary proceeding. *See L.L. Murphrey Co. v. D.A.N. Joint Venture III*, *L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011) (calculating the recapitalized debt under the Confirmed Plan to be $6,168,362.00).

On 6 June 2013, Judge Leonard entered an order ("the Leonard order") in the Chapter 7 case. The Leonard order reviewed the terms of the Confirmed Plan, particularly the portions that purported to require Wachovia to execute Restated Loan Documents to reaffirm the loan. Judge Leonard determined the terms of the Confirmed Plan were "unambiguous and impose[d] an obligation on the parties, the debtor and Wachovia, to execute amended and restated agreements, instruments and other loan documents consistent with the treatment provided therein." Judge Leonard further concluded, "[i]n addition to being explicitly required, the execution and delivery of the amended and restated loan documents was a condition precedent for setting the implementation date for Note A and Note B as October 1, 2001."

Further, Judge Leonard held that in the absence of the Restated Loan Documents, the description of Note A and Note B and the recitation of the terms were insufficient to constitute negotiable instruments. Accordingly, Judge Leonard found that the trustee established the existence of a "bona fide dispute" regarding the validity of DAN's liens. Judge Leonard authorized the trustee to sell the real property free and clear of the liens asserted by DAN. Notably, the Leonard order did not terminate DAN's rights to foreclose on the deed of trust—it merely recognized the

existence of a bona fide dispute between the parties and authorized the trustee to proceed with the sale of the requisite property.

DAN filed a Notice of Hearing for Foreclosure of Deed of Trust on 4 September 2013. Based on the Leonard order, LLM filed a motion to dismiss DAN's foreclosure action on 2 October 2013. On 31 October 2013, the matter came on for hearing before Judge Paul L. Jones in Greene County Superior Court. Judge Jones entered an order denying LLM's motion to dismiss. He also authorized the Substitute Trustee for DAN to proceed with the foreclosure of the subject property pursuant to the power of sale granted to him under the deed of trust. Judge Jones entered the following findings of fact:

> 2. The Deed of Trust secures an indebtedness evidenced by certain promissory notes executed by [LLM] in favor of Wachovia Bank, which were modified over time and through the Fourth Amended Plan (Confirmed Plan) filed in [LLM's] Chapter 11 Bankruptcy Case[.]
>
> 3. The Deed of Trust states that it operates as security for "any renewals, modifications or extensions" of the Notes identified in the Confirmed Plan, as well as "all present and future obligations of Grantor[s] to [DAN]." (Deed of Trust, p.3.)
>
> 5. Under the terms of the Confirmed Plan, the Notes were divided into two tranches: Note A and Note B were to "remain secured by that collateral pledged to Wachovia by [Borrower] prior to the Petition Date". [sic] Although the Confirmed Plan required entry by Borrower and Wachovia into "amended and restated Loan Documents", [sic] it did not specify what documents were required. Instead, the Confirmed Plan required that Borrower "execute and deliver such agreements, instruments and documents as may be reasonably requested by Wachovia." There was no requirement that the Barrow Family, Donald Stocks or Connie Murphrey execute any new documents.
>
> . . .
>
> 8. Through the Adversary Proceeding, it was determined that the amount of the Recapitalized Debt was $6,186,362.00. (May 10, 2012 Order, Adv. Proc. No.: 11-00139-8-JRL, p.6.) Instead of paying the

Recapitalized Debt in full or entering into new loan documents for the amount of the Recapitalized Debt, Borrower filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code, Case No.: 12-03837-8-JRL. (Chapter 7 Case).

9. D.A.N. Joint Venture Properties of N.C., LLC is the current holder of the Notes and the Deed of Trust.

Respondents now appeal.

II. Analysis

A. Judge Leonard's order

[1] Initially, we note that defendant challenges finding of fact #2, #5, and #9 above as being unsupported by competent evidence. The forgoing analysis addresses each of these challenged findings in substance and illustrates how each is, in fact, supported by competent evidence.

Much of respondents' argument is premised on the belief that the Leonard order constituted a final judgment purportedly affecting the merits of the foreclosure action. We find it necessary to dispel this argument at the outset of this appeal. In their brief, respondents advance the following argument:

> The issue of whether the language of the Confirmed Plan, in the absence of Restated Loan Documents, is sufficient to constitute negotiable instrument **has already been litigated and determined by the Leonard Order**. The Leonard Order specifically provides that the Confirmed Plan is "unambiguous and imposes an obligation on the parties, the debtor and Wachovia, to execute [Restated Loan Documents] consistent with the treatment provided therein." In addition, the Leonard Order holds specifically that "in addition to being explicitly required, the execution and delivery of the [Restated Loan Documents] was a condition precedent for setting the implementation date of Note A and Note B as October 1, 2001." Finally the Leonard Order provides that "these provisions appear mandatory and are not self-executing" and that "in the absence of [Restated Loan Documents], the description of Note A and Note B as well as the recitation of its terms, obligations and the treatment provided to Wachovia are insufficient to constitute negotiable instruments." DAN

> does not and cannot meet the Holder requirement of N.C. Gen. Stat. §45-21.16(d).
>
> North Carolina must give full faith and credit to final judgments of Federal Courts. . . . **An Order of a Bankruptcy Court avoiding a mortgage lien is a Final Order**. . . . Issue preclusion prevents [DAN] from re-litigating the issue concerning holder status.

Respondents are misguided. "In order for collateral estoppel to apply in this case, the issues to be concluded must be the same as those in the prior Bankruptcy Court action[.]" *In re Foreclosure Under That Deed of Trust Executed by Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 56, 535 S.E.2d 388, 396 (2000). The Bankruptcy Court did not rule on the merits of DAN's foreclosure action, and the Leonard order was not an adjudication on the merits. For example, the issue of whether DAN was the holder of a valid debt was not litigated and determined in the bankruptcy proceeding. Therefore, collateral estoppel is inapplicable. Respondents' counsel was aware that Judge Leonard's order did not constitute an adjudication on the merits of the foreclosure. During the foreclosure hearing counsel stated, "Judge Leonard's decision is not an adjudication . . . but it's really darn convincing and persuasive argument as to how it is he was going to rule." In respondents' reply brief, they clarify that their position is not that the Leonard order constitutes a final order avoiding a mortgage lien; instead, they aver that it is an order establishing: (1) that the reorganization plan mandated new loan documents, and (2) that the failure to execute new loan documents meant that the payment obligations under the Confirmed Plan were insufficient to constitute negotiable instruments.

Regardless, as applied to the foreclosure action before us on appeal, the Leonard order lacks controlling authority. It is merely a determination that a "bona fide dispute" exists between LLM and DAN regarding the validity of DAN's liens. Under 11 U.S.C. §363(f), a trustee has the right to sell property free and clear of liens if there is a bona fide dispute as to the validity of the lien. Despite respondents' arguments to the contrary, Wachovia was not required to execute Restated Loan Documents for the Confirmed Plan to be valid and enforceable against respondents in the foreclosure action. As the trial court found in Finding #5, the Confirmed Plan simply provides: "The debtor shall execute and deliver such agreements, instruments and documents as **may be reasonably requested** by Wachovia." Thus, the Confirmed Plan allowed Wachovia to determine what, if any, new loan documents Wachovia required.

Restated Loan Documents were neither required nor a condition precedent for the Confirmed Plan to bind the parties.

Further, respondents have waived their right to advance the above argument because the record shows that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (holding doctrine of waiver provides that "[a] person may waive almost any right he has, unless forbidden by law or public policy.)

B. Foreclosure by Power of Sale

[2] Next, we must consider whether the trial court erred in authorizing DAN to foreclose on the subject properties. In a foreclosure by power of sale, the trial court shall enter an order permitting foreclosure upon finding: (i) a valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled. N.C. Gen. Stat. § 45-21.16(d) (2013). Here, respondents essentially challenge the first and third elements of N.C. Gen. Stat. § 45-21.16(d) on the basis that DAN failed to produce competent evidence of a valid debt, failed to show that it was the current note holder, and was unable to show that it had a right to foreclose under the deed of trust. These issues are "question[s] of law controlled by the UCC [Uniform Commercial Code], as adopted in Chapter 25 of the North Carolina General Statutes." *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175-76 (2013). We conclude that the trial court did not err.

The following documents set out the rights of the parties in this case: (1) the five Wachovia promissory notes executed between 1993-1999 by LLM in favor of Wachovia; (2) the deed of trust securing the notes executed by respondents and amended over time; (3) LLM's fourth amended plan of reorganization filed 4 May 2001; (4) the Confirmed Plan effective 13 July 2001; and (5) the order determining LLM's indebtedness entered in the adversary proceeding. *L.L. Murphrey Co. v. D.A.N. Joint Venture III, L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011) (calculating the recapitalized debt under the Confirmed Plan to be $6,168,362.00).

For the reasons set forth above, we decline to address respondents' arguments that are premised entirely on the contention that the Confirmed Plan is not enforceable against them. However, we will address the following three specific arguments advanced by respondents: First, respondents aver that DAN is not the holder of a valid debt because the Confirmed Plan fails to qualify as a negotiable instrument. Second, respondents argue that the Confirmed Plan does not contain a

sufficient description of the debt it proposes to secure. Third, respondents argue that the Confirmed Plan was not intended to operate as an extension or modification of the deed of trust.

First, we note that DAN need not prove that it is the holder of a negotiable instrument in order to satisfy element one of N.C. Gen. Stat. § 45-21.16(d). When determining whether a party is the holder of a valid debt, we must find (i) sufficient competent evidence of a valid debt, and (ii) sufficient competent evidence that the party seeking to foreclose is the current holder of the notes that evidence that debt. *In re Adams*, 204 N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010). Prong two, whether DAN is the holder of a valid debt, need not be addressed. Respondents' argument that DAN is not the "holder" of a valid debt is based on the premise that the Confirmed Plan is a nullity. Accordingly, we must only find competent evidence of a valid debt. In *Azalea*, this Court held that a "valid debt" can be evidenced by several documents (including a confirmed bankruptcy plan), each modifying the terms of the other. *Azalea*, 140 N.C. App. at 53, 535 S.E.2d at 394 (2000) (finding that "the compromise and settlement agreement and *plan of reorganization* that were negotiated, amended and ratified by the parties in this case modified the original documents[.]") (emphasis added). Here, the Wachovia notes were modified by the plan of reorganization, which was negotiated, amended, and ratified by the parties through the Confirmed Plan. The Confirmed Plan set forth the maturity date of the loans, interest rate, and events triggering default. LLM (at respondents' direction) made payments under the terms of the Confirmed Plan for approximately ten years. Upon review, we hold that the Confirmed Plan evidences a valid debt of which DAN is the holder.

In addition, the valid debt and DAN's holder status is further evidenced in the order entered by Judge Leonard. *See L.L. Murphrey Co. v. D.A.N. Joint Venture III, L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011). Judge Leonard calculated LLM's recapitalized debt under the Confirmed Plan at $6,168,362.00 and found that DAN became the holder of this indebtedness in 2008. LLM did not appeal this order and it is therefore binding on this Court.

Second, the deed of trust and the Confirmed Plan both adequately describe the indebtedness each secures. In North Carolina, a deed of trust must identify the obligation secured so that all subsequent purchasers or lenders are afforded sufficient notice as to the nature of the obligations secured by the deed of trust. *In re Hall*, 210 N.C. App. 409, 413, 708 S.E.2d 174, 177 (2011) (holding "[t]o be a valid lien on real property, North Carolina law requires a deed of trust to specifically identify

the obligation it secures.") Here, the deed of trust provides a detailed description of the obligations secured, as follows:

> (a) Note, dated July 9, 1993, in the original principal amount of $1,000,000, executed by Larry Barrow and Lois M. Barrow and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof, is hereinafter referred to as the "Barrow Note").
>
> (b) Note, dated July 9, 1993, in the original principal amount of $1,000,000, executed by Donald Stocks and Connie M. Stocks and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof is hereinafter referred to as the "Stocks Note").
>
> (c) Note, dated July 9, 1993 in the original principal amount of $1,131,478.94, executed by the Maker and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof, is hereinafter referred to as the "1993 Company Note").

The deed of trust also details the modification of the Wachovia notes over time, including the decrease in principal balance and extension of maturity dates. Further, the deed of trust contains a catchall phrase—stating it operates as security for "any renewals, modifications or extension" of the Wachovia notes and "all present and future obligations of [LLM and respondents] to [DAN]."

The Confirmed Plan specifically describes the obligations it secures as including:

> A. Note #1: Note #1 is a promissory note dated July 9, 1993 in the original principal amount of $1,131,478.94. By its terms, this obligation accrued interest at the annual rate of 7.15%. It was to be repaid by monthly principal and interest payments in the amount of $17,160.40. This note matured July 10, 1999.
>
> B. Note #17: Note #17 is a promissory note dated April 23, 1996 in the original principal amount of $3,500,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus .75%. It was to be repaid by monthly principal payments in the amount of $58,334.00 plus accrued interest. This note matures on May 1, 2001.

C. Note #18: Note #18 is a Declining Revolver Note dated April 23, 1996 in the original principal amount of $5,420,000.00. By its terms, this obligation accrued interest at the annual rate of 9%. It was to be repaid by quarterly principal payments in the amount of $250,000.00 plus accrued interest. This note matured March 15, 2000.

D. Note #19: Note #19 is a Grain Line of Credit Note dated April 23, 1996 in the original principal amount of $2,750,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus 1%. It was to be repaid by monthly interest payments with principal due and payable at maturity. This note matured February 25, 1999.

E. Note #22: Note #22 is a future advances note dated March 16, 1999 in the original principal amount of $175,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus 1.5%. It was to be repaid by monthly interest payments with principal due and payable at maturity. This note matured April 15, 1999.

We conclude that the description of the indebtedness evidenced in the deed of trust and the Confirmed Plan is sufficient under North Carolina law to notify creditors of the nature of the obligations secured by the deed of trust and likewise by the Confirmed Plan. *Hall*, *supra*.

As to respondents' third argument, we note that they advance no specific argument to support their position that the Confirmed Plan was not intended to act as an extension or modification of the deed of trust. Our Supreme Court has held that a deed of trust executed as security for a debt will secure all renewals of the debt unless a different intent appears. *Wachovia Nat'l Bank v. Ireland*, 122 N.C. 571, 29 S.E. 835 (1898) ("The deed contains a covenant that the charge shall be binding for all renewals of the debts specified. This would be so without any agreement, unless a different intent appeared."). "Where a note is given merely in renewal of another note and not in payment thereof, the effect is to extend the time for the payment of the debt without extinguishing or changing the character of the obligation, and, in case of default, the holder may sue upon the original instrument." *Dyer v. Bray*, 208 N.C. 248, 180 S.E. 83 (1935).

> Where a [subsequent] contract involves the same subject matter as the first, but where no recession has occurred, the contracts must be construed together in identifying the intent of the parties and in ascertaining what provisions of the first contract remain enforceable, and in such construction the law pertaining to interpretation of a single contract applies.

In re Fortescue, 75 N.C. App. 127, 130, 330 S.E.2d 219, 221 (1985) (citation omitted) (applying terms of a loan modification agreement to find default of promissory note and foreclosure of deed of trust). "The court's primary purpose in construing a contract is to ascertain the intention of the parties." *Id.* at 130, 330 S.E.2d at 222; *see also In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 659-60, 266 S.E.2d 686, 689 (1980) (concluding "that proper interpretation of the provisions in the Note and the Deed of Trust prescribing the conditions of default requires that the instruments be read together as one contract rather than as two independent agreements.")

The modification of the Wachovia notes through the Confirmed Plan did not eliminate the original debt, as respondents contend. The plan of reorganization specifies: "[Note A and Note B] shall remain secured by that collateral pledged to Wachovia by the Debtor prior to the Petition Date and guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of Recapitalized Debt, defined herein" and "[t]he Recapitalized Debt shall remain secured by the same Pre-Petition Collateral." The Confirmed Plan provides: "The guarantors of Wachovia's Notes A and B as provided for under the Plan shall be the same as pre-petition, with the exception [] [of] Connie S. Murphrey[.]" Notably, the Confirmed Plan does not provide for a payoff of the Wachovia notes—it merely reclassifies the preexisting debt. Thus, the Confirmed Plan "set new, specific requirements that the parties in this case intended to follow, in addition to any agreements in the original promissory note and deed of trust, that were not irreconcilable." *Azalea*, 140 N.C. App. at 52, 535 S.E.2d at 393.

The deed of trust also states that it is to operate as security for "any renewals, modifications or extensions" of the Wachovia notes as well as "all present and future obligations of [LLM and the Barrow family] to [DAN]." Based on the language of the Confirmed Plan and deed of trust, we conclude that the parties intended for the deed of trust to operate as security for the Wachovia notes, as modified under the terms of the Confirmed Plan.

C. Statute of Limitations

[3] Respondents argue that DAN's foreclosure action is barred by the applicable statute of limitations set forth in N.C. Gen. Stat. § 1-47(2) and (3) (2013). We disagree and note that the crux of the statute of limitations argument hinges on our having concluded that the Confirmed Plan is unenforceable against respondents.

N.C. Gen. Stat. § 1-47(3) (2013) provides:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

As the statute provides, the statute of limitations does not run until ten years after a final payment is made on an obligation. Respondents do not contest the fact that LLM made payments pursuant to the terms of the Confirmed Plan through 2011. Clearly, DAN is squarely within the requisite time frame in which it can bring its foreclosure action. We overrule respondents' argument.

II. Conclusion

In reviewing the record in its entirety, we hold that DAN presented competent evidence of: (i) a valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled as required under N.C. Gen. Stat. § 45-21.16(d). Accordingly, we affirm the trial court's order.

Affirmed.

Judges CALABRIA and STEPHENS concur.

IN THE MATTER OF J.C., J.C.

No. COA14-268

Filed 7 October 2014

1. Child Abuse, Dependency, and Neglect—permanency planning order—changed legal custody—immediately appealable

The Court of Appeals granted respondent's petition for certiorari in an appeal from the trial court's permanency planning order in a child custody case ceasing reunification efforts. Because the order changed legal custody of the juveniles, the order was immediately appealable pursuant to N.C.G.S. § 7B-1001(a)(4).

2. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—findings not necessary—circumstances must exist

The trial court did err in a child custody case by failing to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction. Although making specific findings of fact related to a trial court's jurisdiction under N.C.G.S. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. In this case, the evidence from the permanency planning hearing demonstrated that neither the parents nor the children continued to live in Kentucky.

3. Child Abuse, Dependency, and Neglect—permanency planning order—findings supported by evidence—findings supported conclusion

The trial court's findings of fact in a child custody permanency planning order were supported by competent evidence and supported the trial court's decision to cease reunification efforts with respondent.

4. Child Abuse, Dependency, and Neglect—authority to order respondent pay costs—oral rendering of judgment—conflict with written order—order remanded

The trial court did not lack the authority in a child custody case to order respondent to pay the costs of supervised visitation and that argument had already been rejected by the Court of appeals in respondent's previous appeal. However, the trial court's written judgment directly contradicted the trial court's statements from the bench regarding visitation. The portion of the trial court's

order regarding visitation was vacated and remanded for entry of an amended order which accurately reflected the trial court's oral disposition.

Appeal by respondent-mother from order entered 12 December 2013 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 9 September 2014.

No brief filed for petitioner-appellee Johnston County Department of Social Services.

No brief filed for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals from the trial court's permanency planning order which, *inter alia*, ceased reunification efforts with respondent. We affirm in part and vacate and remand in part.

I. Background

On 27 June 2013, the Johnston County Department of Social Services ("DSS") filed petitions alleging that respondent's minor children ("the juveniles") were neglected and dependent, based upon unresolved conflicts between respondent and the juveniles' father, which included false reports of sexual abuse of the juveniles by the juveniles' father that had been fabricated by respondent. After a hearing, the trial court entered an order which adjudicated the juveniles as neglected and dependent. In its subsequent disposition order, the trial court placed the juveniles in the custody of their paternal grandmother and ordered respondent to have supervised visits with the juveniles every other week at a supervised visitation center at her expense. Respondent appealed the adjudication and disposition orders to this Court, which affirmed both orders. *In re J.C., J.C.*, ___ N.C. App. ___, 760 S.E.2d 778 (2014).

On 23 September 2013, respondent filed a motion for review in the trial court seeking, *inter alia*, reconsideration of the visitation plan. On 13 November 2013, the trial court conducted a permanency planning hearing. At the conclusion of the hearing, the trial court orally concluded that it was in the juveniles' best interests to return to their father's custody, changed the permanent plan to reunification with the father, ordered DSS to cease reunification efforts with respondent, and ordered

that visitation with respondent would be supervised by DSS until they could find a suitable replacement supervisor. On 12 December 2013, the trial court entered a written order consistent with its statements from the bench, with the exception that the court ordered respondent's visitation to continue to be supervised at a visitation center at her expense. Respondent appeals.

II. Appellate Jurisdiction

[1] As an initial matter, we note that on 31 March 2014, respondent filed a petition for writ of *certiorari* with this Court in which she asserted that her appeal from the order ceasing reunification efforts was interlocutory pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2013), which limits the circumstances under which a respondent may appeal from an order ceasing reunification efforts which were not present in the instant case. However, "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile" is appealable to this Court. N.C. Gen. Stat. § 7B-1001(a)(4) (2013). In the instant case, the trial court's permanency planning order returned the juveniles to their father's custody. Thus, pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), the trial court's order was appealable as an order changing custody, and respondent's petition for writ of *certiorari* is dismissed as moot. *See In re J.V. & M.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009).

III. Subject Matter Jurisdiction

[2] Respondent first argues that the trial court failed to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction over the instant case. Specifically, respondent contends that because the juveniles and their parents were involved in a previous neglect case in Kentucky, the trial court was required to make specific jurisdictional findings pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. We disagree.

Respondent previously made this same argument in her appeal of the prior neglect and dependency adjudication and disposition order entered in this case. In *J.C.*, we rejected the argument:

> Although this Court has recognized that making specific findings of fact related to a trial court's jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. Therefore, so long as the trial court asserts its jurisdiction and there is evidence to satisfy the statutory

> requirements, the trial court has properly exercised subject matter jurisdiction.

___ N.C. App. at ___, 760 S.E.2d at 780 (internal quotations and citations omitted). In the instant case, respondent acknowledges that the evidence from the permanency planning hearing demonstrates that "neither the parents nor the children continue to live in Kentucky[.]" As in respondent's previous appeal, this is sufficient to establish the trial court's jurisdiction to enter the permanency planning order. *See id.* (Holding that jurisdiction was established when "the evidence shows that the juveniles have continuously resided with a parent in North Carolina since December of 2011"). This argument is overruled.

IV. Cessation of Reunification Efforts

[3] Respondent contends the evidence and the trial court's findings of fact do not support its order changing the permanent plan to reunification with the juveniles' father and ceasing reunification efforts with respondent. We disagree.

A court may order DSS to cease reunification efforts if it makes a written finding of fact that "[s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C. Gen. Stat. § 7B-507(b)(1) (2013). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (internal quotations and citations omitted).

In the instant case, the trial court found that further efforts toward reunification with respondent would be "futile and inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time[.]" The court then further found that respondent failed to provide verification she had completed a psychological evaluation; failed to visit the juveniles; failed to recognize her role in the juveniles' placement; failed to cooperate with DSS's attempts to provide services; and failed to make progress on her case plan since May 2013. Each of these findings is supported by the testimony of the social worker who supervised respondent's case at the time of the permanency

planning hearing. Specifically, the social worker described respondent's history of resisting DSS involvement and lack of progress on her case plan, her conflicting statements about her responsibility in contributing to the juveniles' current situation, and her failure to attend visitation. Although, as respondent contends on appeal, her own testimony contradicted some of the social worker's testimony, it was the trial court's responsibility to weigh the conflicting testimony and make appropriate findings of fact. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Ultimately, the trial court's findings, which were supported by competent evidence, supported the trial court's decision to cease reunification efforts. This argument is overruled.

V. Visitation

[4] Respondent argues that the visitation portion of the trial court's order was erroneous for two reasons. First, respondent contends that the trial court lacked the authority to order her to pay the costs of supervised visitation. However, that argument has already been rejected by this Court in respondent's previous appeal. *See J.C.*, ___ N.C. App. at ___, 760 S.E.2d at 782 ("[I]n the best interests of the juvenile, the trial court has the authority to set conditions for visitation, as the trial court did in this case by requiring respondent to pay the costs of visitation."). In addition, respondent contends that the written visitation order conflicts with the trial court's oral pronouncement regarding visitation and therefore must be vacated. We agree with this contention.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013). Thus, "[a]nnouncement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). "If the written judgment conforms generally with the oral judgment, the judgment is valid." *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007). However, if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive. *See State v. Sellers*, 155 N.C. App. 51, 59, 574 S.E.2d 101, 106-07 (2002).

In the instant case, the trial court heard arguments regarding respondent's ability to pay for supervised visitation and her objections to the imposition of those costs. DSS specifically recommended that respondent continue her visits with the juveniles at a visitation center at respondent's expense. At the conclusion of the hearing, the trial court made two statements which constituted its order regarding visitation:

"I'm going to adopt the recommendations put for[th] by the Department with the exception that DSS will supervise until they can find a replacement[,]" and "I'm adopting every recommendation [by DSS] with the exception of the visitation will be at Social Services every other week." Nonetheless, in its written order, the trial court directly contradicted the order it rendered from the bench, instead adopting DSS's recommendation by ordering that respondent's visitation would continue to be at a visitation center at respondent's expense.

The difference between the trial court's pronouncement in open court and its written order is substantive and the change in the written order cannot be said to generally conform to the court's oral statement. The written judgment directly contradicts the trial court's statements from the bench, and as a result, the portion of the trial court's order regarding visitation must be vacated and remanded for entry of an amended order which accurately reflects the trial court's oral disposition. *See id.* We note that

> [i]t is the duty of the trial judge to ensure that a written order accurately reflects his or her rulings before it is signed, and to modify the order if it is not correct. It is also the duty of counsel preparing the order to ensure that it accurately reflects the trial court's findings and rulings.

State v. Veazey, 191 N.C. App. 181, 196, 662 S.E.2d 683, 692 (2008) (Steelman, J., concurring in the result).

VI. Conclusion

The trial court had subject matter jurisdiction to enter the permanency planning order. The trial court properly found the necessary facts which supported its decision to cease reunification efforts with respondent, and accordingly, that portion of the trial court's order is affirmed. The court was authorized to order respondent to participate in supervised visits at a visitation center at respondent's expense. However, the trial court instead ordered, in open court, that respondent would have supervised visits at DSS. Since the trial court's written order contradicted its oral disposition, the portion of the trial court's order regarding visitation is vacated and remanded for a new order which is consistent with the court's oral pronouncement.

Affirmed in part and vacated and remanded in part.

Judges STEELMAN and McCULLOUGH concur.

HANS KINDSGRAB, Petitioner-Appellant
v.
STATE OF NORTH CAROLINA BOARD OF BARBER EXAMINERS,
Respondent-Appellant

No. COA13-1321

Filed 7 October 2014

1. Administrative Law—judicial review—scope—issues decided by Board

The trial court exceeded the permissible scope of review when it ordered petitioner to remove a barber pole and stop advertising barber services unless licensed by the Board of Barber Examiners. The only issues before the trial court for review were those issues decided by the Board – the assessment of civil penalties, attorney's fees, and costs. N.C.G.S. § 86A-20.1 provided an avenue for respondent to seek an injunction, which respondent did not pursue.

2. Administrative Law—judicial review—exceptions to Board's decision—sufficient

The trial court did not err in a case involving judicial review of an administrative action by denying respondent's motion to dismiss the petition for judicial review. Although petitioner did not except to specific findings or conclusions by the Board of Barber Examiners, petitioner clearly stated exceptions to the Board's final decision.

3. Administrative Law—authority of board to issue fines—not limited to licensees—limitation not read into statute

The trial court erred by concluding that the Board of Barber Examiners did not have the statutory authority to impose fines on persons or entities not licensed by the Board. A plain reading of N.C.G.S. § 86A-27(a) revealed no indication that imposition of civil penalties was limited solely to licensees and the Court of Appeals would not read limiting language into the statute where it did not exist.

4. Constitutional Law—Board of Barber Examiners—authority over non-licensees—reasonably necessary to purpose

The ability of the Board of Barber Examiners to impose civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering. While there are other statutory means to accomplish the Board's purpose, such as seeking an injunction or criminal prosecution, those means are not exclusive.

Appeals by petitioner and respondent from orders entered 3 May 2013 and 11 September 2013 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 April 2014.

Harris & Hilton, P.A., by Nelson G. Harris, for petitioner-appellant.

N.C. Board of Barber Examiners, by W. Bain Jones, Jr., and Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols and Catherine E. Lee, for respondent-appellant.

McCULLOUGH, Judge.

Hans Kindsgrab ("petitioner") appeals from the Order On Petition For Judicial Review filed 11 September 2013. The State of North Carolina Board of Barber Examiners ("respondent" or "the Board") appeals from the interlocutory order denying its Motion To Dismiss Petition For Judicial review filed 3 May 2103 and from the Order On Petition For Judicial Review filed 11 September 2013. For the following reasons, we affirm in part and reverse in part.

I. Background

Petitioner is an owner of Maybe Someday, Inc., which owns and operates franchises of "The Barbershop – A Hair Salon for Men" at three locations in the triangle area – Cary, Durham, and Raleigh. At all times relevant to this appeal, each location held a Cosmetic Arts Salon License issued by the North Carolina State Board of Cosmetic Art Examiners.

In 2012, an investigation by barber examiner William Graham revealed that the Cary and Raleigh locations displayed barber polls and advertised barber services without barber permits and without licensed barbers on the premises. As a result, Graham issued "Notice[s] Of Violation[s]" to the Raleigh and Cary locations on 31 July 2012 specifying fraudulent misrepresentation in violation of N.C. Gen. Stat. § 86A-20 and N.C. Admin. Code tit. 21, r. 6O.0107. Following the notices issued by Graham, on 7 September 2012, the Board sent petitioner a Notification of Probable Cause to Fine and ordered petitioner to pay civil penalties, attorney's fees, and costs.

By letter to the Board dated 2 October 2012, petitioner requested an administrative hearing to contest the fraudulent misrepresentation charges. On 3 October 2012, the Board responded to petitioner by letter providing notice that an administrative hearing had been scheduled for 22 October 2012. The hearing took place as scheduled.

Following the 22 October 2012 hearing, the board issued its Final Decision on 6 November 2012. Among the conclusions issued by the board were the following:

> 10. Petitioner must comply with the statutes and administrative rules concerning barber shops, barbering services and use of a barber pole.
>
> 11. The preponderance of the evidence established that it [sic] the Board properly cited Petitioner for misrepresenting itself as a barber shop or barber salon when it failed to have a barber shop permit and a licensed barber at each of its franchise locations in Cary and Raleigh.

The Board then ordered petitioner to "pay one thousand dollars ($1,000.00) in civil penalties for fraudulent misrepresentations concerning attempts to barber and provide barber services without a shop permit and a licensed barber on the premises at the Cary and Raleigh locations[, five hundred dollars ($500.00) per location,]" and to "pay one thousand six hundred fifty dollars ($1,650.00) in attorney's fees and costs for services rendered by the Board Counsel and staff."

On 3 December 2012, petitioner filed a Petition For Judicial Review in Wake County Superior Court seeking review of the Board's Final Decision. After numerous motions by both sides attempting to settle the record, on 26 April 2013, respondent filed a Motion To Dismiss Petition For Judicial Review on the basis that petitioner failed to "specifically state the grounds for exception[.]" Respondent's motion to dismiss came on to be heard with the motions to settle the record on 3 May 2013. Following the hearing, the trial court filed an order denying respondent's motion to dismiss.

Respondent's Petition For Judicial Review came on to be heard in Wake County Superior Court before the Honorable Howard E. Manning, Jr., on 4 September 2013.

In an Order On Petition For Judicial Review filed 11 September 2013, the trial court affirmed the Board's Final Decision in part and reversed in part. Specifically, the trial court found the Board's findings to be supported by substantial evidence and found the board's conclusions to be supported by the findings of fact and the whole record. The trial court also made the following more specific findings:

> 4. The Court affirms in part Paragraph 1 of the Order portion of the Final Agency Decision which holds that

> Petitioner's businesses, The Barber Shop – A Hair Salon For Men, were providing barber services without a barber shop permit and a licensed barber on the premises at Respondent's Cary and Raleigh locations.
>
> 5. The Court affirms in part the Final Agency Decision, which holds that Petitioner is not allowed to use or display a barber pole for the purpose of offering barbering services, and Petitioner is ordered to remove the barber pole unless licensed by Respondent Board.
>
> 6. The Court affirms in part the Final Agency Decision which holds that Petitioner's businesses, advertising of its services as a barber shop is a misrepresentation and confusing and deceptive to the consuming public, and Petitioner is ordered to remove and cease such advertisements unless licensed by Respondent Board.
>
> 7. The Court reverses in part the Final Agency Decision in its imposition of fines because the Court concludes that Respondent Board does not have the statutory authority to impose fines on persons or entities not licensed by the Board.
>
> 8. The Court reverses in part the Final Agency Decision in its imposition of attorney fees and costs for services rendered by the Board Counsel and staff because the Court concludes that Respondent Board does not have the statutory authority to impose such fees and costs on persons or entities not licensed by the Board.

Based on these findings, the trial court ordered the imposition of civil penalties and the award of attorney's fees and costs for services be reversed. Both petitioner and respondent appealed.

II. Discussion

"When reviewing a superior court order concerning an agency decision, we examine the order for errors of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, __ N.C. App. __, __, 741 S.E.2d 315, 318 (2012) (quotation marks and citations omitted).

A. Petitioner's Appeal

[1] The sole issue raised on appeal by petitioner is whether the trial court exceeded the permissible scope of review when it ordered him to remove the barber pole and cease advertising barber services unless licensed by the Board. Petitioner contends the trial court did and that those portions of the trial court's order must be reversed. We agree.

N.C. Gen. Stat. § 150B-51 governs the scope of judicial review of an agency decision. It provides in pertinent part:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2013).

Pursuant to N.C. Gen. Stat. §§ 86A-5 & -27, the Board has the power to assess civil penalties. *See* N.C. Gen. Stat. § 86A-5(a)(6) (2013). The

Board does not, however, have the power to issue injunctions. Thus, in accordance with its powers, the Board did not enjoin petitioner, but simply found petitioner was properly cited for fraudulent misrepresentations and ordered petitioner to pay civil penalties, attorney's fees, and costs.

As detailed more fully above, petitioner petitioned the trial court to review the Board's assessment of civil penalties, attorney's fees, and costs. Upon reviewing the case, the trial court reversed portions of the Board's Final Decision and held the Board did not have the statutory authority to impose civil penalties, attorney's fees, and costs on non-licensees. The trial court did, however, affirm the Board's conclusions that petitioner was subject to the Barber Act, Chapter 86A of the General Statues, and violated certain rules related to advertising barber services. Yet, in addition to affirming those portions of the Board's Final Decision related to advertising, the trial court ordered petitioner to remove the barber pole and cease advertising barber services unless licensed by the Board.

Defendant now contends the decretal portions of the trial court's order ordering the removal of the barber pole and cessation of advertising barber services were beyond the scope of the trial court's review.

Although the Barber Act provides an avenue for the Board to seek an injunction in superior court, see N.C. Gen. Stat. § 86A-20.1 (2013) ("The Board . . . may apply to the superior court for an injunction to restrain any person from violating the provisions of this Chapter or the Board's rules."), respondent concedes that it did not pursue that avenue, nor raise the issue in the underlying contested case. Nevertheless, citing *In re Alamance County Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) ("Generally speaking, the scope of a court's inherent power is its 'authority to do all things that are reasonably necessary for the proper administration of justice.'") (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)), respondent contends that it was within the inherent power of the court to enjoin petitioner from displaying the barber pole and advertising barber services. We disagree.

Given that N.C. Gen. Stat. § 86A-20.1 provides an avenue for respondent to seek an injunction and respondent did not pursue that avenue, we hold the trial court, acting on its own to issue relief outside the authority of the Board, acted outside the scope of review provided in N.C. Gen. Stat. § 150B-51. The only issues before the trial court for review were those issues decided by the Board – the assessment of civil penalties, attorney's fees, and costs. As a result, we reverse those portions of the

trial court's order that mandate petitioner remove the barber pole and cease advertising barber services.

B. Respondent's Appeal

[2] In respondent's appeal, respondent first argues the trial court erred in its 3 May 2013 order by denying its Motion To Dismiss Petition For Judicial Review. Specifically, respondent contends dismissal was appropriate because petitioner failed to make specific exceptions to the Board's Final Decision.

N.C. Gen. Stat. § 150B-46 governs the contents of petitions for judicial review from final agency decisions. It provides, "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C. Gen. Stat. § 150B-46 (2013). This Court has recognized that " '[e]xplicit' is defined in this context as 'characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied.' " *Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 70, 457 S.E.2d 892, 898 (1995) (quoting *Vann v. N.C. State Bar*, 79 N.C. App. 173, 173-74, 339 S.E.2d 97, 98 (1986)). Applying that definition of explicit in both *Gray* and *Vann*, this Court held the trial courts erred in denying the respondents' motions to dismiss because the petitions at issue were not "sufficiently explicit" to allow effective judicial review where the petitioners did not except to particular findings of fact, conclusions of law, or procedures. *Gray*, 119 N.C. App. at 71, 457 S.E.2d at 899, *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98.

Respondent now argues for a similar result in the present case because petitioner did not take exception with specific findings of fact, conclusions of law, or procedures. Respondent claims petitioner made only general assertions of error that fail to meet the required standards of specificity under N.C. Gen. Stat. § 150B-46. We disagree.

Although petitioner did not except to specific findings or conclusions by the Board, petitioner clearly stated exceptions to the Board's Final Decision. These exceptions include the following:

> a. Petitioner is not a licensed or registered barber (hereinafter "a Licensee"), and the Board's powers over individuals who are not Licensees are limited to making a criminal referral alleging a violation of N.C.G.S. § 86A-20, or seeking injunctive relief from the Court as provided for under N.C.G.S. § 86A-20.1. The Board's imposition of fines and costs on Petitioner is beyond the power granted by the General Assembly; the Final Decision is in excess of

the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), the Final Decision must be reversed.

b. Even if N.C.G.S. § 86A-27 applies to individuals who are not Licensees, N.C.G.S. § 86A-27(d) specifically provides that the Board may only impose fees and costs on "the licensee", and Petitioner is not a Licensee. Under the circumstances, imposition of costs and attorney's fees on Petitioner is in excess of the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), the Final Decision must be reversed.

c. N.C.G.S. § 86A-14 provides:

> The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their duties:
>
> . . . .
>
> (5) Persons who are working in licensed cosmetic shops or beauty schools and are licensed by the State Board of Cosmetic Art Examiners.

As the Board recognizes, each of Maybe Someday's locations has a Cosmetic Arts Salon License through Petitioner, and, therefore, in accordance with the provisions of N.C.G.S. § 86A, Petitioner is exempt from the provisions of the Barber Act. Under the circumstances, the Final Decision is in excess of the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), and [sic] it must be reversed.

d. A primary basis for the Board's contention that Petitioner was "attempting to barber by fraudulent misrepresentations" is that Maybe Someday's locations have a "barber pole" in the reception area, without a barber permit for the shop. With respect to the use of the "barber pole", the Board holds that 21 NCAC 06Q.0101 "states that no person shall use or display a barber pole for the purpose of offering barbering services to the consuming public without a barber shop permit." In fact, 21 NCAC 06Q.0101 does not state anything of the sort. The cited section of the North Carolina Administrative Code simply provides

> "[e]very establishment permitted to practice barbering shall display at its main entrance a sign which is visible from the street, and whose lettering is no small[er] than three inches, stating 'barber shop,' 'barber salon,' 'barber styling' or similar use of the designation, 'shop, salon or styling' or shall display a 'barber pole' . . [. .]" Thus, the cited section of the North Carolina Administrative Code imposes obligations on barbers, it does not prohibit any act by individuals who are not Licensees.
>
> . . . .
>
> Under the circumstances, the Final Decision, in accordance with the provisions of N.C.G.S. § 150B-51(b)(2), and/or N.C.G.S. § 150B-51(b)(4), and/or N.C.G.S. § 150B-51(b)(6), must be reversed.

Considering these exceptions in the context of the petition, we find the Petition For Judicial Review "sufficiently explicit" to allow effective judicial review. Thus, we hold the trial court did not err in denying respondent's motion to dismiss.

[3] In the second issue raised by respondent on appeal, respondent argues the trial court erred in concluding that "Respondent Board does not have the statutory authority to impose such fines on persons or entities not licensed by the Board." Upon review of the statutes, regulations, and relevant law, we agree.

Among the powers and duties assigned to the Board is the power "to assess civil penalties pursuant to [N.C. Gen. Stat. §] 86A-27." N.C. Gen. Stat. § 86A-5(a)(6). N.C. Gen. Stat. § 86A-27(a) in turn provides, in pertinent part, "[t]he Board may assess a civil penalty not in excess of five hundred dollars ($500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board." N.C. Gen. Stat. § 86A-27 (2013).

A plain reading of N.C. Gen. Stat. § 86A-27(a) reveals no indication that the imposition of civil penalties is limited solely to licensees. In fact, as respondent points out, where portions of the statute are intended to apply exclusively to licensees, the statute unambiguously provides for it; for example, N.C. Gen. Stat. § 86A-27(d), which governs the assessment of attorney's fees and costs in Board proceedings, provides that "[t]he Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, *to the licensee* against whom the proceedings were brought." N.C. Gen. Stat. § 86A-27(d) (emphasis added). Where there is

no limiting language in N.C. Gen. Stat. § 86A-27(a), we will not read limiting language into the statute.

Moreover, N.C. Gen. Stat. § 86A-27(c) provides that "[t]he Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board." The Board has done so beginning with N.C. Admin. Code tit. 21, r. 6O.0101. As argued by respondent, the rules promulgated by the Board pursuant to the Administrative Procedure Act, Chapter 150B of the General Statutes, indicate that fines may be imposed on non-licensees. *See* N.C. Admin. Code tit. 21, r. 6O.0102 (June 2014) (setting forth a schedule of civil penalties for operating a barber shop without first filing an application for a barber shop license or without a valid permit).

Particularly relevant to this case, the schedule of civil penalties provides that "[t]he presumptive civil penalty for barbering or attempting to barber by fraudulent misrepresentations . . . : 1st offense $500.00." N.C. Admin. Code tit. 21, r. 6O.0107 (June 2014). A subsequent regulation explains that

> [e]xcept as provided in Chapter 86A of the General Statutes, the Board:
>
> (1) will find fraudulent misrepresentation in the following examples:
>
> (a) An individual or entity operates or attempts to operate a barber shop without a permit;
>
> (b) An individual or entity advertises barbering services unless the establishment and personnel employed therein are licensed or permitted;
>
> (c) An individual or entity uses or displays a barber pole for the purpose of offering barber services to the consuming public without a barber shop permit[.]
>
> . . . .

N.C. Admin. Code tit. 21, r. 6Q.0101 (June 2014). Thus, it is clear from the Board rules that civil penalties may be assessed for violations by an "individual or entity", not just against those licensed by the Board.

[4] In response to respondent's argument, petitioner argues that if the Board has statutory authority to impose civil penalties on non-licensees, that authority is unconstitutional because it constitutes a

grant of judicial power to the Board that is not "reasonably necessary" to accomplish the Board's purpose.

North Carolina's Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. As our Supreme Court explained in *State, ex rel Lanier, Comm'r of Ins. v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968),

> The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

Id. at 495, 164 S.E.2d at 166. Our Constitution, however, also provides that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. "Whether a judicial power is 'reasonably necessary as an incident to the accomplishment of the purposes for which' an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred." *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168.

What began as a narrow interpretation of "reasonably necessary" in *Lanier* has since become more liberal, permitting administrative agencies guided by proper standards to exercise discretion in assessing civil penalties. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 381-82, 379 S.E.2d 30, 35 (1989). Applying the less mechanical approach in *In re Civil Penalty*, our Supreme Court upheld a civil penalty imposed by the North Carolina Department of Natural Resources and Community Development for violations of the Sedimentation Pollution Control Act as reasonably necessary. *Id.*

As petitioner states, "[t]he purposes of the Board are to license barbers and to prevent anyone who is not licensed as a barber from practicing barbering." *See* N.C. Gen. Stat. § 86A-1 (2013). As with most agencies, these purposes serve to protect the public.

Now on appeal, petitioner contends the Board has all the tools necessary to accomplish its purposes by referring non-licensees engaged in the practice of barbering for criminal prosecution pursuant to N.C. Gen. Stat. § 86A-20 and seeking to enjoin non-licensees from practicing barbering pursuant to N.C. Gen. Stat. § 86A-20.1. While we recognize that N.C. Gen. Stat. §§ 86A-20 & -20.1 provide means to accomplish the Board's purposes, they are not the exclusive means. As the Court noted in *In re Civil Penalty*, other avenues to prohibit violations, such as injunctions, take time during which irreparable damage may occur. "The power to levy a civil penalty is therefore a useful tool, since even the threat of a fine is a deterrent." 324 N.C. at 381, 379 S.E.2d at 35.

Similarly, in this case we hold that the imposition of civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering.

III. Conclusion

For the reasons discussed above, we affirm the trial court in part and reverse in part.

Affirmed in part; reversed in part.

Judges CALABRIA and ELMORE concur.

LAWSON v. LAWSON

[236 N.C. App. 576 (2014)]

JOHNNIE LEE LAWSON AND BARBARA G. LAWSON, PLAINTIFFS
v.
NOEL LAWSON, HESTER LAWSON JONES, KWAME LAWSON, CLEOTIS LAWSON, JR. AND WIFE, KATRINA LAWSON AND PERRY LAWSON, DEFENDANTS

No. COA14-286

Filed 7 October 2014

1. Real Property—boundary—opinion—referee's report—resolution of complaint

The trial court did not err in a case involving a property boundary by allegedly failing to consider the evidence and give its own opinion and conclusion as to the referee's report. By ordering the referee's report to be entered into judgment as the resolution of plaintiffs' complaint, the trial court signaled its opinion and conclusion that based on the evidence presented, the referee's report was the appropriate resolution of plaintiffs' boundary dispute.

2. Real Property—boundary—referee's report—abandoned issues—competent evidence

The trial court did not err in a case involving a property boundary by concluding that the referee did not err in its findings of fact and conclusions of law. Plaintiffs failed to raise issues 4-10 in their brief, and thus, those arguments were deemed abandoned under N.C. R. App. P. 28(b)(6). Further, the record indicated that the referee's report was supported by competent evidence.

Appeal by plaintiffs from order entered 16 July 2013 by Judge W.O. Smith, III, in Person County Superior Court. Heard in the Court of Appeals 26 August 2014.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for plaintiff-appellants.

The Law Offices of Brian L. Crawford, P.A., by Brian L. Crawford, for defendant-appellees.

BRYANT, Judge.

Where the trial court properly considered the evidence and the referee's findings of fact and conclusions of law, we affirm the decision of the trial court to affirm the referee's report in its entirety.

On 18 November 2010, plaintiffs Johnnie Lee Lawson and Barbara G. Lawson filed a complaint against Noel Lawson, Hester Lawson Jones, Kwame Lawson, Cleotes Lawson, Jr., and wife Katrina Lawson, and Perry Lawson ("defendants"). Plaintiffs brought claims for quiet title and trespass to real property against all defendants, and a claim for destruction of trees against defendant Perry Lawson. Plaintiffs alleged that defendants had trespassed onto, erected buildings and fences on, and removed trees from plaintiffs' property "without consent or permission." On 18 January 2011, defendants answered and counterclaimed for abuse of process, malicious use of process, compensatory damages, and punitive damages.

On 23 March, plaintiffs filed a reply and motion to dismiss defendants' counterclaims. On 24 October, defendants filed a motion for summary judgment. Plaintiffs then filed a motion for reference for appointment of a referee on 28 November, which was granted by order of the trial court on 28 March 2012. The trial court entered an amended order on 24 April after it was determined that the surveyor appointed as the referee had merged with another surveying company.

On 18 June, the referee filed a report which concluded that the placement of the disputed property line was correct as it was currently designated by physical boundary markers and that based on this determination of the property line, defendants had not committed trespass or damage to plaintiffs' property. Plaintiffs timely filed a motion for exceptions to findings of referee on 16 July. Defendants filed a motion for judgment on the pleadings on 21 September.

On 3 October 2012, a hearing was held on plaintiffs' motion for exceptions to findings of referee. In an order entered 16 July 2013, the trial court upheld the findings of the referee and concluded that the plat map generated by the referee should be entered as the judgment and resolution for plaintiffs' complaint. Plaintiffs appeal.

On appeal, plaintiffs raise sixteen issues which can be divided into two central issues: (I) whether the trial court erred by failing to consider the evidence and give its own opinion and conclusion as to the referee's report; and (II) whether the referee erred in its findings of fact and conclusions of law.

I.

[1] Plaintiffs argue that the trial court erred by failing to consider the evidence and give its own opinion and conclusion as to the referee's

report. Specifically, plaintiffs raise three arguments as to whether the trial court: abused its discretion in confirming the referee's report without independently evaluating the evidence and giving its own opinion; erred by failing to make specific findings of fact and conclusions of law in confirming the referee's findings; and erred by failing to make specific findings of fact and conclusions of law during its independent evaluation of the referee's report. As these three issues are closely related and plaintiffs cite little case law in support of them, we address them as a single argument.

Pursuant to our North Carolina Rules of Civil Procedure, "the court may, upon the application of any party or on its own motion, order a reference in the following cases: . . . [w]here the case involves a complicated question of boundary, or requires a personal view of the premises." N.C. Gen. Stat. § 1A-1, Rule 53(a)(2)(c) (2013). Where, as here, a party takes exception to the referee's report,

> it is the duty of the [trial] judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases — use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee's findings in any other way.

Quate v. Caudle, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989) (citation and emphasis omitted). "After conducting this review, the trial court may adopt, modify, or reject the referee's report in whole or in part, remand the proceedings to the referee, or enter judgment." *Gaynor v. Melvin*, 155 N.C. App. 618, 622, 573 S.E.2d 763, 766 (2002) (citations omitted).

> In reviewing the trial court's judgment entered on the referee's report, the findings of fact by a referee, approved by the trial [court], are conclusive on appeal if supported by any competent evidence. Similarly, as the trial court has the authority to affirm, modify, or disregard the referee's findings and make its own findings upon review of the parties' exceptions to the referee's report, different or additional findings by the court are binding on appeal if they are supported by competent evidence. Any conclusions of law made by the referee, however, are reviewed de novo by the trial court, and the trial court's conclusions are reviewed de novo by the appellate court.

Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 210 N.C. App. 522, 531—32, 709 S.E.2d 512, 520 (2011) (citations and quotation omitted).

Plaintiffs contend the trial court erred by failing to consider the evidence and give its own opinion and conclusion both as to the evidence and the law. We disagree.

In his report, the referee noted that he interviewed plaintiffs and defendants, researched the deed history of plaintiffs' property, and conducted fieldwork of the property. This fieldwork included walking the property to look for physical boundary markers, utilizing both GPS observations and traditional survey methods, noting "numerous signs of continuous long term possession by both the plaintiff and the defendants[,]" and comparing the referee's property measurements to those recorded in deeds held by plaintiffs and defendants. As such, it appears that the referee's findings of fact were based on competent evidence. Moreover, plaintiffs have failed to provide any evidence on appeal to disprove this determination. Although the trial court did not make its own findings of fact in its order upholding the referee's report, it was not obligated to; rather, the trial court could, as it did here, chose to affirm the referee's report in whole. *See id.* As such, the referee's findings of fact, approved by the trial court and supported by the evidence, are binding on appeal.

In reviewing the referee's conclusions of law, the trial court was to consider these conclusions *de novo*. *See id.* The trial court, in its order, made the following conclusion of law: "The Court hereby orders the Report of the Referee entitled 'Final Plat Court[-]ordered Survey for [plaintiffs] and [defendants]' by [the referee] dated June 14, 2012 to be entered into the record as the judgment and resolution for this Complaint." As such, plaintiffs' contention that the trial court was required to give its own separate opinion and conclusion as to the referee's report is without merit.

Here, upon plaintiffs' exceptions to the referee's report, the trial court conducted a hearing and evaluated the evidence. The trial court, by ordering the referee's report to be entered into judgment as the resolution of plaintiffs' complaint, clearly signaled its opinion and conclusion that, based on the evidence presented, the referee's report was the appropriate resolution of plaintiffs' boundary dispute. Moreover, although we cannot rely on a transcript[1] to determine whether the trial court made oral statements of opinion and conclusions of law during

1. Although plaintiffs ordered a transcript of the trial court's hearing to be filed with this Court, a transcript could not be prepared as the court reporter's notes from the hearing were deemed lost. As such, the record on appeal does not contain a transcript of the hearing.

the hearing, it is well-established that "[w]here the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties." *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982) (citations omitted). Accordingly, the trial court did not err in affirming the referee's report as the judgment and resolution for plaintiffs' complaint. Plaintiffs' argument is overruled.

II.

[2] Plaintiffs next argue that the referee erred in its findings of fact and conclusions of law. Specifically, plaintiffs raise thirteen arguments as to whether the referee erred in its findings of fact and conclusions of law regarding the referee's use of physical boundary markers, signs of long-term possession, and research into and use of deeds other than plaintiffs' deed. However, as plaintiffs have failed to raise issues 4-10 in their brief, these arguments are therefore deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

As to plaintiffs' remaining issues contending the referee erred in its findings of fact and conclusions of law, these issues lack merit. As discussed in *Issue I*, the referee's findings of fact are deemed binding on appeal if supported by competent evidence and approved by the trial court. The referee's conclusions of law are reviewed *de novo* by the trial court, and the trial court's conclusions of law are reviewed *de novo* on appeal to this Court. *See Cleveland Constr.*, 210 N.C. App. at 531-32, 709 S.E.2d at 520. Our review finds no error in the conclusions reached by the referee and by the trial court.

Here, the trial court, after conducting a hearing on plaintiffs' exceptions to the referee's report, affirmed the referee's report in its entirety and ordered the referee's plat map to be entered as the judgment and resolution of plaintiffs' complaint. The record indicates that the referee's report was supported by competent evidence and, although no transcript of the hearing was filed, plaintiffs have not shown that the trial court failed to properly review the evidence and the referee's findings of fact and conclusions of law before entering its order affirming and adopting the referee's report in its entirety. As indicated, by ordering the referee's report entered into judgment, the trial court indicated its conclusion that the resolution of the boundary dispute was appropriately resolved by the referee. Accordingly, plaintiffs' argument is overruled.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.

POWER v. POWER

[236 N.C. App. 581 (2014)]

ROSEMARY LYNN GROVE POWER, Plaintiff
v.
THOMAS ALFRED POWER, Defendant

No. COA14-249

Filed 7 October 2014

1. Divorce—equitable distribution—potential tax consequences

The trial court was not required to consider potential tax consequences when entering an equitable distribution judgment. Defendant husband failed to present evidence of the potential tax consequences before the close of evidence.

2. Divorce—equitable distribution—valuation—marital cars—opinion testimony

The trial court did not err in an equitable distribution case by excluding defendant husband's Kelley Blue Book values for the marital cars. Although the Kelley Blue Book fell within N.C.G.S. 8C-1, Rule 803(17) as a hearsay exception, defendant was not prejudiced by the omission of such evidence where defendant was permitted to give opinion testimony as to the value of the marital cars.

3. Divorce—equitable distribution—marital property—financial gifts from parent

The trial court did not err in an equitable distribution case by not deducting from the marital estate financial gifts made to plaintiff wife and defendant husband from defendant's father. Defendant failed to show that the monetary gift to the marital couple was not marital property.

Appeal by defendant from equitable distribution judgment entered 28 August 2013 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 26 August 2014.

Allen & Spence, PLLC, by Scott E. Allen, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

BRYANT, Judge.

Where defendant failed to present evidence of potential tax consequences before the close of evidence, the trial court was not required

to consider those potential tax consequences when entering an equitable distribution judgment. Although the Kelley Blue Book falls within Rule 803(17) as a hearsay exception, defendant was not prejudiced by the omission of such evidence where defendant was permitted to give opinion testimony as to the value of the marital cars. Where defendant failed to show that a monetary gift to the marital couple was not marital property, the trial court properly considered that money as part of the marital assets.

On 2 July 2012, plaintiff Rosemary Lynn Grove Parker filed a complaint against defendant Thomas Alfred Power seeking equitable distribution, divorce from bed and board, and a temporary restraining order to prevent defendant from wasting marital assets. Defendant answered and counterclaimed for alimony and post-separation support, equitable distribution, and expenses and attorneys' fees.

On 21 May 2013, plaintiff and defendant filed a joint dismissal in which plaintiff dismissed her claim for divorce from bed and board and defendant dismissed his claim for alimony and post-separation support.

A hearing on the parties' competing equitable distribution claims was held on 8 April 2013 in Wake County District Court, the Honorable Christine Walczyk, Judge presiding. On 28 August, the trial court entered a judgment for equitable distribution between the parties. Defendant appeals.

On appeal, defendant raises three issues as to whether the trial court erred in: (I) not considering the tax consequences arising from its equitable distribution judgment; (II) in excluding defendant's Kelley Blue Book values for the marital cars; and (III) in not deducting from the marital estate financial gifts made to plaintiff and defendant.

I.

[1] Defendant argues that the trial court erred in not considering the tax consequences arising from its equitable distribution judgment. We disagree.

> Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be upset absent clear abuse. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.

Robinson v. Robinson, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations, quotations, and parentheses omitted).

Defendant contends the trial court erred in not considering the tax consequences of its equitable distribution judgment. Specifically, defendant argues that pursuant to N.C. Gen. Stat. § 50-20(c), the trial court was required to consider tax consequences prior to making its judgment.

North Carolina General Statutes, section 50-20, holds that:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:
>
> . . .
>
> (11) The tax consequences to each party . . . . The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

N.C.G.S. § 50-20(c)(11) (2013). However, a trial court must consider *all* of the distributional factors in N.C.G.S. § 50-20(c) only when a party presents evidence that an equal distribution would be inequitable. *Embler v. Embler*, 159 N.C. App. 186, 189, 582 S.E.2d 628, 631 (2003) (emphasis added) (citations and quotation omitted).

In its pre-trial order, the trial court noted that both parties had raised contentions, including tax consequences, as to why an equal division of marital assets would not be equitable. However, during the equitable distribution hearing, neither party presented any evidence regarding potential tax consequences caused by an equal distribution. In fact, the record shows that defendant only raised the issue of tax consequences as to a single marital account, a Scottrade account, at the end of the hearing:

> [DEFENDANT]: Does Your Honor also consider that Scottrade account? I shouldn't be penalized with all the tax burden on that if you're weighing the cash-out values.
>
> THE COURT: I'm going to consider – I mean, you guys didn't put on any evidence about tax consequences, but

> I'm going to consider the liquid or nonliquid nature of assets when I do the division.
>
> [DEFENDANT]: Okay.

As defendant failed to present evidence during the hearing regarding potential tax consequences caused by an equal distribution, the trial court did not err in failing to consider tax consequences in awarding an equitable distribution. *See id.*

Defendant further argues that the trial court erred in not considering the potential tax consequences of its equitable distribution judgment because defendant sent to the trial court, after the equitable distribution hearing, an email challenging plaintiff's proposed equitable distribution order. In his email, defendant asked the trial court to address "a few discrepancies" and to "consider[] the tax consequences on the Defendant's behalf." Plaintiff immediately objected to defendant's email, and the trial court did not respond to either party. In its equitable distribution judgment, the trial court did not make any findings of fact as to tax consequences created by an equal distribution and concluded as a matter of law that "[a]n equal distribution of marital and divisible property is equitable."

Defendant's argument that he offered evidence concerning potential tax consequences to the trial court is without merit, as defendant's email was sent after the close of evidence. *See Wall v. Wall*, 140 N.C. App. 303, 312, 536 S.E.2d 647, 653 (2000) ("The trial court is not required to consider tax consequences unless the parties offer evidence about them. Defendant may not now ascribe error to the trial court's failure to make such findings without demonstrating that such evidence was brought to the trial court's attention before the close of evidence. Defendant has the burden of showing that the tax consequences of the distribution were not properly considered, and he has failed to carry that burden."). Accordingly, the trial court acted within its discretion in ordering an equitable distribution judgment that did not address tax consequences. Defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred in excluding defendant's Kelley Blue Book values for the marital cars.

During the equitable distribution hearing, the trial court permitted plaintiff to testify as to the value of the two marital cars. Plaintiff testified that she believed the value of her car to be about $3,500.00, based on existing mechanical and cosmetic issues with the car and based on an

appraisal of the car by Carmax. Plaintiff then testified that she believed the value of defendant's car to be somewhere between $2,673.00 and $2,773.00, based on the Kelley Blue Book. Defendant did not object to plaintiff's testimony.

When defendant testified as to the value of the marital cars, he sought to admit into evidence copies of the Kelley Blue Book values of the cars. The trial court sustained plaintiff's objection to this evidence, stating it was "hearsay information" and that defendant could "tell me what your opinion is about the value of the car, but you can't show me the Blue Book value." Defendant then gave his opinion that plaintiff's car was worth $7,197.00 and his own car $3,001.00, based on the Kelley Blue Book values.

Defendant contends the trial court erred in refusing to admit his evidence of the cars' Kelley Blue Book values and that this "preclusion of [defendant's] opinion evidence substantially prejudiced [him]." This Court has previously held that the Kelley Blue Book falls within Rule 803(17) as a hearsay exception for market reports. *See State v. Dallas*, 205 N.C. App. 216, 220, 695 S.E.2d 474, 477 (2010) ("Rule 803(17) of the Rules of Evidence provides that [m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations are not excluded by the hearsay rule. We hold that both the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception."). As such, the trial court erred in refusing to admit defendant's Kelley Blue Book values as evidence.

However, even though the trial court erred in not admitting this evidence, defendant has failed to show how this error "substantially prejudiced" him. The record indicates that plaintiff and defendant each gave opinion testimony as to the value of the two marital cars, including each party noting that they consulted the Kelley Blue Book in determining the cars' values. Defendant did not offer additional testimony regarding the condition of the cars, other than the Kelley Blue Book values, nor did defendant contest plaintiff's evidence concerning the cars' conditions and values. As such, defendant was not prejudiced because the trial court heard and weighed the testimony of both parties as to the value of the cars before making its determination that each party should keep its respective car as part of the equitable distribution judgment. *See id.* at 220-21, 695 S.E.2d at 477 (noting that the defendant failed to demonstrate prejudice where the testimony of the witnesses as to the value of several cars was given, considered, and weighed,

even though the testimony varied as to the cars' values). Accordingly, the trial court's error about which defendant argues was not prejudicial to defendant.

III.

[3] Finally, defendant argues that the trial court erred in not deducting from the marital estate financial gifts made to plaintiff and defendant. We disagree.

Pursuant to N.C. Gen. Stat. § 50-20, marital property includes all property "acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property[,]" while separate property includes all property "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C.G.S. § 50-20(b)(1),(2) (2013). "The party claiming a certain classification has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification." *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996) (citation omitted).

During the hearing, defendant argued that the trial court should not consider $51,000.00 as part of the marital estate because that money was given to defendant by defendant's father as a series of gifts. Plaintiff testified that defendant's father had gifted $51,000.00 to her and defendant over a period of time for the purpose of depleting defendant's father's financial interests so he could receive assisted-living care through the government, if needed. When questioned by defendant as to where this money was currently located, plaintiff responded that she did not know where the money was specifically located, other than "[i]t was just all in the funds. . . . I don't know where it's at." Plaintiff also agreed with defendant's assertion that defendant had deposited the funds "into our joint account." Defendant did not offer any evidence as to where the money was located, such as in a separate ear-marked account; rather, defendant only asserted that the funds were a gift to him from his father.

The trial court, in its equal distribution order, noted that: "During the marriage, the parties received regular gifts from the Defendant's father. The [defendant][1] failed to establish that there were any funds left from

1. We note that the trial court made a typographical error in this finding by stating in its second sentence that "The Plaintiff failed to establish . . . ." A review of the hearing transcript indicates that defendant, not plaintiff, raised the issue of whether the $51,000.00 was in fact marital property. As defendant failed to establish that this money was not marital property, we therefore correct the trial court's finding as presented above.

these gifts on the date of separation that were separate and apart from the accounts already distributed hereunder."

Even assuming that the $51,000.00 was given as a gift solely to defendant and not as a joint gift to both parties, the evidence showed that these funds were commingled with the parties' marital funds in their joint account. Thus, defendant had the burden of proof "to trace the initial deposit into its form at the date of separation." *Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) (citation omitted).

> Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into its form at the date of separation.

Id. (citations omitted).

Here, defendant failed to present any evidence tracing the gift of $51,000.00 from his father to show where these funds were located as of the date of separation. Therefore, as defendant failed to prove that the aggregate sum of $51,000.00 was not marital property, the trial court did not err in refusing to classify these funds as defendant's separate property. Accordingly, defendant's argument is overruled.

Affirmed.

Judges McGEE and STROUD concur.

STATE OF NORTH CAROLINA
v.
JOHN BURTON EDMONDS, JR., Defendant

STATE OF NORTH CAROLINA
v.
JAMES RYAN EDMONDS, Defendant

No. COA 14-158

Filed 7 October 2014

1. Evidence—hearsay—witness relating detective's statements—not offered for truth of the matter stated

Defendant James Edmonds argued that the trial court erred by overruling his objection to the testimony of a witness about statements that a detective had made to the witness because the testimony constituted inadmissible hearsay. However, the testimony was merely offered to illustrate how the detective purportedly influenced the witness into making a statement and was not offered for the truth of the matter asserted (that Detective Briggs believed defendant James committed the robbery). Even assuming that the testimony was inadmissible hearsay, defendant did not argue that he was prejudiced by its admission.

2. Evidence—questions containing facts not in evidence—no prejudice

The trial court did not err by failing to declare a mistrial ex mero motu where defendant contended that the State was allowed to ask questions containing facts not in evidence, thereby putting prejudicial hearsay before the jury. Defendants' motion in limine was denied; there was nothing in the record to indicate that the prosecutor's questions were asked in bad faith; and the trial court sustained objections, struck one question from the record, and issued a curative instruction.

3. Witnesses—cross-examination—limited—verdict not improperly influenced

The trial court's limiting of defendant's cross-examination of a State's witness did not constitute reversible error where defendant did not establish that the cross-examination improperly influenced the verdict.

4. Sentencing—colloquy with defendant—not held—harmless error

Defendant was not entitled to a new sentencing hearing where the trial court failed to address him personally and conduct the colloquy required by N.C.G.S. §§ 15A-1022.1(b) and -1022.1(a)(2013), but the error was harmless because defendant did not object or present any argument or evidence contesting the sole aggravating factor.

5. Judgments—clerical errors—remanded for correction

Clerical errors in defendant's Judgment and Commitment form were remanded for correction, correcting defendant's Prior Record Level from II to IV and correcting the amount of attorney's fees owed from $13,004.45 to $6,841.50.

Appeal by defendants from judgments entered 25 July 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 27 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Heather Freeman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant James Ryan Edmonds.

Russell J. Hollers III, for defendant John B. Edmonds.

ELMORE, Judge.

On 5 March 2012, the Buncombe County grand jury returned bills of indictment against defendant John Burton Edmonds, Jr. ("defendant John") for robbery with a dangerous weapon in 11 CRS 64719, and against his son, James Ryan Edmonds ("defendant James") for robbery with a dangerous weapon in 11 CRS 64716. On 18 April 2013, the State filed a Motion for Joinder, requesting that the trial court join the cases for trial. The motion was granted and the case came on for trial on 5 June 2013. The jury found both men guilty of robbery with a dangerous weapon. Defendant John admitted the aggravating factor that he committed the offense while on pretrial release, and he was sentenced to 97 to 129 months imprisonment with a 28-day credit. Defendant James also admitted that he committed the offense while on pretrial release. He was sentenced to 73 to 100 months imprisonment with a 10-day credit. Both defendant John and defendant James (collectively "defendants") now

appeal their convictions. After careful consideration, we find that defendant John received a trial free from error and defendant James received a trial free from prejudicial error. However, we remand for a correction of clerical errors in defendant John's Judgment and Commitment form.

I. Background

At trial, the State called Leslie Pruitt, customer service manager at Forrest Hills Commercial Bank. Ms. Pruitt testified that in September 2011, defendant John opened a bank account at Forrest Hills Commercial Bank that was funded by loan proceeds in the amount of $65,000.00. Ms. Pruitt testified that after this account was opened, large amounts of cash were withdrawn daily until the account was overdrawn. The bank's fraud detection system flagged the account as "a suspect of suspicious activity." Ms. Pruitt tracked the account activity and recommended it be closed. In November 2011, Forrest Hills Commercial Bank closed the account.

Anne Garrett, customer service representative at Forrest Hills Commercial Bank, testified that she was familiar with defendant John because he frequented the bank and called "all of the time" regarding his account. On 7 December 2011, one day before the robbery, defendant John and defendant James arrived together at the bank at 1:33 p.m. Ms. Garrett testified that the men approached her desk and defendant John took a seat. The surveillance video showed that defendant James stood to the side of Ms. Garrett's desk before moving behind it. Ms. Garrett testified that she particularly remembered defendant James that afternoon because he encroached on the personal space behind her desk.

On 8 December 2011, the day of the robbery, Ms. Garrett saw defendant John enter the bank on three separate occasions. At 11:00 a.m., defendant John first entered the bank and paced the lobby while talking on his cell phone. He did not speak to any bank employee. According to Ms. Garrett, it was customary for defendant John to be on his phone when he entered the bank. At 12:20 p.m., defendant John entered the bank once more. He adamantly asked bank personnel to open an account for him. He left after being informed that he could not open an account. Ms. Garrett testified that defendant John entered the bank for a third time at approximately 1:20 p.m. Defendant approached Ms. Garrett's desk, and she opened her cash drawer to put her work away. Defendant John took a seat despite the fact that Ms. Garrett was on the phone and there were other customer service representatives available to assist him. Shortly after defendant John sat down, Ms. Garrett testified that the bank door flung open and a masked man brandishing a gun

ran directly to her with “no hesitation at all.” The robber grabbed Ms. Garrett’s cash drawer—forcing her hands off of it. He took the cash and ran out the door.

In a statement made to Detective Kevin Briggs after the robbery, Ms. Garrett noted that the robber wore a blue mask and was about 5’7” tall. She also stated she believed the gun was fake because it had an orange cap. At trial, Ms. Garrett testified that she no longer thought the gun was fake. Ms. Garrett testified that the robber’s build resembled defendant James’. She testified, “[a]s soon as everything happened and we closed the doors, I said that’s [] John’s son.” Ms. Garrett also recognized that the robber wore the same shoes that defendant James had worn to the bank the previous day.

Sergeant Mark Allen with the Town of Biltmore Police Department testified on behalf of the State at trial. On 8 December 2011, Sergeant Allen responded to a bank robbery at Forest Hills Commercial Bank at approximately 1:22 p.m. As he approached the bank, defendant John was leaving. Sergeant Allen ordered him to stop. Defendant John informed Sergeant Allen that he was a patron of the bank and that it had just been robbed. Defendant John stated that he chased the robber out of the bank, that the robber was Hispanic, wore a black shirt and black mask, and fled across the parking lot into the wooded area behind the bank. Based on the information defendant John provided, Sergeant Allen set up a perimeter and radioed for a tracking K-9 unit.

After viewing the surveillance video of the robbery, Sergeant Allen named defendant John a suspect because (1) the direction defendant John said the robber fled did not match the video, (2)the robber’s mask was not black, and (3) defendant John acted eager to leave the scene.

Jamie Johnson, defendant James’ former girlfriend, testified for the State over defense counsels’ objections. Jamie Johnson stated she and defendant James were living together in December 2011, at which time she was eight months pregnant with his child. Jamie Johnson testified that she drove a gold 2001 Mazda Tribute in December 2011, which defendant James frequently borrowed. This testimony was relevant because the bank’s surveillance video from 8 December 2011 showed a gold Mazda Tribute pass defendant John in the bank’s parking lot after the robbery. The same vehicle was shown on the surveillance video on 7 December 2011 after the men left the bank. Jamie Johnson alleged that defendant James frequently borrowed her vehicle and that he had done so on 8 December 2011.

On 7 December 2011 at 1:15 p.m., defendant James sent Jamie Johnson the following text message: "Jamie, if you want me to have money in the morning, I have have [sic] all the gas that's in your car to be able to do everything I have to, so if you run any gas out we really will be f-----." Jamie Johnson alleged that on the evening of 8 December 2011, defendant James and defendant John arrived at her home with $2,000 cash and pills. Jamie Johnson admitted that she was addicted to oxycodone. Jamie Johnson also admitted that she threw defendant James' shoes into the river the following day per his request. Jamie Johnson also stated that defendant James kept a black Taurus revolver in his night stand.

Sergeant John Thomas of the Buncombe County Sheriff's Department testified that he obtained search warrants for defendant James, defendant John, and Jamie Johnson's cell phone records. The records evidence multiple calls between defendants on 8 December 2011, including calls originating at 1:17 p.m., 1:18 p.m., and 1:19 p.m., each utilizing cell towers near the bank. The surveillance video shows the robber entering the bank at 1:22 p.m. The next call between defendants occurred at 1:31 p.m. There were subsequent calls exchanged at 1:36 p.m., 1:46 p.m., 1:52 p.m., and 1:53 p.m.

Beau Dean, a network switch engineer for U.S. Cellular, testified for the State regarding defendants' cell phone usage on the requisite dates. His testimony corroborated Sergeant Thomas' in that defendants exchanged numerous calls on 8 December 2011 while utilizing cell towers in close proximity to the bank.

II. Analysis

A. Objection to Jamie Johnson's testimony

[1] Defendant James argues that the trial court erred in overruling his objection to the hearsay testimony of Jamie Johnson. Specifically, defendant James argues that Jamie Johnson's testimony regarding alleged statements that Detective Briggs made to her constitutes inadmissible hearsay opinion testimony of a law enforcement officer regarding defendant James' guilt. We disagree.

"The North Carolina Rules of Evidence define 'hearsay' as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87,

558 S.E.2d 463, 473 (2002). The erroneous admission of hearsay is not always so prejudicial as to require a new trial. *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984).

At trial, Jamie Johnson testified on direct examination for the State as follows:

> Q. On December 9th of 2011, did Detective Briggs attempt to have an interview with you?
>
> A. I think that he came to my house. I think that's the day that he came to my house with my mother and his partner, and they told me that I should leave my house, that it probably wasn't safe and to come down—I think that he wanted me to come down to the station or somewhere and have an interview with him at that point, yeah. And I told him that I would rather wait.
>
> Q. You were nervous and upset, anxious at that time, right?
>
> A. Yes.
>
> Q. Didn't really want to talk to Detective Briggs; isn't that true?
>
> A. No. He had come into my house with my mom. I had told my mom what was going on with the bank robbery. And he called her and, I think, went to her house, and they rode together over to my house. **And he basically told me that [defendant James] robbed a bank, that it was for sure**; and that he had opened up my eyes to a very dangerous man.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

Defendant James argues it was error for the trial court to overrule his objection to the admission of the above testimony, particularly the statement made by Detective Briggs "that [defendant James] robbed a bank, that it was for sure[.]" Relying on *State v. Turnage*, 190 N.C. App. 123, 129, 660 S.E.2d 129, 133 (2008), defendant notes that law enforcement witnesses are prohibited from expressing an opinion as to defendant's guilt as that would impermissibly invade the province of the jury. Defendant James avers, "[b]y overruling [defendant's] proper objection to inadmissible evidence, the trial judge erroneously allowed the jury to

consider, without limitation, the opinion of a Detective with twenty-two years of experience investigating major crimes[.]"

Defendant James is misguided. Here, it was Jamie Johnson, not Detective Briggs, who was testifying, and Detective Briggs did not advance his opinion as to defendant James' guilt. Nevertheless, on appeal defendant James cites cases, including, *inter alia*, *Turnage*, *supra*, *State v. White*, 154 N.C. App. 598, 572 S.E.2d 825 (2002), and *State v. Carrillo*, 164 N.C. App. 204, 595 S.E.2d 219 (2004), wherein our courts have held it is impermissible for a law enforcement officer to express an opinion as to a defendant's guilt. These cases are not applicable to the situation at bar.

We note that Jamie Johnson's testimony was not offered for the truth of the matter asserted—that Detective Briggs believed defendant James committed the robbery. Thus, Jamie Johnson's statement was admissible as it was merely offered to illustrate how Detective Briggs purportedly influenced her into making a statement in the case. Assuming *arguendo* that Jamie Johnson's testimony constituted inadmissible hearsay testimony, defendant James has likewise neglected to argue that he was in fact prejudiced by the admission of this testimony. *See State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) ("The defendant must still show that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed."). Defendant James' argument is overruled.

B. Mistrial

[2] Defendant James argues that "the trial court erred by allowing the State to put prejudicial hearsay before the jury by means of questions containing facts not in evidence." More specifically, the crux of defendant James' argument is best summarized as follows: defendant contends that the trial court erred in failing to declare a mistrial *ex mero motu* in response to acts of prosecutorial misconduct during his trial. We disagree.

A trial court's decision not to intervene *ex mero motu* to declare a mistrial on the basis of a prosecutor's questions to a witness "will not be disturbed on appeal unless the trial court clearly has abused its discretion." *State v. Jaynes*, 342 N.C. 249, 280, 464 S.E.2d 448, 467 (1995). Where a prosecutor's questions are improper, the trial court has the authority to provide a curative instruction to the jury or to declare a mistrial. *See, e.g.*, *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996). This is true even where, as here, the defendant never asked the trial court to declare a mistrial. *See Jaynes*, 342 N.C. at 280, 464 S.E.2d

at 467 (considering whether there was error in the trial court's failure to declare a mistrial *ex mero motu* on the basis of alleged improper questions by the prosecutor despite the fact that the defendant made no motion for a mistrial).

Here, both defendants joined in a motion in limine prior to trial, each seeking to exclude "all testimony from Jamie Johnson relating to a gun being thrown in a river or her hearing a splash, [and] any mention of the gun in particular[.]" The trial court denied the motion in limine. The State questioned Jamie Johnson as follows:

> PROSECUTOR: State whether or not, Ms. Johnson, you and [Detective Briggs] were talking about a gun?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: Move to strike.
>
> THE COURT: Allowed. Don't consider that, members of the jury, without any further foundation other than what you've got now.
>
> . . .
>
> PROSECUTOR: Did you tell [Detective Briggs] that you had heard the gun being thrown into the river?
>
> MR. SMITH [Attorney for Defendant John]: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: I can't hear you talking when you're walking with your back –
>
> PROSECUTOR: I'm sorry, Your Honor. The time that you were speaking to Detective Briggs, state whether or not you had told him you had heard a gun being thrown into the river.
>
> MR. SMITH: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.
>
> PROSECUTOR: So if Detective Briggs would have documented that through an audio conversation with you and him and then also now a transcription, which would be

> more correct about you hearing a gun being thrown in the river, what you're saying now or what you said then?
>
> MR. SMITH: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained. It hasn't been established what she said then.

Defendant James contends that the State's line of questioning "appears to have been a deliberate tactic to inform the jury through questions what could not be proved through admissible evidence" and "[q]uestions that place inadmissible information before the jury are improper."

We disagree. The prosecutor did not place inadmissible information before the jury. Again, we note that defendants' motion in limine was denied. Our Supreme Court has held that "[q]uestions asked on cross-examination will be considered proper unless the record shows they were asked in bad faith." *State v. Lovin*, 339 N.C. 695, 713, 454 S.E.2d 229, 239 (1995). There is nothing in the record to indicate that the prosecutor's questions were asked in bad faith. In addition, the trial court sustained the objections, struck one question from the record, and issued a curative instruction. As such, there was no prejudicial evidence introduced in response to the prosecutor's questions. The trial judge's action in sustaining the objections was sufficient to remedy any harm that resulted from the asking of the questions. *See Jaynes*, 342 N.C. at 280, 464 S.E.2d at 467 (holding that the trial court's actions in sustaining the defendant's objections were sufficient to remedy any possible harm resulting from the mere asking of the three questions by the prosecutor); *cf. State v. McLean*, 294 N.C. 623, 634-35, 242 S.E.2d 814, 821 (1978) (holding that the trial court did not abuse its discretion in denying defendant's motion for mistrial where the trial court sustained defendant's objections to a question by the prosecutor containing improper information and instructed the jury to disregard the question). We overrule defendant James' argument. We note that defendant John advances the same argument on appeal. For the foregoing reasons, we also overrule defendant John's argument.

C. Exclusion of evidence of cell phone use

[3] Defendant James next argues that the trial court's limiting of his cross-examination of the State's witness, Beau Dean, constitutes reversible error. We disagree.

In North Carolina, a "trial court has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citation omitted). The trial court's ruling regarding the scope of cross-examination "will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 221, 297 S.E.2d 574, 579 (1982).

During Beau Dean's cross-examination, defendant John attempted to elicit testimony regarding the total number of cell phone minutes he and defendant James used during the 28 October to 27 November 2011 billing cycle. Defense counsel asked Beau Dean, "how many minutes were used in this billing cycle?" The State objected, and the trial court sustained the objection. On appeal, defendant James contends the trial court erred in sustaining the State's objection to this question because "the outstanding feature of the State's case was the extraordinary frequency of cell phone communications between [defendant John and defendant James] at and around the time of the robbery[,]" and the excluded evidence was therefore relevant to show that the high level of communication by each defendant was not peculiar to the day of the robbery.

Here, both the cell phone records entered into evidence and the testimony of Beau Dean established that defendant James and defendant John used their cell phones to communicate with persons besides each other on 8 December 2011. In addition, two bank employees, Anne Garrett and Judy Price, testified that it was not uncommon for defendant John to be on the phone when he entered the bank. Finally, defendants' cell phone records spanning from 5 December 2011 to 9 December 2011 were entered into evidence. Thus, there was evidence before the jury that illustrated defendants' cell phone usage habits. Defendant James has failed to establish that the trial judge's limitation on Beau Dean's cross-examination improperly influenced the verdict in his case.

D. <u>Admission of aggravating factor</u>

[4] Defendant James argues he is entitled to a new sentencing hearing because the trial court failed to address him personally and comply with the procedures set forth under N.C. Gen. Stat. § 15A-1022.1(b) and N.C. Gen. Stat. § 15A-1022.1(a) (2013). We agree that the trial court erred. However, we hold that the error is harmless.

Under North Carolina's Blakeley Act, codified in N.C. Gen. Stat. § 15A-1022.1 (2013), we recognize that a defendant may admit to the

existence of an aggravating factor or to the existence of a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7) before or after the trial of the underlying felony. N.C. Gen. Stat. § 15A-1022.1(d). In all cases in which a defendant admits to the existence of an aggravating factor, N.C. Gen. Stat. § 15A-1022.1 provides that the trial court shall comply with the provisions of N.C. Gen. Stat. § 15A-1022(a).

Under N.C. Gen. Stat. § 15A-1022(a),

> a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and: (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him; (2) Determining that he understands the nature of the charge; (3) Informing him that he has a right to plead not guilty; . . .

N.C. Gen. Stat. § 15A-1022 (2013). The trial court must also address the defendant personally and advise the defendant that he or she (1) is entitled to have a jury determine the existence of any aggravating factors or points under N.C. Gen. Stat. § 15A-1340.14(b)(7); and (2) has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge. N.C. Gen. Stat. § 15A-1022.1(b) (2013).

During defendant James' sentencing hearing, defense counsel admitted the following statutory aggravator under N.C. Gen. Stat. § 15A-1340.16(d)(12): that defendant James committed the offense while on pretrial release.

> THE STATE: regarding the defendant, James Ryan Edmonds, in 11-CRS-64716, it's been alleged on the indictment returned March the 5th of 2012 for robbery with a dangerous weapon that occurred on or about December the 8th of 2011 that Mr. James Ryan Edmonds committed allegedly the robbery with a dangerous weapon offense while on pretrial release on another charge. Does he admit the existence of the aggravating factor listed on the indictment beyond a reasonable doubt or does he deny the existence of the aggravating factor that he committed—allegedly committed this offense while on pretrial release on another charge?
>
> DEFENSE COUNSEL: Your Honor, . . . we would admit that at the time of the offense [defendant James] was on pretrial release for another offense; again, maintain

> innocence in terms of this charge, but we would admit that at the time we were on pretrial release.
>
> . . .
>
> THE COURT: All right. Does [defendant James] waive any further notice of that aggravating factor?
>
> DEFENSE COUNSEL: He would.
>
> THE COURT: Has he had sufficient notice that it exists?
>
> DEFENSE COUNSEL: He has.
>
> THE COURT: And that the State intended to proceed on it?
>
> DEFENSE COUNSEL: He has.
>
> THE COURT: And that if admitting it, it could enhance the punishment against him?
>
> DEFENSE COUNSEL: Yes, sir.
>
> THE COURT: And increase the punishment he could receive?
>
> DEFENSE COUNSEL: Yes, sir.
>
> THE COURT: Does he desire to have a jury determine it?
>
> DEFENSE COUNSEL: No, sir.

The crux of defendant's argument is that his stipulation or admission of the aggravating factor was not made knowingly and voluntarily given that the trial court failed to address him personally and conduct the colloquy required by N.C. Gen. Stat. §§ 15A-1022.1(b) and 15A-1022(a).

We recognize that North Carolina's Blakely Act requires the trial court to address defendants personally, advise them that they are entitled to a jury trial on any aggravating factors, and ensure that their admission is the result of an informed choice. N.C. Gen. Stat. §§ 15A–1022.1(b), (c) (2013). A review of the transcript in the instant case shows that the trial court neglected to follow this procedure. We review such errors for harmlessness. *State v. Blackwell*, 361 N.C. 41, 49, 638 S.E.2d 452, 458 (2006). "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* (citation and quotations omitted).

> The defendant may not avoid a conclusion that evidence of an aggravating factor is uncontroverted by merely raising an objection at trial. *See, e.g.*, *Neder*, 527 U.S. at 19, 119 S.Ct. 1827. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding.

Id. at 50, 638 S.E.2d at 458 (citations and quotations omitted).

Here, the aggravating factor found by the trial judge, not the jury, was that the crime was committed while defendant was on pre-trial release. Defense counsel specifically admitted "that at the time of the offense [defendant James] was on pretrial release for another offense." Defendant James neither objected at trial to this admission nor did he present any argument or evidence contesting the sole aggravating factor. On appeal, defendant James similarly makes no argument that he was not in fact on pretrial release on 8 December 2011. Thus, he has raised no evidence to support a contrary finding of the aggravating factor. We hold that defendant James' failure to object and his failure to present any argument or evidence contesting the sole aggravating factor constitute uncontroverted and overwhelming evidence that defendant committed the present crimes while on pretrial release for another offense. Should this case be remanded to the trial court for a jury determination of this aggravating factor, the State could offer evidence in support of the aggravator "in the form of official state documents and the testimony of state record-keepers." *Id.* at 51, 638 S.E.2d at 459. Accordingly, the Blakely error which occurred at defendant James' trial was harmless beyond a reasonable doubt.

E. Defendant John's argument

[5] Defendant John argues, and the State concedes, that his Judgment and Commitment form contain clerical errors and must be remanded for correction. We agree.

The transcript of defendant John's sentencing hearing shows that the trial judge sentenced him as a Prior Record Level IV offender and ordered him to pay $6,841.50 in attorney's fees. However, defendant John's Judgment and Commitment form incorrectly lists him as a Prior Record Level II offender and states that defendant John owes $13,004.45 in attorney's fees. This sum is the amount of attorney's fees owed by defendant James. Defendant concedes that his sentence of a minimum 97 months and a maximum of 129 months is correct.

Here, the trial court committed a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining clerical error as "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination"). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (citations and quotations omitted). Accordingly, we remand for the correction of the clerical errors described above in the Judgment and Commitment form (correcting defendant's Prior Record Level from II to IV and correcting the amount of attorney's fees owed from $13,004.45 to $6,841.50).

III. Conclusion

In sum, the sole error the trial court made in defendant James' trial was harmless error. The trial court did not err in defendant John's trial. However, defendant John's Judgment and Commitment form contains a clerical error. Accordingly, we remand for the correction of the clerical errors described above.

No prejudicial error in part; no error in part; remanded for correction of clerical error.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
DWAYNE ANTHONY ELLIS, Defendant

No. COA14-77

Filed 7 October 2014

Indictment and Information—fatally defective—injury to personal property—owners legal entities capable of owning property

The trial court lacked subject matter jurisdiction over an injury to personal property charge where the information charging defendant with that crime was fatally defective because it failed to allege that the owners of the injured property were legal entities capable of owning property. Defendant's injury to personal property conviction was vacated and the matter was remanded for resentencing on defendant's remaining convictions.

Appeal by defendant from judgments entered 2 August 2013 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

GEER, Judge.

Defendant Dwayne Anthony Ellis appeals from his convictions of felony larceny, injury to personal property, first degree trespass, and possession of stolen property. Defendant's sole argument on appeal is that the information charging defendant with injury to personal property was fatally defective because it failed to allege that the owners of the injured property -- "North Carolina State University (NCSU) and NCSU High Voltage Distribution" -- are legal entities capable of owning property.

Under *State v. Campbell*, ___ N.C. App. ___, 759 S.E.2d 380 (2014), when an indictment alleges that the property at issue has multiple owners, the indictment must also show that each owner is capable of owning property. Because the information fails to allege with respect to the charge of injury to personal property that "NCSU High Voltage

Distribution" is a legal entity capable of owning property, the information is fatally flawed. Accordingly, we vacate defendant's injury to personal property conviction and remand for resentencing on defendant's remaining convictions.

Facts

The State's evidence tended to show the following facts. On 23 April 2011 at around 4:30 a.m., Sergeant Ian Kendrick of the North Carolina State University ("NCSU") Police initiated a traffic stop of a Chrysler 300 with an attached trailer that had exited from a parking lot near an electrical substation. Defendant, the driver of the vehicle, was taken into custody for an unrelated matter. During a pre-impoundment inventory search of the Chrysler, law enforcement officers discovered four large rolls of copper wire and wet, muddy clothing. It was later discovered that the copper wire had been taken from a fenced in area of the electrical substation. Because the copper wire had been cut, it could no longer be used at the electrical substation.

On 12 July 2011 defendant was indicted in case file number 11 CRS 210130 for felony larceny, misdemeanor injury to personal property, and first degree trespass in connection with the 23 April 2011 theft of the stolen copper wire. The same day, defendant was indicted in case file number 11 CRS 211154 for felony possession of stolen goods relating to a separate incident on 14 February 2011. On 23 July 2013, defendant waived the finding and return of an indictment and consented to being tried on superseding informations alleging the same offenses. With respect to each charge in 11 CRS 210130, the State alleged that the copper wire was the personal property of "North Carolina State University (NCSU) and NCSU High Voltage Distribution."

The trial court granted the State's motion to join the two cases for trial, and on 2 August 2013, a jury found defendant guilty of felony larceny, misdemeanor injury to personal property, and first degree trespass in 11 CRS 210130 and of misdemeanor possession of stolen goods in 11 CRS 211154. The trial court consolidated the convictions in 11 CRS 210130 into one judgment and sentenced defendant to a presumptive-range term of six to eight months imprisonment, followed by a consecutive term of 45 days imprisonment for the conviction in 11 CRS 211154. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court lacked subject matter jurisdiction over the injury to personal property charge

because the information was fatally defective in that it failed to allege that "North Carolina State University (NCSU) and NCSU High Voltage Distribution" are legal entities capable of owning property.

It is well settled that a valid indictment alleging all of the essential elements of the offense is required for a trial court to obtain subject matter jurisdiction over the charge. *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005). When, as in this case, the defendant properly waives the indictment, the trial court may proceed on an information, which must "charge the crime or crimes in the same manner" as an indictment. N.C. Gen. Stat. § 15A-923(b) (2013). Although defendant did not challenge the sufficiency of the information below, "[a] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). This Court reviews the sufficiency of an indictment -- or, in this case, an information -- de novo. *State v. Chillo*, 208 N.C. App. 541, 543, 705 S.E.2d 394, 396 (2010).

This Court has previously addressed the requirements for indictments for injury to personal property and the similar crime of larceny:

> To convict a defendant of injury to personal property, the State must prove that the personal property was that "of another," i.e., someone other than the person or persons accused. N.C. Gen. Stat. § 14-160 (2004) ("If any person shall wantonly and willfully injure the personal property of another he shall be guilty . . . ."); *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981). Moreover, "an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in lawful possession of the injured or stolen property.

State v. Price, 170 N.C. App. 672, 673-74, 613 S.E.2d 60, 62 (2005). Moreover, " '[i]f the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property[.]' " *Id.* at 674, 613 S.E.2d at 62 (quoting *State v. Phillips*, 162 N.C. App. 719, 721, 592 S.E.2d 272, 273 (2004)).

Count II of the information in 11 CRS 210130 alleged that defendant

> unlawfully and willfully did wantonly injure and damage personal property, 228 feet of 350 primary copper wire,

> the personal property of North Carolina State University (NCSU) and NCSU High Voltage Distribution, resulting in damage in excess of $200. This act was done in violation of NCGS § 14-160.

With respect to indictments alleging multiple owners of personal property, as the information did in this case, this Court has recently explained:

> Where an indictment alleges two owners of the stolen property, the State must prove that each owner had at least some property interest in it. *See State v. Greene*, 289 N.C. 578, 585, 223 S.E.2d 365, 370 (1976) ("If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit."); *State v. Burgess*, 74 N.C. 272, 273 (1876) ("If one is charged with stealing the property of A, it will not do to prove that he stole the joint property of A and B."); *State v. Hill*, 79 N.C. 656, 659 (1878) (holding that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners). If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest. *Therefore, where the indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment.*

Campbell, ___ N.C. App. at ___, 759 S.E.2d at 384 (emphasis added).

In *Campbell*, the indictment for larceny alleged two owners of the stolen property – a natural person and "Manna Baptist Church" -- but did not allege that the church was a legal entity capable of owning property. *Id.* at ___, 759 S.E.2d at 384. This Court held that the indictment was fatally flawed and vacated the defendant's conviction for larceny. *Id.* at ___, 759 S.E.2d at 384.

Although *Campbell* involved an indictment for larceny, the same reasoning applies to the information for injury to personal property in this case. *See State v. Lilly*, 195 N.C. App. 697, 702, 673 S.E.2d 718, 721-22 (2009) ("Since this Court has previously held that both larceny and injury to personal property have the same requirement that the indictment allege ownership or lawful possession of the property, we

think the Court's reasoning in [*State v.*]*Liddell*, [39 N.C. App. 373, 250 S.E.2d 77 (1979),] addressing a larceny indictment, applies with equal force in the context of a prosecution for injury to personal property."). Accordingly, we hold that to be sufficient, the information in this case must have shown that both NCSU and "NCSU High Voltage Distribution" are legal entities capable of owning property.

With respect to NCSU, the State argues that it is clear from the information that NCSU is a legal entity capable of owning property. We agree. In *State v. Turner*, 8 N.C. App. 73, 75, 173 S.E.2d 642, 643 (1970), this Court upheld an indictment for larceny that named the " 'City of Hendersonville' " as the owner of the stolen property. The Court took judicial notice of the public act establishing Hendersonville as a municipal corporation and explained that "the words 'City of Hendersonville' denote a municipal corporate entity. Municipal corporations are expressly authorized to purchase and hold personal property." *Id.*

As with the municipality in *Turner*, the legislature has provided, in N.C. Gen. Stat. § 116-4 (2013), that North Carolina State University is a constituent institution of the University of North Carolina, "a body politic and corporate" expressly authorized under N.C. Gen. Stat. § 116-3 (2013) to own property. Thus, we hold that the words "North Carolina State University" sufficiently allege a legal entity capable of owning property.

In contrast to *Turner*, this Court held in *Price* that an indictment for larceny and injury to personal property alleging that the property at issue was owned by " 'City of Asheville Transit and Parking Services,' " without more, was fatally defective. 170 N.C. App. at 674, 613 S.E.2d at 62. The Court distinguished *Turner* "in which 'City of Hendersonville' was sufficient as it clearly denoted a municipal corporation, because the additional words after 'City of Asheville' make it questionable what type of organization it is." *Id.*

Similarly, here, the words "NCSU High Voltage Distribution" do not identify a legal entity necessarily capable of owning property because the additional words after "NCSU" do not indicate what type of organization it is. The information is, therefore, insufficient to show that "NCSU High Voltage Distribution" is a legal entity capable of owning property. *See also State v. Strange*, 58 N.C. App. 756, 757, 294 S.E.2d 403, 404 (1982) (holding indictment for larceny naming owner as "Granville County Law Enforcement Association" was fatally defective).

Because the information failed to allege that one of the owners, "NCSU High Voltage Distribution," is a legal entity capable of owning

property, we hold that the information is fatally defective and vacate defendant's conviction for injury to personal property. Defendant does not, however, challenge any of his remaining convictions on appeal.

We note that the trial court consolidated defendant's conviction for injury to personal property with the other offenses in case file number 11 CRS 210130 and sentenced defendant under the Class H felony of larceny to a presumptive-range term of six to eight months imprisonment. Our Supreme Court has explained that "[s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). Accordingly, we remand for resentencing on defendant's remaining convictions in case file number 11 CRS 210130.

No error in part; vacated in part; and remanded.

Judges STEELMAN and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JAMES E. FOSTER

No. COA14-187

Filed 7 October 2014

Appeal and Error—preservation of issues—failure to argue constitutional issue at trial—unrecorded bench conferences—appellate review not frustrated

The trial court did not commit prejudicial error in an assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon case when it conducted multiple off-the-record bench conferences. The record did not reflect that defendant raised his constitutional argument before the trial court. Further, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction was without merit.

Appeal by defendant from judgment entered 12 August 2013 by Judge Anna Mills Wagoner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where our review is not frustrated, defendant cannot establish that he was prejudiced by the trial court's failure to reconstruct arguments made during unrecorded bench conferences. Accordingly, we find no prejudicial error in defendant's trial.

On 23 May 2011, a Mecklenburg County grand jury indicted defendant on two counts of assault with a deadly weapon with intent to kill inflicting serious injury and two counts of assault with a deadly weapon with intent to kill. A trial commenced on 5 August 2013, in Mecklenburg County Superior Court, the Honorable Anna Mills Wagoner, Judge presiding.

Evidence at trial tended to show that at 2:36 a.m. on 8 May 2011, Charlotte-Mecklenburg Police Department received a 9-1-1 call from 1616 Lynford Drive. Upon arrival, the reporting police officer observed medical personnel outside the residence treating a young male in severe pain. Inside the residence, an adult female was also being attended to by medical personnel. The woman's name was Robin Lewis and the young man was her son, Quinton.[1] While paramedics worked, Lewis stated to the officer that she had been shot by James Foster, defendant. Later that morning, the Charlotte-Mecklenburg Police Department received a 9-1-1 call from 5305 Lyrica Lane informing them that defendant wanted to turn himself in.

Lewis later testified at trial that she had been in a dating relationship with defendant and that the two had lived together for ten months. Lewis had four children—a son, Quinton, another son, and two daughters—who also lived with Lewis and defendant. On the evening of 7 May 2011, Lewis and defendant had an argument that escalated until defendant struck Lewis in the face. Defendant left the home. When he returned, Lewis testified that defendant was intoxicated to the point he vomited on the floor and passed out. Lewis—a licensed practical nurse—became

1. A pseudonym has been used to protect the identity of the minor.

concerned when defendant began sweating profusely. Defendant was a diabetic, and there was a risk defendant could slip into a diabetic coma. Lewis applied ice to cool defendant's body temperature. Defendant remained unconscious for two and a half hours. When defendant awoke, everyone in the residence was awake.

> A. It seems like everything just broke loose. When he first woke up he jumped up saying where's his wallet, where's his keys, somebody took his money, can't find this. . . . [H]e started blaming me. . . . And I was, like, here's your stuff right here.
>
> Q. Where was it?
>
> A. Right there on my bed.
>
> . . .
>
> And he continued to -- I started continuing the conversation about you have to leave.
>
> Q. And how did that go?
>
> A. He said he'd leave and he started grabbing his things, grabbing those steri-lite totes out of the closet, taking them down the steps one by one. . . .
>
> . . .
>
> Q. How was – what was his response about moving out? Did he become agitated or angry?
>
> A. He became angry.

While defendant moved his things out, Lewis and her children gathered on the landing at the top of the stairs leading from the first to second floor. Defendant was at the bottom of the stairs. Lewis testified that at some point she saw that defendant had a gun. While she was trying to push her children back, she heard a lot of shots, and she felt two sharp pains. Defendant then left the residence, and one of Lewis' daughters called 9-1-1. A handgun was later found on the floor near where defendant had been standing. Quinton suffered from two gunshot wounds: one to his intestines and another to his leg. Lewis also suffered two gunshot wounds to her pelvic region.

At the close of the evidence, the jury found defendant guilty of two counts of assault with a deadly weapon with the intent to kill inflicting serious injury and two counts of assault with a deadly weapon. The

trial court entered a consolidated judgment in accordance with the jury verdicts and sentenced defendant to an active term of 69 to 92 months. Defendant appeals.

On appeal, defendant argues the trial court committed prejudicial error when it conducted multiple off-the-record bench conferences. Specifically, defendant contends that the failure to record bench conferences amounts to a constitutional violation warranting a new trial. We disagree.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2013).

Here, defendant has couched his contention that the trial court failed to record bench conferences as a constitutional due process violation; however, defendant fails to provide any support for this contention. Moreover, the record does not reflect that defendant raised his constitutional argument before the trial court. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal."). Yet despite this initial contention, we note that in his argument defendant cites as his primary authority our Supreme Court's opinion in *State v. Pittman*, 332 N.C. 244, 420 S.E.2d 437 (1992).

In *Pittman*, the defendant moved for a complete recordation of all proceedings including bench conferences. The trial court held unrecorded bench conferences. On appeal, the defendant charged that the failure to record the bench conferences amounted to a constitutional violation. Our Supreme Court analyzed the issue against General Statutes, section 15A-1241. Notably, in the instant case, defendant does not provide any argument that a constitutional violation occurred at trial; therefore, we review only for possible statutory violation.

Pursuant to General Statutes, section 15A-1241,

> [t]he trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;

> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.

N.C. Gen. Stat. § 15A-1241(a) (2013). In *State v. Cummings*, our Supreme Court stated that it "[did] not believe the enactment of this statute by the legislature in 1977 was intended to change the time-honored practice of off-the-record bench conferences between trial judges and attorneys." 332 N.C. 487, 498, 422 S.E.2d 692, 698 (1992). The phrase in subsection (a), " 'statements from the bench[,]' does not include private bench conferences between trial judges and attorneys." *Id.* at 497, 422 S.E.2d at 697. "If, however, a party requests that the subject matter of a private bench conference be put on the record for appellate review, section 15A–1241(c) requires the trial judge to reconstruct the matter discussed as accurately as possible." *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (citation omitted); *see also* N.C. Gen. Stat. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made.").

In *Pittman*, the defendant made a pre-trial motion for complete recordation of all proceedings, specifically including bench conferences. *See Pittman*, 332 N.C. at 250, 420 S.E.2d at 440. Our Supreme Court held that "the trial court, having allowed defendant's motion for complete recordation, should have required recordation of all conferences and its failure to do so constituted error. We must now determine whether defendant was prejudiced by this error." *Id.* at 250, 420 S.E.2d at 440. After reviewing what occurred prior to and after the bench conferences, the Supreme Court determined that "[b]ased on the record facts and defendant's failure to specifically allege how he was prejudiced by the lack of complete recordation, we hold that the trial court's failure to require complete recordation was harmless beyond a reasonable doubt." *Id.* at 252, 420 S.E.2d at 441.

Here, defendant filed a pretrial motion "to have the Court Reporter record all phases of the proceedings . . . including pre-trial hearings, voir dire, motions, opening statements, and closing arguments." The trial court granted the motion from the bench prior to the commencement of the jury selection.

> [Prosecutor]: Your Honor, I believe [defense counsel] also has a motion for complete recordation. Obviously we're not opposed to that.

> THE COURT: I'll allow the motion. That's for jury selection and everything; is that right?
>
> [Defense counsel]: Yes, Your Honor. . . .
>
> THE COURT: . . . [T]he Court will allow the motion for complete recordation without objection.

On appeal, defendant *lists* seventeen instances in which the trial court conducted unrecorded bench conferences and states that each unrecorded conference was a violation of the trial court's order. However, defendant *specifically challenges* only two unrecorded bench conferences. Therefore, we focus only on the two bench conferences defendant discusses to determine whether defendant suffered prejudice from the trial court's failure to record or reconstruct them.[2]

In his first challenge, defendant contends he was prejudiced by the lack of any memorialization of the arguments made at a bench conference during the testimony of Detective Bryan Crum. Detective Crum—assigned to the Violent Crimes Division, homicide, of the Charlotte-Mecklenburg Police Department—met victim Robin Lewis at Carolinas Medical Center the morning she was shot. During the State's examination of Detective Crum, the following exchange occurred:

> Q. Did you make contact with Robin Lewis at the hospital?
>
> A. I did. She was in one of the bays in the emergency department. After she was initially taken care of or settled down with the medical staff, I went to speak with her.
>
> Q. And what did she tell you?
>
> A. She told me that basically that something had happened earlier in the night, that a person that she lived with -- and I took a statement from her, -- said that someone had come home and --
>
> [Defense counsel]: Objection, Your Honor, asked to be heard.
>
> THE COURT: Sustained.

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2. Of the remaining fifteen instances, five occurred during jury selection and ten during trial.

[Prosecutor]: Your Honor, may we approach?

[Defense counsel]: Your Honor, I would ask to be heard on the record since we have --

THE COURT: Just come up here now and afterward we'll do that.

(WHEREUPON, the Court, [both prosecutors], and [defense counsel] conferred off the record. Afterward, the State's examination continued.)

Q. Did you have a chance to observe Robin Lewis physically, what she looked like once you spoke with her?

A. I did.

Q. And what if anything did you notice with regards to any injury?

Here, the trial court's failure to reconstruct the substance of the bench conference for the record was a violation of section 15A–1241(c). *See* N.C.G.S. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made."); *see also Blakeney*, 352 N.C. at 307, 531 S.E.2d at 814.

However, on this record as otherwise recorded, we discern no prejudice in the trial court's failure to reconstruct the substance of the bench conference for the record. The transcript reflects that the trial court sustained defendant's objection to the prosecutor's line of questioning. Following the bench conference, the trial court did not amend its ruling and defendant's objection remained sustained. When the prosecutor's examination resumed, Detective Crum was questioned regarding his personal observations of the victim Robin Lewis rather than her statements to him. From this context, it appears defendant's objection was made on hearsay grounds, and there is no indication that the parties at the bench conference discussed any matter other than the hearsay nature of the prosecutor's examination. Therefore, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction is without merit.

Defendant also asserts that he was prejudiced by the lack of recordation during a bench conference held during defendant's cross-examination of Robin Lewis.

Q. Well, your blood alcohol level was high, wasn't it?

A. I don't know.

Q. Have you been allowed to see a copy of your medical report?

A. No, ma'am.

Q. If I showed you a copy of your medical report would it help refresh your recollection about what your level of intoxication was?

A. You can show it to me, but I know what my level of intoxication is. I was not intoxicated.

. . .

[Prosecutor]: Your Honor, I would ask to be heard.

THE COURT: All right, come up here.

(WHEREUPON, the Court, [both prosecutors, and defense counsel] conferred off the record.)

THE COURT: I'll sustain your objection. Rephrase your question.

Q. Ms. Lewis, I'm going to ask you in terms of how much you had to drink that night, you're aware that the hospital took your blood; correct?

A. Yes, ma'am.

Defendant contends that the substance of the bench conference cannot be ascertained from the context of the examination and as such, appellate review is frustrated to his prejudice. Again, we disagree.

Defendant attempted to present Lewis with her medical report from the hospital prepared on the night of her shooting. Specifically, defendant asked, "If I showed you a copy of your medical report would it help *refresh your recollection* about what your level of intoxication was?" Lewis responded, "I know what my level of intoxication [was]." The prosecutor then asked to be heard, and during the bench conference, apparently, lodged an objection. While the exact content of the conference is unclear, it is quite apparent that the document defendant wished the witness to examine was not needed to refresh her recollection and, therefore, would not be proper cross-examination material. *See* N.C. Gen. Stat. § 8C-1, Rule 803(5) (2013) ("Recorded Recollection"). A

recorded recollection, as defined by our Rules of Evidence, is "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable [her] to testify fully and accurately[.]" *Id.* § 8C-1, Rule 803(5).

> Under present recollection refreshed, the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and [she] testifies from [her] memory so refreshed. The evidence presented at trial comes from the witness' memory, not from the aid upon which the witness relies[.]

State v. Ysut Mlo, 335 N.C. 353, 367, 440 S.E.2d 98, 104 (1994) (citations and quotations omitted).

After the conference, the trial court sustained the objection on the record and had defendant re-phrase the question. Robin Lewis then testified unequivocally, "I know what my level of intoxication [was]. I was not intoxicated." Lewis did not indicate that her memory was insufficient. Therefore, presentation of the medical report was not appropriate as either past recollection recorded or present recollection refreshed. *See* N.C.G.S. § 8C-1, Rule 803(5); *Ysut Mlo*, 335 N.C. at 367, 440 S.E.2d at 104. Given the context, our review of the trial court's ruling is not frustrated. We see no error in the trial court's ruling that sustained the prosecutor's objection to an improper question. Accordingly, defendant's arguments are overruled.

No prejudicial error.

Chief Judge McGEE and Judge STROUD concur.

[236 N.C. App. 616 (2014)]

STATE OF NORTH CAROLINA
v.
SANTONIO THURMAN JENRETTE

No. COA13-1353

Filed 7 October 2014

1. Criminal Law—joinder—multiple charges, victims, counts—transactional connection

The trial court did not abuse its discretion by granting the State's motion for joinder of all 12 of the offenses for which defendant was charged. The events were factually related even though they occurred over a period of two months and the transactional connection between these events was sufficient to support joinder.

2. Homicide—instructions—multiple theories—any error cured by verdict sheet

There was no plain error in the trial court's instructions to the jury regarding first-degree murder where defendant contended that the jury could have construed the not guilty mandate as applying solely to the theory of lying in wait as opposed to the overall charge of first-degree murder. While the instruction was not worded with perfect clarity, any confusion stemming from the trial court's instructions was remedied by the verdict sheet.

3. Homicide—instructions—lying in wait—any error cured by other theories

Any error in a first-degree murder prosecution in an instruction on lying in wait would not have affected convictions on the theories of premeditation and deliberation and felony murder.

4. Criminal Law—instructions—verdict sheets—multiple charges, victims, counts—no plain error

There was no plain error in a prosecution involving two murders and other offenses where defendant argued that the trial court erred by failing to instruct the jury to consider each offense individually. The trial court's instructions, along with the verdict sheets, made clear to the jury the number of charges, victims, and counts.

5. Homicide—instructions—felony murder—underlying assaults —only one required

There was no plain error in a felony murder instruction in a prosecution involving numerous charges surrounding two murders

where defendant argued that the jury was not told which assault could be the basis for the felony murder charge. Only one felony is required to support a felony murder conviction.

6. Homicide—instructions—felony murder—second conviction —no prejudice

Any error in the trial court's decision to instruct the jury on felony murder did not affect defendant's conviction for the first-degree murder of his second victim on a theory of premeditation and deliberation.

Appeal by defendant from judgments entered 3 July 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 9 April 2014.

Roy Cooper, Attorney General, by Marc X. Sneed, Assistant Attorney General, for the State.

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

Santonio Thurman Jenrette ("Defendant") appeals from his convictions of two counts of first-degree murder, possession with intent to sell and/or deliver cocaine, two counts of possession of a firearm by a felon, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and two counts of conspiracy to commit first-degree murder. On appeal, he contends that the trial court erred in (1) granting the State's motion to join all of the charges against him for trial; (2) failing to provide an adequate not guilty mandate at the conclusion of its jury instructions as to one of the first-degree murder charges; (3) instructing the jury on a charge of first-degree murder based on the lying in wait doctrine; (4) failing to adequately distinguish between the separate offenses with which Defendant was charged in its jury instructions; and (5) instructing the jury on a charge of first-degree murder based on the felony murder doctrine where there was insufficient evidence of the predicate felonies. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 21 September 2007, a confrontation took place between

Connail Reaves ("Reaves") and Eugene Williams ("Williams") at a high school football game in Columbus County, North Carolina between East Columbus High School and Whiteville High School. Williams and Reaves were members of two rival gangs with a history of animosity toward each other. Williams was a member of the "Chadbourne Boys" and Reaves — like Defendant — was a member of the "Whiteville Circle Boys." Members of both groups, including Reaves and Williams, were prepared to fight as a result of the confrontation but ultimately backed down due to the presence of law enforcement officers at the game.

After the game, several members of the Chadbourne Boys, including Williams, Darnell Frink ("Frink"), Travis Williams, Jason Williams, and William Inman ("Inman"), went to the stadium parking lot where they ran into Reaves again. Reaves was talking on his cellphone, and when he saw them, he pointed his finger at them as if he was pulling the trigger of a gun. Without engaging Reaves, they got into Jason Williams' Chevrolet Tahoe and drove to a local gas station, Sam's Pitt Stop.

At Sam's Pitt Stop, Williams, Frink, Travis Williams, Jason Williams, and Inman parked in front of a gas pump and were standing around the Tahoe when Jason Williams and Inman noticed a Ford Taurus pulling up toward them with the windows down. Jason Williams saw gun barrels protruding from both the front passenger window and the rear passenger-side window of the Taurus. He yelled "get down" and immediately thereafter occupants of the Taurus — all of whom were wearing ski masks — opened fire on them. Defendant, Reaves, and Defendant's 14-year-old cousin Rashed[1] Delamez Jones ("Jones") were three of the occupants of the Taurus who fired guns.

Inman and Frink were both struck by bullets fired by the masked persons in the Taurus. Frink died as a result of his gunshot wounds. Inman was wounded in his left thigh and was taken to the hospital for treatment. A bystander, Antwan Waddell, was struck by bullets in his left thigh and ankle.

Shortly after the shooting, Sabrina Moody ("Moody") saw a Taurus containing Defendant, Marquell Hunter, and an unknown person pull into Stanley Circle directly in front of her parked car. Moody saw Defendant and the other two men get out of their vehicle, remove guns from the back of the Taurus, and then quickly run across the street in order to place the guns inside another vehicle.

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1. The trial transcript at times spells Rashed as "Rasheed." Both spellings, however, refer to the same person.

The Taurus was found burning in a field off of Prison Camp Road later that night. It was ultimately identified as a car belonging to Johnny Sellers ("Sellers"), a used car salesman, that had been stolen along with Sellers' .25 caliber semi-automatic pistol from the dealership lot the evening of the shooting.

The following evening, Defendant and Reaves were driving a black Acura when they were pulled over by Officers Donald Edwards ("Officer Edwards") and Edward Memory ("Officer Memory") of the Whiteville Police Department because the rear taillight of the Acura was not working. Upon inspecting the backseat of the vehicle where Reaves was sitting, Officer Edwards observed two pistols between Reaves' legs. Defendant and Reaves were removed from the vehicle, and the firearms were seized.

Officer Donnie Hedwin ("Officer Hedwin") of the Whiteville Police Department, who had arrived on the scene, patted down Defendant, handcuffed him, and placed him in the backseat of Officer Memory's patrol car. However, while the officers were securing the scene, Defendant managed to force open the door of Officer Memory's car and escape unobserved.

Upon searching the backseat of Officer Memory's car after Defendant had escaped, Officer Edwards discovered two baggies containing a substance that was later identified as cocaine wedged underneath the seat. A .45 caliber pistol recovered from the Acura was identified as the same weapon used in the shooting at Sam's Pitt Stop.

On 19 November 2007, approximately two months after the shooting, Defendant, who was still at large, took Jones out to the woods in a car he had borrowed from a woman named Rebecca White on the pretext of getting in some "target practice." While in the woods, Defendant shot Jones five times, killing him. Defendant then left Jones' body in the woods after wedging it under several nearby wooden pallets. The next day, Jones' mother and aunt, who were searching for Jones, saw Defendant walking along the side of the road. When Jones' mother asked him whether he had seen Jones, Defendant "just kept walking, he wouldn't look at [her]." On 5 December 2007, Jones' body was discovered in the woods off of Barney Tyler Road in Hallsboro, North Carolina.

Defendant fled to Gary, Indiana, where he was eventually apprehended and extradited back to North Carolina. Prior to being apprehended, Defendant filmed a video of himself performing a piece of rap music that he had composed. The lyrics of the song mentioned both

the location where Jones' body was found and the manner in which he had been killed.

While in custody pending trial, Defendant told Aaron McDowell ("McDowell"), Defendant's cellmate at the Columbus County Jail, how and why he had killed Jones, explaining that he had done so in order to prevent Jones from revealing Defendant's role in the 21 September 2007 shooting. He also told McDowell he had taken Jones out to a secluded area in Hallsboro to shoot him.

Jeffrey Morton ("Morton"), another inmate in the Columbus County Jail who was incarcerated in the same cell block as Defendant, overheard Defendant talking to a third inmate, Rufus McMillian, about the murder of Jones. Specifically, Morton heard Defendant state that he considered Jones to be "a weak link," that he took Jones "to a wooded area for target practice[,]" and that he "basically . . . smoked a couple of blunts with this young guy and took him out and gave him a pistol and they shot some and then he turned the pistol on him and shot him five or six times."

Defendant was indicted on (1) two counts of possession of a firearm by a felon; (2) the first-degree murder of Frink; (3) two counts of assault with a deadly weapon with intent to kill inflicting serious injury; (4) two counts of conspiracy to commit first-degree murder; (5) the first-degree murder of Jones; (6) first-degree kidnapping; (7) conspiracy to commit first-degree kidnapping; (8) one count of possession with intent to sell and/or deliver cocaine; and (9) possession of a stolen firearm. A jury trial was held in Columbus County Superior Court on 24 June 2013. At the close of all the evidence, the trial court dismissed the charge of possession of a stolen firearm.

Defendant was convicted of all remaining charges except for the charges of first-degree kidnapping and conspiracy to commit first-degree kidnapping. With regard to the murder of Frink, the jury found him guilty on theories of premeditation and deliberation, felony murder, and lying in wait. As to the murder of Jones, the jury found him guilty on theories of premeditation and deliberation and felony murder.

Defendant was sentenced to two consecutive life sentences without the possibility of parole for the murders of Frink and Jones. In addition, he was sentenced to (1) 8-10 months for possession with intent to sell and/or deliver cocaine; (2) 15-18 months for each count of possession of a firearm by a felon; (3) 100-129 months for each count of assault with a deadly weapon with intent to kill inflicting serious injury; and

(4) 189-236 months for each count of conspiracy to commit murder. These sentences were ordered to run concurrently with the sentence imposed for the first-degree murder of Jones. Defendant gave notice of appeal in open court.

Analysis

I. Joinder

[1] Defendant argues that the trial court abused its discretion in allowing all 12 of the offenses for which he was charged to be joined for trial. Specifically, he contends that joinder was improper due to the lack of a sufficient transactional similarity between the 12 charges.

"The motion to join is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent an abuse of discretion. However, if there is no transactional connection, then the consolidation is improper as a matter of law." *State v. Simmons*, 167 N.C. App. 512, 516, 606 S.E.2d 133, 136 (2004) (internal citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 359 N.C. 325, 611 S.E.2d 844 (2005). "On appeal, the question of whether offenses are transactionally related so that they may be joined for trial is a fully reviewable question of law." *State v. Huff*, 325 N.C. 1, 22, 381 S.E.2d 635, 647 (1989) (citation omitted), *vacated on other grounds*, 497 U.S. 1021, 111 L.E.2d 777 (1990).

We have held that

> in ruling upon a motion for joinder, a trial judge must utilize a two-step analysis: (1) a determination of whether the offenses have a transactional connection and (2) if there is a connection, a consideration of whether the accused can receive a fair hearing on the consolidated offenses at trial. . . . In determining whether offenses are part of the same series of transactions, the following factors must guide the court: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case. No single factor is dispositive.

Simmons, 167 N.C. App. at 516, 606 S.E.2d at 136-37 (internal citations and quotation marks omitted).

In the present case, while the charges against Defendant stemmed from a series of events that occurred over the course of approximately two months, they were factually related. The State's evidence tended to

show that Defendant was present during, and participated in, the shooting at Sam's Pitt Stop along with Reaves and Jones. The following night, Defendant and Reaves were pulled over, and two firearms were recovered from their possession, one of which was ultimately shown to have been used in the shooting the previous evening. This evidence shows a direct link between the possession of a firearm by a felon charges and the charges arising directly out of the shooting at the gas station. Furthermore, the discovery of the cocaine forming the basis for the charge of possession with intent to sell and/or deliver cocaine occurred during the course of the traffic stop.

The charges related to the killing of Jones were also transactionally related. In *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 602 (1990), our Supreme Court held that two murders are transactionally related when the second is committed in order to cover up the first. "It is apparent that the second murder in this case was an act connected to the first murder. The second murder was committed to avoid detection for the first murder. This transactional connection supports the consolidation of all the charges for trial pursuant to N.C.G.S. § 15A-926(a)." *Id.* at 421, 373 S.E.2d at 410.

Similarly, the evidence in the present case tended to show that Defendant killed Jones so as to avoid being implicated in the murder of Frink. As such, we are satisfied that the transactional connection between these events was sufficient to support the trial court's granting of the State's motion for joinder of all of these charges. Furthermore, Defendant has failed to offer any persuasive argument why the consolidation of these charges rendered him unable to receive a fair trial on all of the charges against him. *See State v. Bowen*, 139 N.C. App. 18, 29, 533 S.E.2d 248, 255 (2000) (where "[t]here is no evidence defendant was hindered or deprived of his ability to defend one or more of the charges [against him] . . . [t]he trial court's error in joining the offenses for trial was harmless" (internal citation and quotation marks omitted)).

Based on our consideration of the factors set out in *Simmons*, we conclude that the trial court did not abuse its discretion in granting the State's motion for joinder. Therefore, Defendant's argument on this issue is overruled.

II. Not Guilty Mandate

[2] Defendant next contends that the trial court erred in its instructions to the jury regarding the first-degree murder charge as to Frink by failing to adequately instruct the jury of its duty to return a verdict of not guilty if the State failed to establish his guilt beyond a reasonable doubt.

Where, as here, a defendant does "not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." *State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005), *disc. review denied*, 362 N.C. 368, 628 S.E.2d 9 (2006).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Our Supreme Court has held that "[e]very criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) (citation and quotation marks omitted); *see also State v. McArthur*, 186 N.C. App. 373, 380, 651 S.E.2d 256, 260 (2007). Furthermore, "[i]t is well established that the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *McHone*, 174 N.C. App. at 294, 620 S.E.2d at 907 (citation and quotation marks omitted).

In order to fully understand Defendant's argument on this issue, it is necessary to quote in full the trial court's instructions on first-degree murder with regard to the killing of Frink:

> The defendant has been charged with the first degree murder of Darnell Antonio Frink. Under the law and the evidence in this case it is your duty to return a verdict of either guilty of first degree murder or not guilty. You may find the defendant guilty of first degree murder on either the basis of malice, premeditation and deliberation or under the first degree felony murder rule, or on the basis of lying in wait, or any combination of those three.
>
> First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing

of a human being with malice and with premeditation and deliberation.

First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of an assault with a deadly weapon with intent to kill inflicting serious injury.

For you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt.

First, that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will or spite, as is ordinarily understood, to be sure that is malice, but it also means that condition of the mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.

If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all of the facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. A firearm is a deadly weapon.

Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence, it must be ordinarily be (sic) proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim. If the killing of the intended person would be with malice, then the killing of the different person would also be with malice.

Fourth, that the defendant acted after premeditation; that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.

And, fifth, that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind, which does not mean there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof. It may be proved by proof of circumstances from which they may be inferred, such as lack of provocation by the victim, conduct of the defendant before, during and after the killing, use of grossly excessive force, brutal or vicious circumstances of the killing or the manner in which or means by which the killing was done.

I further charge you that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove three things beyond a reasonable doubt:

First, that the defendant committed the offense of assault with a deadly weapon with intent to kill inflicting serious injury.

I've read this before, but I'm going to go back over it one more time, the elements for assault with a deadly weapon with intent to kill inflicting serious injury are:

First, that the defendant assaulted the victim by intentionally, without justification or excuse, discharging a firearm into a group of people.

Second, that the defendant used a deadly weapon; a firearm is a deadly weapon.

Third, the State must prove the defendant had a specific intent to kill the victim. I remind you, I've already given the instruction twice as to transferred intent, again, that instruction applies as to intent.

And, fourth, that the defendant inflicted a serious injury.

Second, that while committing assault with a deadly weapon with intent to kill inflicting serious injury, the defendant killed the victim with a deadly weapon.

Third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

The defendant has also been accused of first degree murder perpetrated while lying in wait. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant lay in wait for the victim; that is, he waited and watched for the victim in ambush for a private attack on him. It is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at the time the victim does not know of the assassin's presence, or if he does know, is not aware of his purpose to kill him, the killing constitutes a murder perpetrated by lying in wait. One who lays in wait does not lose his status because he is not concealed at the time he shoots his victim. The fact that he reveals himself or the victim discovers his presence does not permit the murder from being perpetrated by lying in wait. Indeed a person may lie in wait in a crowd as well as being — excuse me, as well as behind a log or a hedge.

Second, that the defendant intentionally assaulted the victim.

And, third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, acause without which the victim's death would not have occurred.

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant assaulted the victim while lying in wait for him and that the defendant's act proximately caused the victim's death, it would be your duty to return a verdict of guilty of first degree murder.
>
> *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

(Emphasis added.)

As quoted above, at the conclusion of the first-degree murder instruction and immediately following the portion of the instruction addressing the theory of lying in wait — which was the third and final theory submitted to the jury regarding this charge — the trial court ended the instruction by giving the following mandate:

> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant asserts that the jury could have construed this not guilty mandate as applying solely to the theory of lying in wait as opposed to applying to the overall charge of first-degree murder as to Frink.

Our Supreme Court addressed the sufficiency of a final not guilty mandate in *Chapman*. In that case, the defendant wounded one passenger of a car and killed another when he fired his rifle into the victims' car from his own vehicle while both vehicles were traveling on the highway. *Chapman*, 359 N.C. at 337-38, 611 S.E.2d at 804-05. The defendant was charged with first-degree murder based on three separate theories — premeditation and deliberation, felony murder based upon attempted first-degree murder, and felony murder based upon discharging a firearm into occupied property. *Id.* at 380, 611 S.E.2d at 831. The defendant claimed that he was entitled to a new trial because the trial court failed to provide a not guilty mandate as to the theory of felony murder based upon attempted first-degree murder. *Id.* at 380, 611 S.E.2d at 830-31.

The Supreme Court acknowledged that the trial court did not instruct the jury that it was their duty to return a verdict of not guilty if the State failed to establish felony murder based upon attempted first-degree murder. However, the Court observed that

> [a]t the conclusion of the trial court's mandate on all three theories of first-degree murder, the trial judge instructed

> the jurors as follows: "If you do not find the defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if you do not find the defendant guilty of first-degree murder under the felony murder rule, it would be your duty to return a verdict of not guilty."

Id. In light of the presence of this final mandate at the conclusion of the trial court's overall instructions on the charge of first-degree murder, the Supreme Court concluded that the absence of a not guilty mandate as to one of the three theories submitted did not constitute error. *Id.*

> Because defendant confuses the trial court's instructions on the three separate theories of first-degree murder with instructions on first-degree murder itself, and because the trial court gave a proper mandate at the closure of the first-degree murder instruction, we determine that the trial court instructed the jury that it could find defendant not guilty of first-degree murder. Accordingly, this assignment of error is overruled.

Id.

In *McHone*, upon which Defendant primarily relies in his argument on this issue, the defendant was convicted of robbery with a dangerous weapon and first-degree murder on theories of both premeditation and deliberation and felony murder. *McHone*, 174 N.C. App. at 291, 620 S.E.2d at 905-06. The defendant argued on appeal that the trial court committed plain error by (1) failing to include the option of not guilty of first-degree murder in its final mandate to the jury; and (2) omitting the not guilty option from the verdict sheet for that offense despite including a not guilty option on the verdict sheet for the robbery with a dangerous weapon charge. *Id.*

In our analysis regarding this issue, we set out three factors that must be weighed in determining whether the failure to give an appropriate not guilty mandate rises to the level of plain error.

> We first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error. . . . The instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by defendant on the

> basis of at least one of the theories. Telling the jury "not to return a verdict of guilty" as to each theory of first degree murder does not comport with the necessity of instructing the jury that it *must or would* return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder.

McHone, 174 N.C. App. at 297, 620 S.E.2d at 909 (internal brackets omitted).

After considering the not guilty mandate, this Court next considered the composition of the verdict sheet submitted to the jury:

> Secondly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error. Here, the trial court initially informed the jury that it was their "duty to return one of the following verdicts: guilty of first-degree murder or not guilty." However, the verdict sheet itself did not provide a space or option of "not guilty." And while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated "if" it found defendant guilty of first degree murder, we repeat our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return — a not guilty verdict.

Id. at 297-98, 620 S.E.2d at 909.

Finally, we stated the need to compare the challenged instruction to the instructions given for other charged offenses:

> Thirdly, we consider the instructions and verdict sheet for the armed robbery/larceny offenses in determining whether the failure to provide a not guilty final mandate for the murder charge constitutes plain error. As to these taking offenses, the trial court judge *did* provide a not guilty mandate. After instructing the jury that it must consider the offense of larceny should they reject the armed robbery, the court properly charged the jury, "If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to that charge." Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses

> likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.[2] Likewise, the content and form of the verdict sheet on the taking offenses, which *did* afford a space for a not guilty verdict, also likely *reinforced* the suggestion that defendant must have been guilty of first degree murder on some basis . . . .

Id. at 298, 620 S.E.2d at 909.

This Court has addressed this issue in several cases since *McHone* was decided. In *State v. Wright*, 210 N.C. App. 697, 709 S.E.2d 471, *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011), the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary. *Id.* at 699, 709 S.E.2d at 473. During the final mandate on the charge of first-degree burglary, the trial court instructed the jury as follows: "If you do not so find or have a reasonable doubt as to one or more of these things, *you will not return a verdict of guilty of first-degree burglary*." *Id.* at 704, 709 S.E.2d at 476. We determined that this final not guilty mandate was insufficient, reasoning that "the trial court failed to add at the end of the mandate that 'it would be your duty to return a verdict of not guilty.' We have held that the failure to give the final not guilty mandate constitutes error." *Id.*

However, applying *McHone*, we next examined the verdict sheet in order to determine whether the absence of the final not guilty mandate constituted plain error.

> In *McHone*, this Court's plain error analysis centered upon the fact that the trial court *impermissibly suggested* that the defendant must have been guilty of first degree murder on some basis. This Court concluded that the jury instructions in that case constituted plain error. This conclusion was based not only on the importance of

2. "The versions of *McHone* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online also contains this full sentence. *State v. McHone*, 620 S.E.2d at 909. However, the subject of the sentence is missing from the hard copy of the N.C. Court of Appeals Reports. The N.C. Court of Appeals Reports has only the following incomplete sentence: 'Rather than help correct the failure to provide a similar not guilty mandate with respect to the taking offenses likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.' *McHone*, 174 N.C.App. at 298, 620 S.E.2d 903."

Gosnell, __ N.C. App. at __, n. 1, 750 S.E.2d at 596, n. 1.

> the jury receiving a not guilty mandate from the presiding judge, *but also on the form and content of the particular verdict sheets utilized in this case.*

Id. at 706, 709 S.E.2d at 477 (internal citations and quotation marks omitted).

Upon inspection of the verdict sheet for the first-degree burglary charge, we determined that the not guilty option had been included therein.

> In the instant case, there was nothing that would support the proposition that the trial court impermissibly suggested that defendant must be guilty of first-degree burglary. The trial court gave the jury a choice of returning a verdict of guilty of first-degree burglary or not returning a verdict of guilty of first-degree burglary if they had a reasonable doubt as to one or more of the elements of the crime. There were no alternative theories that the jury could consider or lesser-included offenses. The verdict sheet for first-degree burglary provided a space for the jury to check "Guilty of First Degree Burglary" or "Not Guilty." Likewise, the verdict sheet for the other offense in this case also included a space for a verdict of guilty or not guilty.
>
> While it was error for the trial court to fail to deliver the final not guilty mandate, this error does not rise to the level of plain error.

Id. at 706, 709 S.E.2d at 477.

In *State v. Gosnell*, __ N.C. App. __, 750 S.E.2d 593 (2013), the trial court instructed the jury on two theories as to which it could find the defendant guilty of first-degree murder — premeditation and deliberation and lying in wait. While its instructions on the lying in wait theory contained a not guilty mandate, no such mandate was given in the portion of the jury instructions relating to the theory of premeditation and deliberation. *Id.* at __, 750 S.E.2d at 595.

In conducting a plain error review, we applied the three-factor test set forth in *McHone* and concluded that

> [t]he verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with

> the requirement in *McHone*. The trial court did not commit plain error in failing to instruct that the jury would or must return a "not guilty" verdict if it did not conclude that Defendant committed first-degree murder on the basis of premeditation and deliberation.

Id. at __, 750 S.E.2d at 596.

In *State v. Jenkins*, 189 N.C. App. 502, 658 S.E.2d 309 (2008), the defendant was charged both with assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. *Id.* at 503, 658 S.E.2d at 310. While the verdict sheet did contain a not guilty option for the charge of assault inflicting serious bodily injury, it failed to include a not guilty option for the charge of assault with a deadly weapon inflicting serious injury. *Id.* at 504-05, 658 S.E.2d at 311. We held that the defendant was entitled to a new trial because the trial court's not guilty mandate in its jury instructions was "not clear enough to support a verdict sheet that omits a 'not guilty' option . . . ." *Id.* at 507, 658 S.E.2d at 313.

In the present case, the trial court did issue a not guilty mandate at the conclusion of the instruction on first-degree murder as to Frink, stating the following:

> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

While the better practice would have been for the trial court to make clear to the jury that its final not guilty mandate applied to all three theories of first-degree murder, this — by itself — is not sufficient to establish plain error. Instead we must examine the second and third factors of the *McHone* test.

With regard to the second factor, we are unable to identify any error in the verdict sheet regarding the first-degree murder charge as to Frink. This portion of the verdict sheet stated as follows:

____ 1. GUILTY of FIRST DEGREE MURDER of Darnell Antonio Frink

IF YOU ANSWERED "YES," IS IT:

A. On the basis of malice, premeditation and deliberation?

ANSWER:______

B. On the basis of the first degree felony murder rule?

ANSWER:_______

C. On the basis of lying in wait?

ANSWER:_______

OR

____ 2. NOT GUILTY

We are satisfied that this portion of the verdict sheet clearly informed the jury of its option of returning a not guilty verdict regarding this charge. Indeed, Defendant does not contend otherwise.

We next turn to the third factor enumerated in *McHone*. It is particularly appropriate to compare the not guilty mandate regarding the first-degree murder charge as to Frink with the analogous mandate regarding the first-degree murder charge as to Jones. This is so because not only were both instructions for the offense of first-degree murder but, in addition, both charges involved more than one theory of guilt upon which Defendant could be convicted.[3] The instruction on the first-degree murder charge as to Jones — with the portions containing a not guilty mandate italicized — stated in pertinent part as follows:

> The defendant has been charged with the first degree murder of Rasheed Delamez Jones.
>
> Under the law and the evidence of this case it is your duty to return one of the following verdicts, either guilty of first degree murder or not guilty.
>
> You may find the defendant guilty of first degree murder either on the basis of malice, premeditation and deliberation or under the first degree felony murder rule, or both.
>
> First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and premeditation and deliberation.
>
> First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of first degree kidnapping.

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3. With regard to both murder charges, the jury was instructed on theories of premeditation and deliberation and felony murder. However, as noted above, the jury was also instructed on a theory of lying in wait as to the death of Frink.

For you to find the defendant guilty of first degree murder on the basis of malice premeditation and deliberation, the State must prove five things beyond a reasonable doubt:

First, that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.

If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. A firearm is a deadly weapon.

Second, the State must prove the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

Fourth, that the defendant acted after premeditation; that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.

And, fifth, that the defendant acted with deliberation, which means he acted while he was in a cool state of mind, this does not mean there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly

aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof, it may be proved by proof of circumstances from which they may be inferred such as the lack of provocation by the victim, the conduct of the defendant before, during and after the killing, use of gross excessive force, brutal or vicious circumstances of the killing, or the manner in which or means by which the killing was done.

I further charge you that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove four things beyond a reasonable doubt:

First, that the defendant committed first degree kidnapping. I remind you the elements of first degree kidnapping are as follows:

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant acted with malice, killed the victim with a deadly weapon, thereby proximately causing the victim's death, that the defendant intended to kill the victim and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

Whether or not you find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the first degree felony murder rule.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully removed a person from one place to another and that the person had not reached his sixteenth birthday

> and his parent or guardian did not consent to his removal and that this was done for the purpose of facilitating the defendant's commission for (sic) the murder of Rasheed Delamez Jones, and that this removal was a separate, complete act, independent of and apart from the murder, and that the person removed was not released by the defendant in a safe place or was seriously injured and that while committing first degree kidnapping, the defendant killed the victim and that the defendant's act was a proximate cause of the victim's death, and that the defendant committed first degree kidnapping with the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.
>
> *If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty, excuse me, you would return a verdict of not guilty.*
>
> *Let me make sure it's absolutely clear on that language. Again under — for Mr. Frink, you will have three choices under first degree murder. You will go through and consider each of those three bases for first degree murder, consider all three. You will only render not guilty if you find that none of those three exist.*
>
> *As to Mr. Jones, the same situation, first degree murder there are two bases, you will consider both of those bases, only if you found (sic) that neither of those bases exist, then you go to not guilty.*

(Emphasis added.)

Initially, we note that Defendant has not challenged on appeal the trial court's not guilty mandate contained in its first-degree murder instruction as to Jones. In comparing the first-degree murder instructions as to Frink and Jones, several observations can be made. First, the final not guilty mandate in the Frink instruction is worded more appropriately than that in the Jones instruction. The former informed the jury of its "duty" to return a verdict of not guilty while the latter merely stated that the jury "would" return a not guilty verdict if the State failed to prove Defendant's guilt beyond a reasonable doubt.

Second, in the Jones instruction, the trial court gave a not guilty mandate both after its instruction on the theory of premeditation and deliberation and then again at the conclusion of the overall first-degree

murder charge. Conversely, as discussed above, with regard to the Frink charge, the trial court only gave a not guilty mandate at the conclusion of the overall first-degree murder instruction rather than after each specific theory of guilt.

Finally, at the end of the Jones first-degree murder charge, the trial court referenced the Frink first-degree murder charge, stating the following:

> Let me make sure it's absolutely clear on that language. Again under — for Mr. Frink, you will have three choices under first degree murder. You will go through and consider each of those three bases for first degree murder, consider all three. You will only render not guilty if you find that none of those three exist.

We acknowledge that this reference by the trial court to the jury's obligation regarding the Frink first-degree murder charge was not worded with perfect clarity and that it would have been more appropriate for the trial court to emphasize the jury's duty to return a verdict of not guilty in the event that it found the State had failed to prove Defendant's guilt beyond a reasonable doubt. Nevertheless, we are satisfied that any confusion that may have arisen stemming from the trial court's instructions was remedied by the verdict sheet, which — as discussed above — clearly provided an option of not guilty.

Even assuming, without deciding, that the trial court's instructions relating to this charge were not free from error, based on our careful review of the jury instructions in their entirety and the caselaw discussed above, we conclude that Defendant has failed to show plain error. Therefore, Defendant's argument on this issue is overruled.

III. Lying in Wait

[3] Defendant also contends that the trial court erred by instructing the jury — over the objection of his trial counsel — on first-degree murder based upon a theory of lying in wait with regard to the death of Frink.

> Preserved legal error is reviewed under the harmless error standard of review. . . . North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

Lawrence, 365 N.C. at 512-13, 723 S.E.2d at 330-31 (internal citations and quotation marks omitted).

In the present case, Defendant was convicted of first-degree murder as to Frink based upon three separate theories — premeditation and deliberation, felony murder, and lying in wait. On appeal, Defendant has only challenged the sufficiency of the evidence with regard to the lying in wait theory.

A similar issue was presented in *Gosnell*. In that case, the defendant was convicted of first-degree murder both on a theory of lying in wait and a theory of premeditation and deliberation. *Gosnell*, __ N.C. App. at __, 750 S.E.2d at 598. However, on appeal, he argued only that it was error for the trial court to have submitted the theory of lying in wait to the jury. *Id.* at __, 750 S.E.2d at 596. This Court held that because the jury had separately convicted him based on premeditation and deliberation, "[e]ven assuming Defendant can show error on this basis, Defendant cannot show prejudice resulting from the error because there is no possibility that, had the error in question not been committed, a different result would have been reached at trial." *Id.* at __, 750 S.E.2d at 598.

Therefore, even assuming, without deciding, that the jury instruction on lying in wait was erroneous, such error would not have affected Defendant's conviction of first-degree murder as to Frink on the theories of premeditation and deliberation and felony murder. Consequently, Defendant has failed to demonstrate how a different result would have been reached at trial had the challenged theory not been submitted to the jury.

IV. Failure to Adequately Individualize Charges

[4] Defendant next makes a series of arguments in which he contends that the trial court erred by failing to instruct the jury to consider each offense individually. Because Defendant did not object to any of these instructions at trial, we again apply a plain error standard of review. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. We address each of his specific arguments in turn.

First, Defendant asserts that "[f]or the assault with a deadly weapon with intent to kill inflicting serious injury charges for two victims, the court named both victims, but then gave an instruction as to 'the victim.' " Based on our Supreme Court's holding in *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, Defendant's argument lacks merit.

In *Huff*, the defendant was being tried on two separate counts of first-degree murder. *Id.* at 51-54, 381 S.E.2d at 664-66. On appeal, he

cited as plain error various instructions that referred to a single victim, a single case, and a single decision to be made. *Id.* He contended that these references were misleading and could have led jurors to believe that they were permitted to make a joint determination of guilt. *Id.* He argued that the trial judge had (1) periodically referred to a single "victim" (although there were *two* victims); (2) stated that the State had the burden of "proving the case" (although there were *two* cases for the State to prove); and (3) instructed the jury that the "decision in the case must be unanimous" (although the jury was required to make decisions in each of *two* cases). *Id.* The defendant also contended that the trial court erred by giving a single joint instruction on the affirmative defense of insanity. *Id.*

In rejecting the defendant's argument, the Supreme Court explained that although "[t]he trial judge did not specifically instruct the jurors to consider each charge separately[,] . . . the instructions which he did give achieved that result; taken as a whole, they make clear that in the determination of defendant's guilt or innocence the jury was to consider each charge separately." *Id.* at 52, 381 S.E.2d at 664. The Court held that if a trial court identifies each victim for each separate count of the same charged offense, it is not plain error for the trial court to then describe the elements of the offense only once:

> The trial judge proceeded to the instruction on first-degree murder. He instructed on the first element, an intentional killing by the defendant of the victim with malice. After giving the general instruction which applied to both cases, [the trial judge] specifically referred to the Gail Strickland case and gave the specific instruction which applied only in the shooting death . . . He said, "In your consideration of the case in which Gail Strickland is the victim . . . ." By referring to the Gail Strickland case by name, he distinguished it from the case in which Crigger Huff was the victim and indicated that the jury should consider the evidence of the Gail Strickland case separately from the evidence in the Crigger Huff case.

Id. at 52-53, 381 S.E.2d at 665. The Supreme Court in *Huff* further held that

> [t]he format of the verdict sheet and the trial judge's instruction describing it are additional evidence that the instructions as a whole made clear that the jury was to consider each charge separately. The record on appeal

> shows that the verdict form lists each charge separately and states the permitted verdicts under each charge. This separate treatment clearly requires that the two charges be addressed separately.

Id. at 54, 381 S.E.2d at 665.

In the present case, as in *Huff*, all charges against Defendant were listed separately on separate verdict sheets and each sheet set forth all permissible verdicts under each charge. In addition, the trial court referred to Waddell and Inman as separate victims of two different counts of assault with a deadly weapon with intent to kill inflicting serious injury:

> The defendant has been charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injury in regards to William Inman and Antwan Waddell. For you to find the defendant guilty of those two, offenses, the State must prove four things beyond a reasonable doubt[.]

We believe that the trial court's instructions — coupled with the verdict sheets — made clear to the jury that there were two separate counts and two separate victims regarding this charge.

While Defendant also contends the trial court failed to separately instruct on the two counts of conspiracy to commit first-degree murder, the trial court likewise informed the jury that there were two counts for its consideration as to that offense by stating the following: "The defendant has been charged with conspiracy to commit murder of Darnell Antonio Frink and Rasheed Delamez Jones, two counts as to that offense." Furthermore, the verdict sheets made clear that there were two separate counts regarding the conspiracy charge as each count was listed on a separate verdict sheet. Consequently, based on *Huff*, we cannot say that this instruction constituted plain error.

In his brief, Defendant also contends that "the [trial] court combined the two charges of felon in possession [of a firearm] without specifying the dates of the offenses or instructing the jurors that guilt for one of the offenses did not mean guilt for the other offense." Our review of the trial transcript, however, reveals that the trial court did specifically indicate the dates of the offenses and make clear that there were two separate counts of that offense by stating that "[t]he defendant has been charged with two counts of possession of a firearm by a felon . . . and the two alleged dates, the first being September 21st, 2007 and the second being

November 19th, 2007." Furthermore, the jury was given two separate verdict sheets reflecting the two counts of this offense and the respective dates of each count was clearly contained on each verdict sheet. Therefore, Defendant has also failed to show plain error with regard to this instruction.

[5] Defendant next asserts that with regard to the felony murder instruction regarding the death of Frink, the jury was not informed which assault could form the basis for the felony murder charge. However, this error does not rise to the level of plain error. *See State v. Coleman*, 161 N.C. App. 224, 234-35, 587 S.E.2d 889, 896 (2003) ("[T]he trial court's instructions to the jury were ambiguous as to what underlying felony formed the basis of [the] felony murder charge. . . . Only one underlying felony is required to support a felony murder conviction, and in this case, the jury convicted defendant of four separate felonies which could have served as the underlying felony. . . . [B]ecause the instructions in the instant case allowed the jury to convict defendant of a single wrong by alternative means the instructions were not fatally ambiguous." (internal citation and ellipses omitted)). Therefore, based on *Coleman*, Defendant has also failed to establish plain error with regard to this instruction.

Finally, Defendant briefly argues that "[t]he [trial] court gave the mandate for the Jones murder, but gave no mandate for the underlying felony, kidnapping." However, our review of the trial transcript reveals that the trial court did, in fact, expressly provide such a mandate. Therefore, this argument fails as well.

V. Felony Murder

[6] Defendant's final argument is that the trial court committed plain error by instructing the jury on the theory of felony murder regarding the death of Jones because there was insufficient evidence of the predicate felonies, first-degree kidnapping and conspiracy to commit first-degree kidnapping.

However, Defendant was convicted of first-degree murder as to the death of Jones based not only on a theory of felony murder but also based on a theory of premeditation and deliberation. Therefore, as discussed above in connection with Defendant's challenge to the lying in wait instruction as to the death of Frink, any error in the trial court's decision to instruct the jury on felony murder would not have affected his conviction for the first-degree murder of Jones on a theory of premeditation and deliberation. *See Gosnell*, __ N.C. App. at __, 750 S.E.2d at 598. Thus, this argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
SHAWN MOORE, Defendant

No. COA14-244

Filed 7 October 2014

Evidence—admission of prior statement—corroborative purposes

The trial court did not err in a robbery with a dangerous weapon case by admitting into evidence a prior statement of a witness for corroborative purposes. The prior statement did not differ significantly from the witness' trial testimony.

Appeal by defendant from judgment entered 31 October 2013 by Judge Richard Brown in Scotland County Superior Court. Heard in the Court of Appeals 26 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

BRYANT, Judge.

Where the prior statement of a witness did not differ significantly from the witness' trial testimony, the trial court did not abuse its discretion in admitting the statement for corroborative purposes.

On 24 June 2013, defendant Shawn Moore was indicted by a Scotland County grand jury for robbery with a dangerous weapon. The matter came on for trial during the 28 October 2013 criminal session of Scotland County Superior Court, the Honorable Richard Brown, Judge presiding. At trial, the State's evidence tended to show the following.

On 15 March 2012, Sergeant Jeffrey Cooke of the Scotland County Sheriff's Office responded to an emergency call. When Sergeant Cooke arrived at the scene, he found Travis McLean lying on the ground bleeding from a foot injury. McLean told Sergeant Cooke that three men came to his house to look at some electronic equipment. The men then grabbed McLean's shotgun and shot McLean in the foot before taking McLean's cell phone and fleeing in McLean's car, a lavender-colored 1994 Cadillac Fleetwood Brougham. McLean's car was later found abandoned and seriously damaged in Marlboro, South Carolina.

At trial, McLean testified that he knew one of the three men who robbed him because his cousin once introduced the two men. This man, defendant, was known to McLean as "Mook" or "Mooky." McLean stated that defendant and two other men, later identified as Michael Liles and Ari Miles, came to McLean's house to buy a half pound of marijuana. McLean testified that because he did not have enough marijuana to sell, he texted his supplier "Scottie" to bring additional marijuana to his house.

While the men waited for the marijuana, defendant noticed McLean's shotgun in the corner of the living room and asked if he could buy it. After McLean declined to sell the shotgun, defendant then asked if he could shoot it; McLean said yes. After defendant fired the shotgun outside in the backyard, defendant asked McLean to show him McLean's car's electronics. McLean went to his car and turned it on to run the audio system.

After McLean turned on his car's audio system, he stated that he received a phone call and began to walk back towards his house. McLean testified that as he walked back towards his house, Ari Miles suddenly stepped in front of him, pointed the shotgun at him, and demanded McLean give Miles his cell phone. Miles then fired the shotgun towards McLean's feet. McLean threw his cell phone at Miles and began to run away but realized that he had been shot in the left foot and ankle and was unable to run. McLean testified that immediately after the shooting, defendant got into McLean's car and drove away. Liles and Miles both left in Liles' car. McLean stated that the shotgun damage to his foot was so severe his Achilles tendon had to be removed.

The State also presented the testimony of Ari Miles at trial. Miles was currently being held at the Scotland County Correctional facility following his conviction for the armed robbery of McLean. Miles testified that he went with defendant and Liles to McLean's house to purchase marijuana and that while McLean was trying to find more marijuana for

them, defendant told Miles he wanted to steal McLean's car. Miles said defendant threatened him by flashing a gun tucked into his waistband and ordered Miles to use McLean's shotgun for the robbery. Miles testified that he did not want to hurt McLean and that he thought he had only shot at the ground, rather than hitting McLean's left foot and ankle. Miles said that after the robbery, he traded McLean's cell phone to another person for a different cell phone.

On 29 October 2013, defendant filed a motion *in limine* to exclude/redact statements or exhibits. During the pre-trial hearing, the trial court heard arguments from counsel regarding two of the State's exhibits: a statement made by Ari Miles on 28 March 2012; and a statement by Ari Miles made 9 October 2013. The trial court denied defendant's motion on grounds that the two statements were not significantly different but noted that if Miles testified at trial and his testimony changed significantly from the prior statements, the trial court would reconsider its decision.

Ari Miles testified during trial as to his involvement with defendant and the robbery of McLean. Defendant then objected during the testimony of Investigator Laviner when Miles' 28 March 2012 statement was read aloud to the jury. The trial court, after reconsidering the arguments of counsel and the statement in question, overruled defendant's objection and allowed the statement to be admitted for corroborative purposes. The trial court also gave limiting instructions to the jury regarding their consideration of Miles' prior statement.

On 31 October, a jury convicted defendant of robbery with a dangerous weapon. Defendant was found to be a prior record level II and was sentenced to 59 to 83 months imprisonment. Defendant appeals.

In his sole issue on appeal, defendant argues that the trial court erred in allowing Ari Miles' 28 March 2012 statement to be admitted for corroborative purposes, and that defendant was prejudiced as a result. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008) (citation and quotation omitted). "The abuse of discretion standard applies to decisions by a trial

court that a statement is admissible for corroboration." *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations omitted).

Defendant contends the trial court erred in admitting Miles' 28 March 2012 statement into evidence because the statement contained significant differences from Miles' own testimony during trial and these differences resulted in prejudicial error entitling defendant to a new trial.

> [C]orroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness'[] prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

Id. at 526-27, 684 S.E.2d at 740 (citations omitted). "The trial court is [ultimately] in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter]." *State v. Bell*, 159 N.C. App. 151, 156, 584 S.E.2d 298, 302 (2003) (citation omitted). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Tellez*, 200 N.C. App. at 527, 684 S.E.2d at 740 (citation omitted).

Ari Miles testified at trial that he went with Michael Liles and defendant to McLean's house to purchase marijuana. Miles stated that defendant became interested in McLean's shotgun and that after discussing the marijuana purchase with him and Liles, told Miles "he was going to give me the shotgun for me to stick [McLean] up." Miles said defendant then began to ask McLean questions about McLean's car, and McLean turned the car and its audio system on. Miles stated that once McLean began to walk away from the car, defendant signaled for Miles to rob McLean. After Miles fired the shot gun at McLean, McLean "threw his cell phone and ran" while defendant got into McLean's car. Miles stated that defendant threatened him by flashing a gun tucked into defendant's waistband before driving away. Miles further said that he

gave the shotgun to Liles and fled in Liles' car, and traded McLean's cell phone to another person for a different type of cell phone.

During his testimony, Investigator Laviner read a statement made by Ari Miles on 28 March 2012. In his statement, Miles described his trip with Liles and defendant to McLean's house to purchase marijuana, defendant's interest in McLean's shotgun, and defendant asking McLean to show him the audio system in McLean's car. Miles said in his statement that defendant said he wanted to rob McLean and that if Miles did not shoot McLean, defendant "would do [Miles.]" In his statement, Miles further said that he shot at the ground and McLean threw his cell phone at him in response; Miles then ran back to Liles' car and left. Defendant was described as taking the shotgun and driving the car down to the sand hills.

Defendant's contention that there were significant differences between Miles' testimony and prior statement is without merit. In reviewing Miles' testimony and prior statement, the differences between the two are slight. Moreover, both substantiate defendant's participation in McLean's robbery, including defendant's decision to rob McLean for McLean's car, defendant getting Miles to use the shotgun as part of the robbery by threatening Miles, and defendant leaving the scene in McLean's car. As such, the trial court did not abuse its discretion in allowing Miles' prior statement to be admitted, as the differences between Miles' testimony and prior statement were slight and did not change Miles' account of McLean's robbery. *See State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) ("[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." (citation omitted)).

Defendant further contends the trial court erred in its admission of Miles' prior statement as corroborative evidence based on our Supreme Court's decisions in three cases: *State v. Frogge*, 345 N.C. 614, 481 S.E.2d 278 (1997); *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976); and *State v. Fowler*, 270 N.C. 468, 155 S.E.2d 83 (1967). However, these cases are not applicable to the instant case.

In *Frogge*, *Warren*, and *Fowler*, the defendants were convicted of first-degree murder. On appeal, the defendants challenged the trial court's admission of prior statements of witnesses as corroborative evidence, arguing that the prior statements were so substantially different from testimony given during the trial that the defendants were prejudiced as a result. Our Supreme Court agreed, finding that in each

case the prior statements were contradictory to testimony given during the trial and, because the evidence directly affected the first-degree murder charges facing the defendants, the admission of such evidence was indeed prejudicial. *See Frogge*, 345 N.C. at 616-18, 481 S.E.2d at 279-80 (ordering a new trial for the defendant on grounds of prejudice caused by the improper admission of corroborative evidence where "the inconsistencies between [defendant's] prior statement and his trial testimony went to the heart of the prosecution's case for felony murder[]"); *Warren*, 289 N.C. at 553-59, 223 S.E.2d at 319-22 (holding that corroborative evidence was prejudicial to the defendant where the testimony "went beyond and contradicted" other testimony that was essential to the defendant's charged offense of first-degree murder); *Fowler*, 270 N.C. at 469-72, 155 S.E.2d at 84-87 (ordering a new trial where the differences in the corroborative testimony could account for the difference between the defendant receiving life imprisonment and the death penalty).

Here, defendant was charged with the offense of robbery with a dangerous weapon. As previously discussed, there were only slight differences between Ari Miles' testimony and his prior statement. Further, Miles' testimony and prior statement were substantially consistent regarding defendant's involvement in McLean's robbery including events leading up to, during, and immediately after the robbery. Any "inconsistencies between [Miles'] prior statement and his trial testimony [did not go] to the heart of the prosecution's case for [robbery with a dangerous weapon]." *See Frogge*, 345 N.C. at 616-18, 481 S.E.2d at 279-80.

Defendant also argues that the trial court erred by admitting as corroborative evidence Miles' testimony and prior statement because Miles' prior statement "introduced a murderous intent on the part of the defendant" and "this inadmissible and highly prejudicial testimony resulted in prejudicial error entitling the defendant to a new trial." We disagree for, as discussed above, the differences that existed between Miles' testimony at trial and his prior consistent statement made within days of the robbery were only slight and did not go to the heart of defendant's charged offense of robbery with a dangerous weapon. Defendant is unable to demonstrate prejudice from the admission of Miles' prior statement. *See State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) ("The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." (citations omitted)). We further note that the evidence presented against defendant,

particularly the testimony of McLean, was overwhelming such that the differences in Miles' testimony and prior statement would not affect the outcome of defendant's trial. *See State v. Moses*, 52 N.C. App. 412, 421-24, 279 S.E.2d 59, 65-66 (1981) (holding that the trial court did not abuse its discretion in admitting evidence of corroborative statements where there were no fundamental differences between the statements, nor did the defendant receive an unfair trial where the defendant presented no evidence and the State's evidence against the defendant was overwhelming). Accordingly, the trial court did not abuse its discretion in admitting Miles' prior statement for corroborative purposes, where the statement tended to add weight and credibility to Miles' testimony at trial.

No error.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
MELISSA LEE OTT

No. COA13-1412

Filed 7 October 2014

Drugs—trafficking by sale—entrapment—jury instruction—sufficient evidence

The trial court erred in a trafficking of opium by sale; trafficking of opium by possession, and possession of opium with the intent to sell and deliver case by denying her request to instruct the jury on the defense of entrapment. Defendant offered sufficient evidence of entrapment where, taken in the light most favorable to defendant, the evidence showed that the plan to sell the pills originated in the mind of Eudy (an informant), who was acting as an agent for law enforcement, and defendant was only convinced to do so through trickery and persuasion.

Appeal by defendant from judgment entered 5 July 2013 by Judge Julia L. Gullett in Rowan County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Oliver G. Wheeler, IV, for the State.

James R. Glover for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Melissa Lee Ott appeals from the judgment entered after a jury convicted her of: (1) trafficking in 28 grams or more of opium by sale; (2) trafficking in 28 grams or more of opium by possession; and (3) possession of opium with the intent to sell and deliver. On appeal, defendant argues that the trial court erred by denying her request to instruct the jury on the defense of entrapment.

After careful review, because defendant offered sufficient evidence of entrapment, the trial court erred in refusing to instruct the jury on the defense of entrapment. Accordingly, we vacate the judgment and remand for trial.

Background

In 2011, Emily Eudy ("Eudy"), a friend of defendant, contacted the Rowan County Sheriff's Office and offered to serve as a confidential informant in an attempt to receive a more lenient sentence for her pending drug charges. Eudy informed Rowan Sherriff's Detective Jay Davis ("Detective Davis") that defendant had narcotics for sale and agreed to introduce an undercover officer to defendant to make a purchase. Eudy and defendant had been friends for about one year.

On 27 July 2011, the Rowan County Sherriff's office provided Detective Kevin Black ("Detective Black") with an undercover vehicle, $150 in special funds, and a recording device. Detective Black drove Eudy to defendant's house. According to the audio/video recording which was shown to the jury at trial, the following interaction took place: defendant told Detective Black that she usually only dealt drugs to six people and asked Detective Black to pull up his shirt to prove that he was not a police officer. Detective Black told defendant that he had $150 to spend on pills. Defendant pulled three pill bottles out of her purse and asked if he was interested in "5's" (5 milligram pills). Detective Black acknowledged that he was interested in purchasing the pills, and defendant poured a bottle of white pills onto the table and counted out 40 5 mg pills of hydrocodone and acetaminophen. Defendant told Detective Black that she could sell him the white pills for $3 and asked if he also wanted to buy 10 mg pills. After Detective Black said he did, defendant

poured blue and yellow pills onto the table and told him that she could get $7 to $8 for the blue pills. Defendant also asked Detective Black if he wanted some speed and claimed that she sold 90 percent of her speed to truckers.

In total, defendant sold Detective Black 34.2 grams of pills which included 40 white pills, 9 blue pills, and 1 yellow pill. Analysis by the Iredell County Sherriff's lab confirmed the presence of hydrocodone in the blue and white pills.

On 31 July 2011, defendant was indicted for (1) trafficking in 28 grams or more of a preparation opium by sale to Detective Black; (2) trafficking in 28 grams or more of a preparation opium by possession; and (3) possession of a preparation opium with intent to sell and deliver. The matter came on for trial on 2 July 2013.

At trial, defendant took the stand in her own defense; she testified that she was a drug user, not a seller, and only sold the pills as a favor to Eudy. Defendant claimed that she "absolute[ly]" would not have sold the pills but for Eudy's involvement. According to defendant, Eudy "wanted [her] to sell the pills to [Detective Black] and convince him that . . . he could keep coming back for more . . . so that [Eudy] wouldn't get in trouble with her husband." Defendant also alleged that, on the morning of the sale, Eudy gave her three bottles of pills, coached her on what to say, and told her that she could keep the 7.5 mg pills for herself for helping Eudy complete the sale. Defendant claimed that she was just trying to "complete the act [Eudy] wanted [her] to do" and was only "talking the talk" when she spoke to Detective Black about pricing, people she usually dealt with, and selling speed to truckers. In other words, according to defendant, Eudy provided her details on exactly what to say to Detective Black during the sale. However, defendant did admit that, on two prior occasions, she sold cocaine to Eudy and had previously been convicted of possession of cocaine and drug paraphernalia.

At trial, Eudy also testified as a witness for the defense. Eudy refuted defendant's claim that she did not sell drugs, claiming that defendant had been selling crack cocaine and pain pills for the entire time she knew defendant. Moreover, she denied providing the pills to defendant. Eudy was not convicted of the pending trafficking charge but was convicted of attempted trafficking and received a probationary sentence.

At the beginning of the charge conference, the trial court listed the jury instructions it intended to give, including an instruction on the defense of entrapment. The State objected, and, after hearing arguments from both parties, the trial judge ruled that the evidence established

defendant's predisposition to commit the crime and, therefore, declined to give the defense instruction. On 5 July 2013, the jury found defendant guilty of all three charges. The trial court sentenced defendant to a minimum term of 225 months to a maximum term of 279 months imprisonment and fined her $500,000. Defendant gave timely notice of appeal.

Discussion

Defendant's sole argument on appeal is that the trial court erred by failing to give the requested instruction on the defense of entrapment. Specifically, defendant contends that, taken in the light most favorable to defendant, the evidence shows that the plan to sell the pills originated in the mind of Eudy, who was acting as an agent for law enforcement, and defendant was only convinced to do so through trickery and persuasion. Therefore, the evidence was sufficient to justify a jury instruction on entrapment. We agree.

Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo. *State v. Redmon*, 164 N.C. App. 658, 662-664, 596 S.E.2d 854, 858-859 (2004). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment, for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

"Entrapment is complete defense to the crime charged." *State v. Branham*, 153 N.C. App. 91, 99, 569 S.E.2d 24, 29 (2002). To be entitled to the defense of entrapment, a defendant must present "some credible evidence," *State v. Thomas*, __ N.C. App. __, __, 742 S.E.2d 307, 309, *disc. review denied*, __ N.C. __, 747 S.E.2d 555 (2013), of the following elements: "(1) acts of persuasion, trickery, or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and that] (2) . . . the criminal design originated in the minds of the government officials, rather than the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities[,]" *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978). A "defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant." *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983). "The issue of whether or not a defendant was entrapped is generally a question of fact to be determined by the jury," *State v. Collins*, 160 N.C. App. 310, 320, 585 S.E.2d 481, 489 (2003), and when the "defendant's evidence creates an issue of

fact as to entrapment, then the jury must be instructed on the defense of entrapment[,]" *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002).

However, the entrapment defense is not available to a defendant who has a "predisposition to commit the crime independent of governmental inducement and influence." *State v. Hageman*, 307 N.C. 1, 29, 296 S.E.2d 433, 449 (1982). "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in a criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450.

Here, taking the evidence in a light most favorable to defendant and, in particular, defendant's testimony, there was sufficient evidence that defendant was induced to commit the sale through acts of persuasion and trickery to warrant the instruction. Specifically, according to defendant's evidence, Eudy was acting as an agent for the Sherriff's office when she approached defendant, initiated a conversation about selling pills to her buyer, provided defendant the pills, and coached her on what to say during the sale. While it is undisputed that defendant was a drug user, defendant claimed that she had never sold pills to anyone before. In fact, the only reason she agreed to sell them was because she was "desperate for some pills," and she believed Eudy's story that she did not want her husband to find out what she was doing. Defendant's testimony established that Eudy told defendant exactly what to say such that, during the encounter, defendant was simply playing a role which was defined and created by an agent of law enforcement. In sum, this evidence, if believed, shows that Eudy not only came up with the entire plan to sell the drugs but also persuaded defendant, who denied being a drug dealer, to sell the pills to Detective Black by promising her pills in exchange and by pleading with her for her help to keep the sale secret from her husband. Furthermore, viewing defendant's evidence as true, she had no predisposition to commit the crime of selling pills. Although Eudy disputed this fact at trial, as this Court has noted, "[f]or purposes of the entrapment issue, we must assume that [the] defendant's testimony is true[,]" *State v. Foster*, __ N.C. App. __, __, __ S.E.2d __, ___ (Aug. 5, 2014) (No. COA13-1084). Thus, defendant's evidence was sufficient to create an issue as to inducement and lack of predisposition to commit the offense, and the trial court should have instructed on entrapment.

The case of *State v. Jamerson*, 64 N.C. App. 301, 307 S.E.2d 436 (1983), provides guidance. In *Jamerson*, this Court held that the defendant introduced sufficient evidence of inducement to justify a jury

instruction on entrapment by showing: (1) an undercover officer and his informant initiated a conversation about selling drugs with the defendant; (2) the officer repeatedly urged the defendant to provide the drugs; (3) the informant located a person who would sell the drugs and drove the officer and the defendant to the location; and (4) the officer then provided the defendant the money to buy the drugs. *Id.* at 303-304, 307 S.e.2d at 437. In a similar case, this Court has also held that there is sufficient evidence of inducement to justify a jury instruction on entrapment when the defendant is promised something in return for participating in the sale of drugs. *State v. Blackwell*, 67 N.C. App. 432, 438, 313 S.E.2d 797, 801 (1984) (defendant was promised a job if he would sell drugs to an undercover officer).

Similarly, in *State v. Stanley*, 288 N.C. 19, 32-33, 215 S.E.2d 589, 597-98 (1975), our Supreme Court held that the evidence was sufficient to establish that the defendant was entrapped as a matter of law. In *Stanley*, the undisputed evidence showed that an undercover officer befriended the defendant based on false pretenses, repeatedly asked the defendant about purchasing drugs, persuaded the defendant to purchase drugs for him, and supplied the defendant with the money to do so. *Id.* at 32, 215 S.E.2d at 597. Prior to his arrest for possession of a controlled substance, the defendant admitted to purchasing drugs that turned out to be counterfeit. *Id.* at 22, 215 S.E.2d at 591. The Supreme Court held that this evidence was sufficient to demonstrate that the criminal design originated with the law enforcement officer, and there was no evidence that defendant was predisposed to commit the crime. *Id.* at 32-33, 215 S.E.2d at 597.

We believe that the facts of this case are analogous to *Jamerson* and *Stanley*. Here, defendant testified that she was approached by Eudy, an agent of law enforcement, who initiated the discussion about selling drugs. Defendant testified that not only did Eudy initiate the conversation, but that the entire plan was Eudy's idea. Similar to the *Jamerson* and *Stanley* defendants, defendant did not locate the drugs on her own but they were provided to her by Eudy. Furthermore, defendant testified that Eudy instructed her on what to say and how to act during the sale.

In sum, viewed in a light most favorable to defendant, defendant's testimony, if believed, would permit the jury to find that the idea for the crime of selling pills originated with and was pursued by Eudy, with no indication that defendant had a predisposition to sell pills. Thus, as in *Jamerson* and *Stanley*, the evidence was sufficient to warrant an instruction on entrapment.

The State, nevertheless, argues that defendant was predisposed to commit the crime and that Eudy simply afforded defendant the opportunity to sell the pills. Consequently, relying on *State v. Thompson*, 141 N.C. App. 698, 707, 543 S.E.2d 160, 166 (2001), the State contends that defendant was not entitled to the instruction on entrapment, noting that this Court has consistently held that the sale of drugs as a favor is "not evidence of inducement, just opportunity to commit the offense." We disagree.

In *Thompson*, *id.* at 699, 543 S.E.2d at 162, the sheriff's office received information from a confidential informant that the defendant was selling narcotics. In order to "ascertain the validity of the informant's information," law enforcement officers arranged for and observed the confidential informant buy cocaine from the defendant. *Id.* The informant then introduced an undercover narcotics detective to the defendant. *Id.* When the undercover officer initially asked to buy cocaine, defendant claimed that he "could not help" because he only used heroin. *Id.* at 700, 543 S.E.2d at 162. According to the defendant, however, the informant told him that the defendant's upstairs neighbor was a supplier. Id. On two separate occasions, the defendant purchased cocaine from his upstairs neighbor for the undercover officer. *Id.* At trial, the defendant testified that, although he was a recovering heroin addict, he had no prior convictions for drug dealing, had never gotten cocaine for the confidential informant before, and did not know that the upstairs neighbor was a drug dealer. *Id.* The trial court denied his request for an entrapment instruction. *Id.* at 699, 543 S.E.2d at 162.

On appeal, the defendant argued that the trial court committed reversible error by refusing to instruct on entrapment. However, this Court disagreed, noting:

> Neither the informant nor O'Neil provided gifts or made promises before asking to purchase cocaine from defendant. Also, although defendant testified that he had been reluctant to sell cocaine to the informant and O'Neil, his own testimony showed defendant required little urging before acquiescing to their requests. "That [the undercover officer] gave defendant the money and asked him to obtain the cocaine is not evidence of inducement, just an opportunity to commit the offense." *State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 463 (1985), *cert. denied*, 317 N.C. 711, 347 S.E.2d 47 (1986). As we held in *Martin*, selling drugs as a favor and taking no profit from the

> transaction does not entitle a defendant to an instruction on entrapment. *See also State v. Booker*, 33 N.C. App. 223, 234 S.E.2d 417 (1977). Defendant failed to introduce sufficient evidence of persuasion by either the informant or O'Neil to suggest that the criminal design originated with the law enforcement agents and not with defendant.

Id. at 707, 543 S.E.2d at 166. Thus, the Court concluded that the evidence did not warrant the instruction. *Id.*

However, we find the facts of the present case distinguishable. Unlike *Thompson*, here, there was no "ascertain[ment]" of the validity of Eudy's information. Although Detective Davis testified that Eudy made a "controlled buy" from defendant prior to the incident where she sold the pills to Detective Black, Detective Davis acknowledged that the "controlled buy" was not witnessed by law enforcement nor recorded. Instead, Eudy brought him 0.5 grams of hard cocaine that she claimed she had purchased from defendant. However, at trial, when asked about the previous "controlled buy," Eudy pled the Fifth Amendment and refused to answer. Thus, unlike *Thompson* where the police actually observed the defendant sell drugs to the informant, here, police had no way of ascertaining the validity of the "controlled buy" nor the reliability of Eudy's information about defendant, especially since Eudy was unwilling to confirm this prior purchase at trial. Furthermore, construing defendant's testimony as true, Eudy, the agent of law enforcement, did not simply point defendant to a supplier but actually supplied defendant the pills to sell and told her what to say during the interactions with Detective Black. Once the transaction was complete, the money would go to Eudy with defendant being paid in pills. In other words, the entire drug transaction flowed through Eudy, an agent of law enforcement; there were no other suppliers or third parties involved as in *Thompson* where the defendant had to go to an outside, unrelated supplier to get the drugs.

Finally, unlike the defendant in *Thompson*, defendant, who admitted that she was a pill user, did receive pills in exchange for selling Detective Black the pills, pills which defendant admitted she was "desperate" for. In contrast, however, the *Thompson* defendant received nothing in exchange for selling the cocaine—his entire motivation was to do a favor for the confidential informant, and he "[took] no profit from the transaction." *Id.* at 707, 543 S.E.2d at 166. Thus, in sum, the evidence does not simply show that defendant was given an "opportunity" to sell the drugs; there was sufficient evidence of persuasion and evidence that

the entire criminal design, including the supply of the drugs and the details of how defendant should act, originated with law enforcement. Accordingly, the State's reliance on *Thompson* is misplaced.

In contrast, viewing the evidence in a light most favorable to defendant and "assum[ing]" defendant's testimony is true, *Foster*, __ N.C. App. at ___, ___ S.E.2d at ___, Eudy initiated a conversation with defendant and asked her to sell pills to Detective Black. Eudy introduced defendant to Detective Black, coached defendant on exactly what to do during the encounter, and supplied the drugs. Although a user of pills, defendant denied ever selling them and steadfastly claimed that she would never have sold them but for Eudy's persistence and offer to provide defendant pills. Accordingly, defendant presented sufficient evidence of the elements of entrapment, and the trial court erred in refusing to instruct on this defense at trial.

Conclusion

In sum, we hold that defendant presented sufficient evidence to warrant submission of the entrapment defense to the jury. Defendant is, therefore, entitled to a new trial.

NEW TRIAL.

Judges DILLON and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 October 2014)

Case	Source	Disposition
BASS v. HARNETT CNTY. No. 14-261	N.C. Industrial Commission (X65648)	Affirmed
FLEMING v. FLEMING No. 13-1347	Gaston (07CVD4408)	Vacated and Remanded
GEIGER v. CENT. CAROLINA SURGICAL EYE ASSOCS., P.A. No. 14-169	Guilford (12CVS5477)	No Error
HALL v. HALL No. 13-921	Catawba (11CVD2481-82)	Vacated and Remanded
IN RE A.M.B. No. 14-309	Mecklenburg (12JT32)	Affirmed
IN RE C.O.W. No. 14-517	Alamance (12JT101)	Affirmed
IN RE COTTRELL No. 14-519	Lincoln (13CVS25)	Affirmed
IN RE J.M.L. No. 14-563	Lincoln (12JT8)	Affirmed
IN RE L.D.S. No. 14-524	Guilford (12JT75)	Affirmed
IN RE M.T. No. 14-385	Robeson (12JT17-18)	Vacated
JEFFRIES v. MILLER No. 14-263	Forsyth (12CVS1970)	Dismissed
SANDY GROVE BAPTIST CHURCH v. FINCH No. 14-199	Nash (11CVS1177)	Dismissed
STATE v. ALLEN No. 14-152	Robeson (07CRS57605-07 (07CRS57688) (08CRS53434) (08CRS53570-77) (08CRS53579-84) (09CRS1362)	Vacated and Remanded

STATE v. ALLEN No. 14-290	Mecklenburg (12CRS233035-36) (13CRS599)	No prejudicial error
STATE v. AVANT No. 14-436	Alamance (11CRS54334)	Vacated and remanded.
STATE v. BROOKS No. 14-203	Cleveland (08CRS774)	No Error
STATE v. CARDEN No. 14-151	Alamance (12CRS50143-44) (12CRS9106)	No Error
STATE v. COOK No. 14-393	Durham (13CRS57905)	Affirmed
STATE v. CRISP No. 14-232	Johnston (12CRS2809) (12CRS54938)	No error in part; no prejudicial error in part.
STATE v. GAYTAN No. 14-277	Guilford (13CRS71032)	No Error
STATE v. HARRIS No. 14-430	Guilford (12CRS98056)	No Error
STATE v. HILL No. 14-344	Cleveland (12CRS56659) (13CRS386)	No Error
STATE v. JOLLIFF No. 14-422	Wake (13CRS212414)	No Error
STATE v. LUCKEY No. 14-12	Union (10CRS56329) (10CRS56331) (11CRS2523) (13CRS717)	No Error
STATE v. MARTIN No. 13-1432	Buncombe (11CRS394) (11CRS395) (11CRS55315)	No Error In Part; Remanded In Part to Correct A Clerical Error.
STATE v. MEEKS No. 14-340	Jackson (13CRS146) (13CRS147)	No error in part; no prejudicial error in part.
STATE v. MORE No. 14-139	Wake (12CRS223968)	No Error

STATE v. PICKENS No. 14-320	Buncombe (12CRS61206) (12CRS61207) (12CRS61251) (12CRS701) (13CRS382)	No Error
STATE v. RIQUELME No. 14-289	Union (12CRS52806)	No Error
STATE v. RODGERS No. 14-558	Pamlico (07CRS50615)	Reversed and remanded.
STATE v. SEVILLA-BRIONES No. 14-240	Mecklenburg (12CRS252339-41)	Dismissed in part; no error in part; no prejudicial error in part.
STATE v. THORPE No. 14-346	Orange (12CRS245) (12CRS53107)	No error; remanded for correction of clerical error.
STATE v. WILLIAMS No. 14-342	Durham (09CRS894-897)	No Error

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ADMINISTRATIVE LAW

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Judicial review—exceptions to Board's decision—sufficient—The trial court did not err in a case involving judicial review of an administrative action by denying respondent's motion to dismiss the petition for judicial review. Although petitioner did not except to specific findings or conclusions by the Board of Barber Examiners, petitioner clearly stated exceptions to the Board's final decision. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

Judicial review—scope—issues decided by Board—The trial court exceeded the permissible scope of review when it ordered petitioner to remove a barber pole and stop advertising barber services unless licensed by the Board of Barber Examiners. The only issues before the trial court for review were those issues decided by the Board—the assessment of civil penalties, attorney's fees, and costs. N.C.G.S. § 86A-20.1 provided an avenue for respondent to seek an injunction, which respondent did not pursue. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

APPEAL AND ERROR

Appeal after guilty plea—driving while impaired—no statutory right—Defendant's appeal from judgment entered after pleading guilty to driving while impaired was dismissed because she had no statutory right to appeal. **State v. Shaw, 453.**

Appeal not moot—involuntary commitment—basis for future commitment—collateral legal consequences—Respondent's appeal from the trial court's order involuntarily committing him to inpatient mental health treatment for a period not to exceed sixty days was not moot. Even though the sixty-day commitment period had expired, the possibility that respondent's commitment might form a basis for a future commitment, along with other obvious collateral legal consequences, rendered the appeal not moot. **In re Spencer, 80.**

Appealability—notice of appeal—interlocutory order and judgment—affected final judgment—The Court of Appeals had jurisdiction to hear an appeal from an equitable distribution (ED) judgment, a discovery order, and a sanctions judgment. Appellant timely filed notice of appeal from the ED judgment. Moreover, appellant timely objected to the discovery order and sanctions judgment; (2) the order and judgment were interlocutory and not immediately appealable; and (3) the order and judgment involved the merits and necessarily affected the ED judgment. **Green v. Green, 526.**

Interlocutory orders and appeals—additional arguments dismissed—Additional arguments that addressed the substance of the case before the trial court were dismissed because they were from an interlocutory order. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 56.**

Interlocutory orders and appeals—attorney fees—sovereign immunity—substantial right—Defendants' appeal of the attorney fees award was granted only

APPEAL AND ERROR—Continued

to the extent that their challenge was based on sovereign immunity since it affected a substantial right. However, defendants' appeal of attorney fees based on some other defense or upon the merits was dismissed. **Sanders v. State Pers. Comm'n, 94**.

Interlocutory orders and appeals—attorney fees—sovereign immunity—substantial right—cross-appeal—remaining issues not addressed—With respect to issues raised in defendants' cross-appeal, the Court of Appeals affirmed the portion of the trial court's order imposing the attorney fees award "as provided by law" based on the State's contention concerning its defense of sovereign immunity. However, the merits of the State's remaining contentions on this issue were not reached since they were not predicated upon a substantial right of the State. **Sanders v. State Pers. Comm'n, 94.**

Interlocutory orders and appeals—denial of class certification—substantial right—Plaintiff's appeal of the trial court's denial of his motion for class certification was properly before the Court of Appeals. Although the order was interlocutory, the denial of class certification affected a substantial right because it determined the action as to the unnamed plaintiffs. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 76.**

Interlocutory orders and appeals—denial of motion for summary judgment—res judicata—collateral estoppel—substantial right—The denial of plaintiff Hedgepeth's motions for summary judgment that were based upon res judicata or collateral estoppel affected a substantial right and were properly before the Court of Appeals. However, any other matters not arising from that ruling were from an interlocutory order and were not reviewed. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 56.**

Interlocutory orders and appeals—discovery order—patient medical records—substantial right—Although an order compelling discovery is generally interlocutory and not immediately appealable, defendants assertion of the statutory privilege set out in N.C.G.S. § 8-53 regarding patient medical records affected a substantial right. **Brewer v. Hunter, 1.**

Interlocutory orders and appeals—sovereign immunity—substantial right—The Court of Appeals had jurisdiction to determine defendant's interlocutory appeal of motions to dismiss because defendant's defense of sovereign immunity affected a substantial right warranting immediate review. **Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty., 340.**

Interlocutory orders and appeals—substantial right to enforce laws—Portions of a preliminary injunction order in a case involving allegedly illegal video sweepstakes machines affected defendant's substantial right to enforce the laws of North Carolina. The Court of Appeals exercised jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the order. The Court of Appeals declined to hear defendant's challenge to the remaining portions of the trial court's order as they did not affect a substantial right. **Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty., 340.**

Issue not addressed—use of defendant's silence against him—addressed on retrial— The Court of Appeals did not address defendant's argument that trial court improperly allowed the State to use his silence against him in a first-degree felony murder case. Having already determined defendant's entitlement to a new trial

APPEAL AND ERROR—Continued

on the trial court's refusal to allow defendant to cross-examine a State's witness with a recorded message, the Court left the issue for the trial court to resolve in defendant's retrial. **State v. Triplett, 192.**

Mootness—motion for appropriate relief—new trial granted—A motion for appropriate relief (MAR) was dismissed as moot where defendant was granted a new trial. **State v. Rogers, 201.**

Mootness—production of medical records—not introduced—used during questioning—In a negligence action against a surgeon who had suffered a back and arm injury, defendant's appeal from a trial court order allowing the production of her medical and pharmaceutical records was not moot even though the subpoenaed documents were never entered into evidence. The result of the production of defendant's records was the extensive use of those documents during plaintiff's questioning of defendant, which remained in controversy between the parties. **Nicholson v. Thom, 308.**

Notice of appeal—denial of motion for summary judgment—construed to encompass only three of nine cases—Since plaintiff Hedgepeth's notice of appeal was directed only to the denial of his motion for summary judgment, the Court of Appeals construed his notice of appeal to encompass cases 10 CVS 275 and 10 CVS 288, even though Hedgepeth was a defendant and not a plaintiff in each of those cases. Hedgepeth's appeal in the remaining cases were dismissed. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 56.**

Preservation of issues—double jeopardy—issue not raised at trial—Defendant failed to persevere for appellate review his argument that his sentences for offenses arising out of the shooting of a police officer violated the prohibition on double jeopardy. Defendant did not raise the double jeopardy issue below and constitutional issues not raised and ruled on at trial cannot be raised for the first time on appeal. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to review the issue. **State v. Rawlings, 437.**

Preservation of issues—failure to argue constitutional issue at trial—unrecorded bench conferences—appellate review not frustrated—The trial court did not commit prejudicial error in an assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon case when it conducted multiple off-the-record bench conferences. The record did not reflect that defendant raised his constitutional argument before the trial court. Further, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction was without merit. **State v. Foster, 607.**

Preservation of issues—mortgage debt discharged in bankruptcy—not raised at trial—Plaintiffs failed to preserve for appellate review their argument that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court and plaintiffs failed to support their argument with citation to record evidence. **Basmas v. Wells Fargo Bank Nat'l Ass'n, 508.**

Preservation of issues—notice of summary judgment motion not given—objection waived—Plaintiff waived the right to object to the lack of timely notice of defendant's effort to obtain summary judgment. Plaintiff failed to object to the adequacy of the notice or request additional time, participated in the hearing, and

APPEAL AND ERROR—Continued

addressed the issues raised by defendant's motion on the merits. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Settlement of record—presumption of correctness—In an appeal that involved the discovery of a surgeon's medical records, the trial court was presumed to have correctly produced documents to plaintiff where the settlement of the record left no way to determine whether the documents in defendant's supplement to the record were the same documents that the trial court turned over to plaintiff at trial. **Nicholson v. Thom, 308.**

Standard of review—use of material protected by physician-patient privilege—abuse of discretion—In a negligence action against a surgeon who had suffered a back and arm injury, the standard of review for issues involving the production and use of the surgeon's medical records was abuse of discretion. The parties did not dispute the protection of the records by the physician-patient privilege, which would have meant de novo review, but contested the trial court's decisions concerning the production and use of those documents during the questioning of defendant. Challenging a trial court's decision that the administration of justice requires the disclosure of information protected by the physician-patient privilege requires a showing of abuse of discretion. **Nicholson v. Thom, 308.**

Transcript not provided—interests of justice—Defendant's arguments on appeal were considered in the interests of justice where the State contended that she had waived her issues by not providing a transcript, but the trial court had ordered the State to provide transcripts to defendant's attorney at AOC expense. The lack of complete transcripts on appeal was the responsibility of the State. **State v. Bernard, 134.**

Unpublished opinion—use as authority—by trial court—The principle that an unpublished opinion may be used as persuasive authority on appeal if the case was properly submitted and discussed and there is no published case on point was applied to the trial court. **Zurosky v. Shaffer, 219.**

ASSAULT

With deadly weapon with intent to kill—assault with deadly weapon—clerical error—The trial court erred by entering judgment on the offense of assault with a deadly weapon with intent to kill where the trial court instructed the jury and accepted a verdict of guilty on the lesser-included offense of assault with a deadly weapon. The error was merely clerical. Furthermore, defendant failed to preserve for appellate review his argument that convictions for both assault with a deadly weapon and assault with a firearm on a law enforcement officer, when based upon the same conduct, violate double jeopardy. **State v. Rawlings, 437.**

ASSIGNMENTS

Liability—stranger to original contract—The trial court did not err by granting summary judgment in favor of defendant Smith even though plaintiff contended that the assignment of the contract between defendant Smith and defendant Mini Storage to Royall did not relieve defendant Smith of his liability under the contract. Plaintiff has not established any basis for holding defendant Smith, a stranger to the original contract, liable for plaintiff's injuries. **Hyatt v. Mini Storage on the Green, 278.**

ASSOCIATIONS

Homeowners—fiduciary duties—overlapping board members and development principals—The trial court erred by granting summary judgment on breach of fiduciary duty claims against two of plaintiff homeowner's board members who were also principals in the development of the community, in an action arising from construction defects. The evidence, viewed in the light most favorable to plaintiff, created a genuine issue of fact concerning whether and to what extent those board members breached a fiduciary duty by failing to disclose relevant information in their possession. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

ATTORNEY FEES

Local school board—not state agency—The trial court erred a charter school funding case by awarding plaintiffs attorneys' fees under N.C.G.S. § 6-19.1. Defendant Cleveland County Board of Education is a local school board and, thus, is not a state agency for purposes of § 6-19.1. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 207.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Authority to order respondent pay costs—oral rendering of judgment—conflict with written order—order remanded—The trial court did not lack the authority in a child custody case to order respondent to pay the costs of supervised visitation and that argument had already been rejected by the Court of appeals in respondent's previous appeal. However, the trial court's written judgment directly contradicted the trial court's statements from the bench regarding visitation. The portion of the trial court's order regarding visitation was vacated and remanded for entry of an amended order which accurately reflected the trial court's oral disposition. **In re J.C., 558.**

Contributing to abuse or neglect of juvenile—jury instructions—no plain error—The trial court did not commit plain error by misstating the applicable law when instructing the jury on contributing to the abuse or neglect of a juvenile. The outcome of defendant's trial would not have been different had the trial court correctly instructed the jury concerning the issue of whether defendant had placed the victim in a place or set of circumstances under which she could be adjudicated abused or neglected. **State v. Harris, 388.**

Permanency planning order—changed legal custody—immediately appealable—The Court of Appeals granted respondent's petition for certiorari in an appeal from the trial court's permanency planning order in a child custody case ceasing reunification efforts. Because the order changed legal custody of the juveniles, the order was immediately appealable pursuant to N.C.G.S. § 7B-1001(a)(4). **In re J.C., 558.**

Permanency planning order—findings supported by evidence—findings supported conclusion—The trial court's findings of fact in a child custody permanency planning order were supported by competent evidence and supported the trial court's decision to cease reunification efforts with respondent. **In re J.C., 558.**

Subject matter jurisdiction—findings not necessary—circumstances must exist—The trial court did err in a child custody case by failing to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction.

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Although making specific findings of fact related to a trial court's jurisdiction under N.C.G.S. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. In this case, the evidence from the permanency planning hearing demonstrated that neither the parents nor the children continued to live in Kentucky. **In re J.C., 558.**

CHILD CUSTODY AND SUPPORT

Support—retroactive—outside guidelines—standard—evidence sufficient— There was sufficient evidence to support an award of retroactive child support, although the case was remanded for correction of clerical errors. Neither party disputed that the case was properly outside the guidelines because of their combined incomes. An identical standard (the parties' ability to pay and the reasonably necessary expenses of the child) was applied to both prospective and retroactive child support because there was no prior child support order. There was sufficient evidence to support the trial court's award, although the case was remanded for the correction of errors involving the date of the complaints and the labeling of the type of child support awarded. **Zurosky v. Shaffer, 219.**

CIVIL PROCEDURE

Motion to dismiss erroneously granted—failure to make written or oral motion to dismiss—The trial court erred by dismissing the charges of impaired driving and unsafe movement against defendant. Defendant did not make a written or oral motion to dismiss, and thus, controlling precedent required the Court of Appeals to reverse the trial court's dismissal of the charges. **State v. Overocker, 423.**

CLASS ACTIONS

Class certification—denial not abuse of discretion—The trial court did not abuse its discretion by denying plaintiff's motion for class certification where the denial of the motion was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc. 76.**

Class certification—lot owners bound by federal order—holdings incorporated—Plaintiff's argument in a case involving a motion for class certification that individual lot owners were bound by a federal court order issued in a case involving plaintiff was addressed in the companion case of *Hedgepeth v. Parker's Landing* (COA 13-914), and the holdings in that case were incorporated by reference. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc. 76.**

Denial of motion for class certification—no abuse of discretion—The trial court did not abuse its discretion by denying plaintiffs' motion for class certification given the circumstances presented and procedural posture of this case. **Sanders v. State Pers. Comm'n, 94.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—inapplicable—not an adjudication on the merits— Collateral estoppel was inapplicable where the Bankruptcy Court did not rule on the merits of D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure

COLLATERAL ESTOPPEL AND RES JUDICATA—Continued

action, and the Leonard order was not an adjudication on the merits. Further, respondents waived their right to advance the argument that Wachovia was required to execute Restated Loan Documents for the Confirmed Plan to be valid and enforceable against respondents in the foreclosure action because the record showed that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. Findings of fact #2, #5, and #9 were supported by competent evidence. **In re Foreclosure of L.L. Murphrey Co., 544.**

Existence and location of easements—res judicata inapplicable with an exception—Although plaintiff Hedgepeth contended that Parker's Landing Property Owners' Association, Inc. was estopped by a federal court order from relitigating the existence and location of the 25-foot and 10-foot easements found by the federal court, with the exception of the 25-foot easement where it crossed the lot owned by POA, res judicata was inapplicable to these claims. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 56.**

Foreclosure action—new or changed circumstances—A trial court's order vacating defendant's first foreclosure action did not bar a subsequent foreclosure action under the doctrine of res judicata. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and the trial court in the subsequent action found two separate instances of new or changed circumstances. **Basmas v. Wells Fargo Bank Nat'l Ass'n, 508.**

COLLEGES AND UNIVERSITIES

Fan banned from athletic facilities—not arbitrary or capricious—university's General Order on trespass—substantially followed—The University of North Carolina's (UNC's) decision to ban petitioner from all athletic facilities indefinitely was not arbitrary, capricious, or unsupported by substantial evidence where the decision was based on a series of incidents over a number of years and this was not the first time petitioner had been reprimanded for this behavior. Although four lines on the Notice of Trespass were left blank, those provisions in the UNC's General Order on trespass warnings were merely matters of form and did not affect a substantial right. UNC substantially complied with the goals of the General Order. **Donnelly v. Univ. of N.C., 32.**

CONSPIRACY

Manufacture of methamphetamine—motion to dismiss—sufficiency of evidence—implied agreement—The trial court did not err by denying defendant's motion to dismiss the conspiracy charge even in the absence of an acting in concert instruction. Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, the evidence is sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss. **State v. Davis, 376.**

CONSTITUTIONAL LAW

Board of Barber Examiners—authority over non-licensees—reasonably necessary to purpose—The ability of the Board of Barber Examiners to impose civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering. While there

CONSTITUTIONAL LAW—continued

are other statutory means to accomplish the Board's purpose, such as seeking an injunction or criminal prosecution, those means are not exclusive. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

Due process—photo identification—independent in-court identification— Normal due process rules applied in a prosecution for carrying a concealed firearm and possession of a firearm by a felon even if the Eyewitness Identification Reform Act did not. Even if the procedure by which officers identified defendant from a database was impermissibly suggestive, the officers' in-court identification of defendant from their encounter during a chase was from an independent source and the trial court did not err by denying defendant's motion to suppress. **State v. Macon, 182.**

Effective assistance of counsel—alleged concessions of guilt—closing arguments—no Harbison error—Defendant did not receive ineffective assistance of counsel at trial based on his counsel's alleged concessions of defendant's guilt during closing arguments without defendant's express consent. Although defense counsel's statements were less than clear at closing, none of his statements amounted to a Harbison error. **State v. Wilson, 472.**

Effective assistance of counsel—failure to move to dismiss charge—record evidence supported conviction—Although defendant contended that he received ineffective assistance of counsel based upon his trial counsel's failure to move to have a contributing to the abuse or neglect of a juvenile charge dismissed for insufficiency of the evidence, the evidence supported defendant's conviction, thus necessitating the conclusion that defendant's ineffective assistance of counsel claim had no merit. **State v. Harris, 388.**

Effective assistance of counsel—testimony of guilt not elicited by defense counsel—Defendant did not receive ineffective assistance of counsel in a possession of a stolen vehicle case. Contrary to defendant's argument on appeal, defense counsel did not elicit testimony at trial from defendant which conceded his guilt of any crime for which he was charged. **State v. Robinson, 446.**

Fourth Amendment rights—overlapping civil and criminal case—Defendant's Fourth Amendment rights were not violated where she was engaged in in an ongoing employment action with A&T University after her termination; a university officer obtained warrants, searched her home, person, and vehicle in a criminal action arising from a false email; and the officer deliberately chose to seize documents subject to the attorney client privilege. The trial court properly suppressed privileged evidence. **State v. Bernard, 134.**

Freedom of speech—harassment of athletes—not protected—A fan of University of North Carolina (UNC) sports who was banned from all UNC sports facilities for inappropriate behavior had not engaged in any speech protected by the First Amendment. Petitioner had harassed athletes, athletes' family members, athletic staff, and fans; harassment is not protected speech. **Donnelly v. Univ. of N.C., 32**.

CONSTRUCTION CLAIMS

Building defects—fiduciary duty of developer—summary judgment—The trial court erred by granting summary judgment for defendant Trillium Links on breach of fiduciary claims arising from building defects in condos where Trillium Links was the developer of the community in which the affected condos were located. The

CONSTRUCTION CLAIMS—Continued

record contained sufficient evidence from which the existence of a fiduciary duty between the developer and the homeowners association could be established in that Trillium Links had a position of dominance over plaintiff homeowners association and that individual unit owners or prospective unit owners had little choice but to rely upon Trillium Links to protect their interests during the period of developer control. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Gross negligence—summary judgment—no specific acts or omissions alleged—The trial court did not err by granting summary judgment in favor of developer and defendant Trillium Links on plaintiff's gross negligence claim arising from the construction of condominiums. Aside from simply asserting that Trillium Links acted in a grossly negligent fashion, plaintiff did not point to any specific act or omission by Trillium Links which it contended was grossly negligent. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Negligent construction—developer's liability—supervision of construction—summary judgment—The trial court erred by granting summary judgment in favor of defendant and developer Trillium Links with respect to a claim for negligent construction of condominiums. Although Trillium Links argued that a developer does not owe a legal duty to a condominium unit purchaser, the persons responsible for supervising construction are obligated to comply with the Building Code and there was of a genuine issue of material fact concerning the extent to which Trillium Links supervised the construction project. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Negligent construction—last act—repair to deck—original contract not produced—In a negligent construction claim involving a statute of repose issue, there was no basis for determining that the "last act" occurred later than the date of substantial completion where plaintiff argued that repairs to a deck might have been required under the original contract, which was never produced. Plaintiff had the burden of proof. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Negligent construction—possession of control exception—developer and contractor—Although defendant Trillium Construction (the general contractor) was entitled to rely on the statute of repose as a defense to plaintiff's negligent construction claims relating to two condominium buildings, the extent to which the "possession or control" exception to the statute of repose defense applies to Trillium Links (the developer) was a question for the jury. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Substantial completion of building—certificate of occupancy—Plaintiff failed to assert its negligent construction claim within the six year statute of repose for two buildings in a condominium complex where certificates of occupancy were issued seven years before the certificates of occupancy were issued. A building is substantially complete when a certificate of occupancy is issued. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Summary judgment—notice of construction defects—issue of material fact—The trial court erred by granting summary judgment for defendant Trillium Links (the developer) and Trillium Construction (the general contractor) on statute of limitations grounds on plaintiff's negligent construction claims. The evidence demonstrated the existence of a genuine issue of material fact concerning the accrual of the negligent construction claim more than three years before the date upon which

CONSTRUCTION CLAIMS—Continued

the complaint was filed. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Unsafe improvement to real property—statute of repose—Plaintiff's negligent construction claims against a developer and a builder sought recovery arising from an allegedly defective or unsafe improvement to real property, and those claims were within the ambit of the statute of repose in N.C.G.S. § 1-50(a)(5)(a). **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

CONSUMER PROTECTION

North Carolina Debt Collection Act—manufactured home—individual alleged by debt collector to be liable for debt—The trial court erred by concluding that defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act in an action seeking to recover a manufactured home and its contents based upon the fact that required payments against the underlying debt had not been made. The trial court's order was reversed and the case was remanded to the superior court for further proceedings. **Green Tree Servicing LLC v. Locklear, 514.**

CONTRACTS

Breach of contract—summary judgment—no promises or inducements—The trial court did not err by granting defendants' motion for summary judgment with respect to plaintiffs' breach of contract claim. Plaintiffs failed to produce any evidence to create a genuine issue of material fact with respect to whether defendants had made any promises or inducements to plaintiffs to cause them to continue their employment beyond twelve months, other than to continue paying their normal wages, which were, in fact, paid as agreed. **Sanders v. State Pers. Comm'n, 94.**

Rental agreement—exculpatory clause—absolved from personal injury claims—no public interest exception—no unequal bargaining power—The trial court did not err by granting summary judgment in favor of defendant Mini Storage with respect to plaintiff's personal injury claim even though plaintiff contended that the rental agreement between these parties did not absolve defendant from responsibility for providing safe storage units. The pertinent exculpatory clause in the agreement absolved defendant from personal injury claims unless defendant acted negligently, and no negligence was shown. Further, the public interest exception did not invalidate the exculpatory clause and there was no unequal bargaining power. **Hyatt v. Mini Storage on the Green, 278.**

CRIMINAL LAW

Instructions—flight—The trial court did not err in a felony breaking and entering and felony larceny case by instructing the jury regarding flight. The State presented evidence that reasonably supported the theory that defendant fled after breaking and entering into the victim's home. Further, the instruction was not prejudicial given the victim's identification of defendant. **State v. Harvell, 404.**

Instructions—verdict sheets—multiple charges, victims, counts—no plain error—There was no plain error in a prosecution involving two murders and other offenses where defendant argued that the trial court erred by failing to instruct the jury to consider each offense individually. The trial court's instructions, along with

CRIMINAL LAW—Continued

The verdict sheets, made clear to the jury the number of charges, victims, and counts. **State v. Jenrette, 616.**

Joinder—multiple charges, victims, counts—transactional connection—The trial court did not abuse its discretion by granting the State's motion for joinder of all 12 of the offenses for which defendant was charged. The events were factually related even though they occurred over a period of two months and the transactional connection between these events was sufficient to support joinder. **State v. Jenrette, 616.**

Prosecutor's arguments—ruined victim's childhood—credibility of victim—The trial court did not err in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile case by failing to intervene ex mero motu during the prosecutor's challenged comments. The prosecutor's comment to the effect that defendant had ruined the victim's childhood represented a reasonable inference drawn from the record. Further, the comments were grounded in the evidentiary record and represented nothing more than an assertion that the jury should not refrain from believing the victim because the record did not contain corroborative physical evidence. **State v. Harris, 388.**

DAMAGES AND REMEDIES

Instructions—permanent injury—improper for deceased victim—It was noted that the trial court's instruction on permanent injury in a medical malpractice action was erroneous in light of the fact that the decedent was not alive at the time of the trial and plaintiff (her estate) did not bring suit for wrongful death. The purpose of the permanent injury instruction is to compensate the plaintiff for additional future harm such as impaired earning capacity or pain. **Nicholson v. Thom, 308.**

DECLARATORY JUDGMENTS

Justiciable actual controversy—jurisdiction proper—The trial court's exercise of jurisdiction over a declaratory judgment claim in a case involving allegedly illegal video sweepstakes machines was proper. A justiciable actual controversy, as required by the Declaratory Judgment Act, existed. **Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty., 340.**

DISCOVERY

Medical records—former patients—The trial court did not abuse its discretion in a medical malpractice case by determining that the disclosure of various medical records of certain former patients of Dr. Hunter was necessary to a proper administration of justice. **Brewer v. Hunter, 1.**

Motion to quash—subpoenas duces tecum—not improper discovery—Subpoenas duces tecum for the medical records of a surgeon were not issued for an improper fishing expedition where the documents produced were not introduced at trial in a negligence action against the surgeon. The trial court had determined in a pre-trial hearing that the records would not be admitted, plaintiff's attorneys did not have the opportunity to inspect the documents before the trial's court's determination that some should be produced, and the trial court's decision that some of the requested records were sufficiently relevant to require production to plaintiff but not admission as substantive evidence was neither arbitrary nor manifestly unsupported by reason. **Nicholson v. Thom, 308.**

DISCOVERY—Continued

Subpoenas duces tecum—defendant's medical records—HIPPA violations— To the extent plaintiff's subpoenas duces tecum for the medical records of a surgeon in a negligence action did not comply with the HIPPA regulations, those violations should be charged against the covered entities that provided those records, not against plaintiff. **Nicholson v. Thom, 308.**

DIVORCE

Alimony and child support—defendant's income—no finding of bad faith—selection of reporting period—The trial court did not abuse its discretion in determining alimony and child support by not using defendant's actual income at the time of the order. The trial court did not expressly make a finding of bad faith, but found that defendant's numbers were not credible. The trial court's use of defendant's income from a period before he had reason to alter the reported figure was rational. **Zurosky v. Shaffer, 219.**

Equitable distribution—cash and checks—presently owned on date of separation—The Court of Appeals found no merit in defendant's argument in an equitable distribution case that because cash and checks that had been kept in a safe during the parties' marriage were not found in the safe upon their divorce, the trial court could not find that they were "presently owned" by the parties on the date of separation. The trial court found that defendant had removed from the marital home $350,000 in cash and checks, which were marital funds, and the record was devoid of any evidence that the cash or checks were ever owned by someone other than plaintiff or defendant. **Sauls v. Sauls, 371.**

Equitable distribution—cash and checks on date of separation—sufficient supporting evidence—The trial court did not err in an equitable distribution case by finding as fact that the parties had $350,000 in cash and checks as of the date of separation. The record contained competent evidence to support the trial court's finding regarding the value of the cash and checks. **Sauls v. Sauls, 371.**

Equitable distribution—classification—marital property—business bank accounts—The trial court did not err in an equitable distribution case by including plaintiff husband's separate business property, namely the bank accounts, in the marital estate. Plaintiff failed to articulate how the trial court could possibly trace his premarital funds based upon the evidence presented, and the findings of fact which the trial court made were fully supported by the evidence. **Clark v. Dyer, 9.**

Equitable distribution—classification—marital property—reduction in debt value—The trial court did not err in an equitable distribution case by including the separately owned rental property of plaintiff husband in the marital estate. The trial court determined that the reduction in debt paid with marital funds was marital property, not the properties themselves, and the trial court included only this reduction in debt value as a marital asset. **Clark v. Dyer, 9.**

Equitable distribution—classification—valuation—home—The trial court did not err in an equitable distribution case by its classification and valuation of the Lakeview Drive Property. Plaintiff did not present any argument that the trial court erred in its conclusion that he made a gift of a one-half interest in the home to defendant, and thus, he waived this argument. **Clark v. Dyer, 9.**

Equitable distribution—credit for debt—credit cards—line of credit—attorney fees—The trial court did not err in an equitable distribution case by failing to

DIVORCE—Continued

give plaintiff husband credit for his debt including credit cards, a line of credit, and defendant wife's attorney fees that he was ordered to pay. Even if the trial court's findings as to the amounts of the debts were erroneous, it did not affect the distribution of property. Further, plaintiff's argument regarding attorney fees was frivolous. **Clark v. Dyer, 9.**

Equitable distribution—financial ability to maintain property not a factor— The trial court did not err in an equitable distribution case by awarding the Lakeview Drive Property to defendant wife even though plaintiff husband contended that she did not have the financial ability to maintain it. Plaintiff cited no law requiring the trial court to consider as a distributional factor what may happen to property in the future or a party's ability to maintain a property. **Clark v. Dyer, 9.**

Equitable distribution—in-kind award—liquid assets—An equitable distribution case was remanded for the trial court to make an additional finding of fact as to how the presumption in favor of an in-kind award was rebutted and a conclusion of law supporting its distributive award. Several bank accounts valued in excess of $60,000.00 in total were liquid assets which could logically serve as a source of payment. **Clark v. Dyer, 9.**

Equitable distribution—in-kind distribution—presumption not rebutted— The trial court did not err in an equitable distribution case by ordering an in-kind distribution of $178,667.49 without first considering whether defendant had sufficient liquid assets to satisfy such an award. Defendant did not rebut the presumption that an in-kind distribution of the cash and checks would be equitable and the trial court was not required to consider the distributive award factors enumerated under N.C.G.S. § 50-20(c). **Sauls v. Sauls, 371.**

Equitable distribution—judgment—attached exhibits—clerical error—The trial court erred in an equitable distribution action by attaching to the amended judgment and order exhibits concerning distributions that were inconsistent with the decretal provisions. However, the errors were considered clerical and the case was remanded for correction. **Zurosky v. Shaffer, 219.**

Equitable distribution—loss in property value—separation of asset and loss—The trial court did not abuse its discretion in an equitable distribution action by distributing the loss in value of a vacation home to defendant despite the fact that plaintiff received the asset. Appreciations and diminutions in value may be divided among the parties, even if the asset is distributed to one party while the passive loss is distributed to the other. The trial court conducted the proper statutory analysis, the evidence supported its findings, its findings supported its conclusions, and it specifically found that the diminution in value was divisible property. **Zurosky v. Shaffer, 219.**

Equitable distribution—marital property—direct financial contributions not required—Although defendant wife did not make any direct financial contributions to various property from her own income or her own separate funds during the marriage, plaintiff husband's income during the marriage was marital property, and his direct financial contributions from his income during the marriage were marital contributions. **Clark v. Dyer, 9.**

Equitable distribution—marital property—financial gifts from parent—The trial court did not err in an equitable distribution case by not deducting from the marital estate financial gifts made to plaintiff wife and defendant husband from

DIVORCE—Continued

defendant's father. Defendant failed to show that the monetary gift to the marital couple was not marital property. **Power v. Power, 581.**

Equitable distribution—potential tax consequences—The trial court was not required to consider potential tax consequences when entering an equitable distribution judgment. Defendant husband failed to present evidence of the potential tax consequences before the close of evidence. **Power v. Power, 581.**

Equitable distribution—property tax decrease—extent of stipulation—The trial court did not err in an equitable distribution action by distributing equally a decrease in property taxes as part of interim distributions from an insurance policy to pay property taxes prior to the date of distribution. The trial court found the property to be marital, as the parties had stipulated, but the parties had reserved the right to dispute the classification and distribution of the property and the trial court did not err by distributing the decrease in property taxes equally. **Zurosky v. Shaffer, 219.**

Equitable distribution—real property—insufficient findings of fact—case remanded—The Court of Appeals was unable to discern which of the trial court's findings of fact applied to the Duffie Road Property, and thus, the equitable distribution judgment was remanded to the trial court for additional findings of fact and conclusions of law regarding this property. **Clark v. Dyer, 9.**

Equitable distribution—stipulation—credit for post-separation payments—The trial court did not err in an equitable distribution case by allegedly failing to honor the stipulation of the parties and/or correctly calculate the stipulation regarding the credit for post-separation payments by plaintiff on the mortgage on the Lakeview Drive Property. The trial court applied the consent order exactly as it was written. **Clark v. Dyer, 9.**

Equitable distribution—stipulation—reward programs—The trial court did not err in an equitable distribution action where plaintiff alleged that the trial court had not adhered to the stipulations in the final pre-trial order concerning the value and distribution of a credit card and airline rewards programs. The parties had stipulated these items were marital but had not agreed to a value or distribution. The trial court made the determination to which the parties had agreed. **Zurosky v. Shaffer, 219.**

Equitable distribution—tax refunds—divisibility stipulated—sufficiency of evidence of value—division not necessarily required—The trial court erred by in an equitable distribution action by finding that tax refunds were not marital or divisible and making no division where the parties had stipulated that the property was divisible. The matter was remanded for reclassification of the property and for distribution if there was credible evidence of value. The trial court is not required to distribute marital property if there is insufficient evidence of value. **Zurosky v. Shaffer, 219.**

Equitable distribution—valuation—business assets and accounts—weight given to evidence—Although plaintiff husband contended in an equitable distribution case that the trial court erred by its valuation of his business assets and accounts, it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial. **Clark v. Dyer, 9.**

Equitable distribution—valuation—marital cars—opinion testimony—The trial court did not err in an equitable distribution case by excluding defendant husband's Kelley Blue Book values for the marital cars. Although the Kelley Blue Book fell within N.C.G.S. 8C-1, Rule 803(17) as a hearsay exception, defendant was not

DIVORCE—Continued

prejudiced by the omission of such evidence where defendant was permitted to give opinion testimony as to the value of the marital cars. **Power v. Power, 581.**

Equitable distribution—valuation—typographical error—miscalculations— Although the Court of Appeals did not find any abuse of discretion in how the trial court allocated the percentages of values for the Lakeview Drive property in an equitable distribution case, the case was remanded for the trial court to correct the typographical error and resulting miscalculations. **Clark v. Dyer, 9.**

Equitable distribution—valuation of business—evidence—credibility—within judge's discretion—The trial court did not err in an equitable distribution action in its valuation of plaintiff's interest in his law practice. The credibility of the evidence in an equitable distribution action is for the trial court and the trial court does not err by not valuing an asset using evidence that it finds unreliable. **Zurosky v. Shaffer, 219.**

Equitable distribution—valuation of jewelry—expert testimony—defendant's testimony—discretion of judge—The trial court did not err in an equitable distribution action in its valuation of the parties' jewelry. It was within the trial court's discretion to rely on defendant's values instead of the values given by an expert. **Zurosky v. Shaffer, 219.**

Equitable distribution—value of business—active or passive change—no diminution in value—The trial court did not err in an equitable distribution case by not determining the active or passive components of the change in value of plaintiff's law firm between the date of separation and the date of divorce. The trial court specifically found that there was no evidence of the date of distribution value of the practice and used the same value for the date of separation and date of distribution. Without a diminution in value, there is no active or passive change to consider. **Zurosky v. Shaffer, 219.**

DRUGS

Methamphetamine—manufacturing—trafficking—motion to dismiss—sufficiency of evidence—presence at the scene—The trial court did not err by denying defendant's motions to dismiss the manufacturing methamphetamine and trafficking in methamphetamine by manufacture charges even in the absence of an acting in concert instruction. A reasonable inference of defendant's guilt could be drawn from defendant's presence with another person at the scene for the duration of the time law enforcement observed, approximately 40 minutes, along with the evidence recovered from the scene that was consistent with the production of methamphetamine. **State v. Davis, 376.**

Methamphetamine—possession—trafficking—motion to dismiss—sufficiency of evidence—constructive possession—The trial court did not err by denying defendant's motions to dismiss the trafficking in methamphetamine by possession and possession of drug paraphernalia charges even in the absence of an acting in concert instruction. The totality of circumstances revealed that there was sufficient evidence of constructive possession and that defendant had the capability and intent to control the items that he was near and moving around. **State v. Davis, 376.**

Methamphetamine—trafficking—motion to dismiss—sufficiency of evidence—any mixture containing methamphetamine—The trial court did not err by denying defendant's motion to dismiss the trafficking in methamphetamine

DRUGS—Continued

charges based on use of the weight of the liquid containing methamphetamine. The statute provided that a defendant is guilty of trafficking when he manufactures any mixture containing methamphetamine meeting the minimum 28 gram weight requirement. **State v. Davis, 376.**

Trafficking by sale—entrapment—jury instruction—sufficient evidence— The trial court erred in a trafficking of opium by sale; trafficking of opium by possession, and possession of opium with the intent to sell and deliver case by denying her request to instruct the jury on the defense of entrapment. Defendant offered sufficient evidence of entrapment where, taken in the light most favorable to defendant, the evidence showed that the plan to sell the pills originated in the mind of Eudy (an informant), who was acting as an agent for law enforcement, and defendant was only convinced to do so through trickery and persuasion. **State v. Ott, 648.**

ESTOPPEL

Equitable—negligent construction—concealment of defects—plaintiff's notice of defects—summary judgment—The trial court erred by granting summary judgment for defendant Trillium Construction (a general contractor) with respect to whether it was estopped from asserting the statute of limitations or the statute of repose in a negligent building claim where plaintiff argued that Trillium Construction had actively concealed its defective work. However, given the determination elsewhere in this opinion that there were issues of fact as to whether a consultant's report put plaintiff on notice of the defects, issues of fact existed as to whether plaintiff lacked knowledge and the means of knowledge sufficient to bar either defense. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Equitable—statutes of limitation and repose—property damage report—information not hidden—Trillium Links, a developer, was not equitably estopped from asserting the statute of limitations or statute of repose in opposition to plaintiff's negligent construction claims. Although plaintiff argued that defendants were equitably estopped from asserting either the statute of limitations or the statute of repose because plaintiff's property manager reviewed a consultant's report and advised the homeowners association (plaintiff) that he believed that further investigation would not be necessary, plaintiff's entire board received the consultant's report. Additionally, the record was devoid of information tending showing that plaintiff was induced to delay the filing of its action by misrepresentations of Trillium Links. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

EVIDENCE

Admission of prior statement—corroborative purposes—The trial court did not err in a robbery with a dangerous weapon case by admitting into evidence a prior statement of a witness for corroborative purposes. The prior statement did not differ significantly from the witness' trial testimony. **State v. Moore, 642.**

Alco-sensor test—not redacted—not introduced at trial—The trial court did not abuse its discretion in a driving while impaired prosecution by allowing into evidence at a pretrial hearing the numerical results of an alco-sensor test. Although the admission of the numerical results was error, the numerical results of the test were never admitted before the jury and there was sufficient other evidence to survive defendant's motion to dismiss for lack of probable cause. **State v. Townsend, 456.**

EVIDENCE—Continued

Blood alcohol test performed at hospital—no different results if excluded— The trial court did not err in a felony death by motor vehicle and reckless driving case by admitting evidence of the blood alcohol test performed by the hospital as part of its treatment of defendant's injuries. Given the evidence that defendant had consumed a substantial amount of alcohol so as to impair her ability to drive, there was no reasonable possibility that the jury would have reached a different result had the blood test results been excluded. **State v. Hawk, 177.**

Collateral source rule—voluntary forgiveness of debt by hospital—rule not applicable—The collateral source rule was not applicable in a medical malpractice action and the trial court erred by failing to admit evidence of the hospital system's write-offs. The bills were forgiven by the hospital of its own accord as a business loss; the paying party was not independent and not collateral to the matter. It was noted that this action was begun in 2008, before the effective date of N.C.G.S. § 8C-1, Rule 414, which abrogated the collateral source rule. **Nicholson v. Thom, 308.**

Driving while impaired—checkpoint—motion to suppress—legitimate purpose—requirements satisfied—The trial court did not err during a driving while impaired prosecution by denying defendant's motion to suppress evidence resulting from a checkpoint. The trial court determined that the checkpoint had a legitimate primary purpose and that the requirements of *Brown v. Texas*, 443 U.S. 47 (1979), were met. **State v. Townsend, 456.**

Expert testimony—properly admitted—The trial court did not err in a first-degree murder case by admitting into evidence expert opinion testimony offered by two doctors where the testimony was reliable. **State v. Borders, 149.**

Hearsay—information told to counsel by pharmacist—not used to prove the truth of the matter—In a negligence action against a surgeon who took medications after an injury, plaintiff's reference when questioning defendant to information plaintiff's counsel had obtained from the local pharmacist about side effects did not constitute inadmissible hearsay . Plaintiff's questions were not asked to establish the truth of the warnings obtained from the pharmacist but to elicit defendant's testimony regarding the extent to which her medications might have affected her judgment during the surgery. **Nicholson v. Thom, 308.**

Hearsay—witness relating detective's statements—not offered for truth of the matter stated—Defendant James Edmonds argued that the trial court erred by over ruling his objection to the testimony of a witness about statements that a detective had made to the witness because the testimony constituted inadmissible hearsay. However, the testimony was merely offered to illustrate how the detective purportedly influenced the witness into making a statement and was not offered for the truth of the matter asserted (that Detective Briggs believed defendant James committed the robbery). Even assuming that the testimony was inadmissible hearsay, defendant did not argue that he was prejudiced by its admission. **State v. Edmonds, 588.**

Intoxication—motion to suppress—probable cause—driving while impaired—The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress for lack of probable cause to arrest. Although defendant argued that he did not exhibit signs of intoxication such as slurred speech or glassy eyes, defendant had bloodshot eyes, an odor of alcohol, showed signs of intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests. **State v. Townsend, 456.**

EVIDENCE—Continued

Medical negligence—physician's use of pain killers—relevant and not prejudicial—The trial court did not abuse its discretion on relevance or prejudice issues in a medical negligence case where it allowed a line of questions about a surgeon's use of prescription drugs after an injury, with her medical records used as a basis for the questions. Plaintiff's questions elicited relevant testimony concerning defendant surgeon's use of pain medicines and their side effects. **Nicholson v. Thom, 308.**

Questions containing facts not in evidence—no prejudice—The trial court did not err by failing to declare a mistrial ex mero motu where defendant contended that the State was allowed to ask questions containing facts not in evidence, thereby putting prejudicial hearsay before the jury. Defendants' motion in limine was denied; there was nothing in the record to indicate that the prosecutor's questions were asked in bad faith; and the trial court sustained objections, struck one question from the record, and issued a curative instruction. **State v. Edmonds, 588.**

Recorded message—impeach credibility—cross-examination—prejudice—The trial court erred in a first-degree murder under the felony murder rule case by refusing to allow defendant to cross-examine his sister, a witness for the State, about a recorded message. The message was relevant to attack the witness's credibility and to show her bias against defendant and defendant's family, and it was within defendant's right to bear the risk of prejudice resulting from the cross-examination. Furthermore, defendant was prejudiced by the trial court's error as the witness was the only witness who testified that defendant was aware of the plan to rob the victim. Without evidence that defendant was aware of the plan to rob victim, it is likely the jury would not have found defendant guilty of robbery and burglary, the felonies underlying defendant's conviction for first degree felony murder. **State v. Triplett, 192.**

Testimony—conversion of blood plasma test results—blood alcohol concentration—The trial court did not err in a felony death by motor vehicle and reckless driving case by allowing a State's witness to testify regarding the conversion of the blood plasma test results used by the hospital to the legal standard for blood alcohol concentration. Given the evidence that defendant had consumed a substantial amount of alcohol so as to impair her ability to drive, there was no error admitting this testimony. **State v. Hawk, 177.**

Testimony—relevancy—vouching for credibility—no plain error—The trial court did not commit plain error in a misdemeanor sexual battery and contributing to the abuse or neglect of a juvenile case by failing to exclude challenged portions of the testimony of the victim's grandmother, who was also defendant's former girlfriend, on relevance grounds and for alleged impermissible vouching of the victim's credibility. The outcome of the trial would not have been different had the trial court refrained from allowing the challenged testimony. **State v. Harris, 388.**

FRAUD

Constructive—building defects—no evidence of intent to benefit—Plaintiff homeowners association failed to forecast sufficient evidence to establish a constructive fraud claim governed by a ten year statute of limitations rather than a breach of fiduciary duty governed by a three year statute of limitations where it did not adduce any evidence tending to show that defendants sought to benefit themselves in the transaction. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

HOMICIDE

First-degree murder—self-defense—defensive force in commission of a felony—applicable to offenses after certain date—jury instruction not prejudicial—The Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to review the issue of whether the trial court erred in an attempted first-degree murder case by instructing the jury that self-defense is not available to a person who used defensive force in the commission of a felony under N.C.G.S. § 14-51.4. That statute only applies to offenses committed on or after 1 December 2011 and the offense at issue in this case happened in 2006. The State, defendant, and the trial court all operated under the erroneous assumption that the law applied to defendant's offense. The instruction did not amount to plain error because defendant failed to show that the instruction had a probable impact on the verdict, as opposed to possibly influencing a single juror. **State v. Rawlings, 437.**

Instructions—felony murder—second conviction—no prejudice—Any error in the trial court's decision to instruct the jury on felony murder did not affect defendant's conviction for the first-degree murder of his second victim on a theory of premeditation and deliberation. **State v. Jenrette, 616.**

Instructions—felony murder—underlying assaults—only one required— There was no plain error in a felony murder instruction in a prosecution involving numerous charges surrounding two murders where defendant argued that the jury was not told which assault could be the basis for the felony murder charge. Only one felony is required to support a felony murder conviction. **State v. Jenrette, 616.**

Instructions—lying in wait—any error cured by other theories—Any error in a first-degree murder prosecution in an instruction on lying in wait would not have affected convictions on the theories of premeditation and deliberation and felony murder. **State v. Jenrette, 616.**

Instructions—multiple theories—any error cured by verdict sheet—There was no plain error in the trial court's instructions to the jury regarding first-degree murder where defendant contended that the jury could have construed the not guilty mandate as applying solely to the theory of lying in wait as opposed to the overall charge of first-degree murder. While the instruction was not worded with perfect clarity, any confusion stemming from the trial court's instructions was remedied by the verdict sheet. **State v. Jenrette, 616.**

IDENTIFICATION OF DEFENDANTS

Photo identification by officers from database—EIRA not applicable—The Eyewitness Identification Reform Act (EIRA) did not apply in a prosecution for carrying a concealed firearm and possession of a firearm by a felon where officers identified defendant from a database. Two officers saw defendant during a chase that followed an investigatory stop at a convenience store, another officer suggested that their description sounded like defendant, and the first two officers identified defendant from photos in their database. EIRA does not apply to such identifications because they are not lineups; the Legislature did not intend to prevent police officers from consulting photographs in their database to follow up leads given by other officers. **State v. Macon, 182.**

S**how-up identification—motion to suppress—suggestive—no plain error—** The trial court did not commit plain error in a felony breaking and entering and felony larceny case by denying defendant's motion to suppress a victim's show-up

IDENTIFICATION OF DEFENDANTS—Continued

identification of defendant. Although it was suggestive, under the totality of the circumstances it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process. **State v. Harvell, 404.**

IMMUNITY

Sovereign immunity—jurisdiction proper—The trial court properly exercised jurisdiction in a case involving allegedly illegal video sweepstakes machines as sovereign immunity did not bar plaintiffs' claim for injunctive relief. **Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty., 340.**

INDICTMENT AND INFORMATION

Defective short form indictment—attempted first-degree murder—lesser-included offense—attempted voluntary manslaughter—Although the short form indictment used to charge defendant with attempted first-degree murder failed to include the essential element of malice aforethought, the jury's guilty verdict of attempted first-degree murder necessarily meant that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter. The case was remanded to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter. **State v. Wilson, 472.**

Fatally defective—injury to personal property—owners legal entities capable of owning property—The trial court lacked subject matter jurisdiction over an injury to personal property charge where the information charging defendant with that crime was fatally defective because it failed to allege that the owners of the injured property were legal entities capable of owning property. Defendant's injury to personal property conviction was vacated and the matter was remanded for resentencing on defendant's remaining convictions. **State v. Ellis, 602.**

JUDGMENTS

Clerical errors—remanded for correction—Clerical errors in defendant's Judgment and Commitment form were remanded for correction, correcting defendant's Prior Record Level from II to IV and correcting the amount of attorney's fees owed from $13,004.45 to $6,841.50. **State v. Edmonds, 588.**

JURISDICTION

Subject matter—eminent domain—property spanning two counties—motion to amend pleadings—The trial court erred in a private condemnation proceeding by dismissing petitioner's petition to condemn easements for a power line across respondent's property and the trial court abused its discretion by denying petitioner's motion to amend its pleadings. Although the tract of land at issue spanned two counties, the trial court had jurisdiction to hear the petition concerning the land located in the county in which the trial court was located and the trial court should have allowed petitioner's motion to amend its pleadings to remove the portion of the property from its pleadings that was not located in that county. **Rutherford Elec. Membership Corp. v. 130 of Chatham, LLC, 86.**

University police—off campus home—search warrant—sending false email—University police had jurisdiction to execute a search warrant at defendant's

JURISDICTION—continued

off-campus private home where defendant was charged with sending a false email to a campus computer. Under N.C.G.S. § 14-453.2, any offense committed by the use of electronic communication is deemed to have been committed where the communication was originally sent or received, in this case on the campus since the email was sent through the university servers on the campus. Moreover, the university and city police had an agreement for police cooperation and mutual aid. **State v. Bernard, 134.**

LARCENY

Felony larceny—taking—carrying away—jury request for clarification— The trial court did not violate N.C.G.S. § 15A-1234 by responding to a jury question regarding the distinction between "taking" and "carrying away" after receiving a request from the jury on the clarification of the terms for felony larceny. Neither party objected to the instructions after they were given, and the trial court specifically asked both parties if there were any objections. Further, the parties were given an opportunity to be heard and defendant was not prejudiced by the additional instructions. **State v. Harvell, 404.**

From the person—misdemeanor larceny—no instruction necessary—The trial court did not err in a larceny from the person case by denying defendant's request to instruct the jury on the lesser-included offense of misdemeanor larceny. The evidence supported both elements of proximity and control of the crime of larceny from the person. **State v. Hull, 415.**

From the person—sufficient evidence—jury instruction not erroneous—The trial court did not err by denying defendants' motions to dismiss the charge of larceny from the person. The State presented sufficient evidence of all elements of the crime, including that a computer was within the victim's protection and presence at the time it was taken. Moreover, the trial court did not commit plain error when it instructed the jury on the offense of larceny from the person. There is no substantial difference between the holdings in *State v. Buckom*, 328 N.C. 313 (1991) and *State v. Barnes*, 345 N.C. 146 (1996), with regard to the element that the taking be "from the person" and North Carolina Pattern Jury Instruction Criminal 216.20 sufficiently instructs on this cause of action. **State v. Hull, 415.**

LOANS

Capacity in which loan documents signed—genuine issue of material fact— The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs. There was a genuine issue of material fact concerning the capacity in which plaintiff Dr. Lanzi and defendant Dr. Cottrell signed the loan agreement. **Coll. Rd. Animal Hosp., PLLC v. Cottrell, 259.**

Contribution—loan current—no liability under guaranty agreement—The trial court erred in a loan payment dispute by entering summary judgment in favor of plaintiffs on the basis of a contribution theory. The loan at issue was current so defendants were not liable for any amount owed to Bank of America under the loan agreement as a result of their signing the guaranty agreement. **Coll. Rd. Animal Hosp., PLLC v. Cottrell, 259.**

Unjust enrichment—express contract—relief governed by contract—The trial court erred in a loan payment dispute by entering summary judgment in favor

LOANS—Continued

of plaintiffs on the theory of unjust enrichment. Unjust enrichment relief is not available in instances governed by an express contract. The loan agreement in this case, when read in conjunction with applicable principles of North Carolina law, fully governed the relationship between the parties concerning the extent, if any, to which they were liable for any indebtedness arising under that instrument. **Coll. Rd. Animal Hosp., PLLC v. Cottrell, 259.**

MEDICAL MALPRACTICE

Standard of care—expert testimony—not required—sponge left inside body—In a negligence action against a surgeon, expert testimony about the standard of care was not necessary when plaintiff asked the surgeon whether she had a "legal duty" to advise the decedent regarding defendant's use of medications prior to the surgery. In this case, an inference of a lack of due care was raised because a sponge was left in the decedent's body; furthermore, the cited portions of the transcript did not indicate that counsel for plaintiff ever used the phrase "legal duty" when examining defendant. **Nicholson v. Thom, 308.**

Surgeon's medications—side effects—expert testimony—not needed— Expert testimony was not required in a medical negligence action to establish the side effects of drugs taken by defendant surgeon after an injury and during the general time period when this surgery occurred. A sponge was left in decedent's abdominal cavity after the surgery; when the standard of care is established pursuant to res ipsa loquitur, as here, expert testimony is not necessary to establish the relevant standard of care. **Nicholson v. Thom, 308.**

MENTAL ILLNESS

Involuntary commitment—examination by second physician—no written findings—no prejudice—The trial court did not err by involuntarily committing respondent to inpatient mental health treatment for a period not to exceed sixty days even though the record did not include written findings that he had been examined by a second physician within twenty-four hours of being admitted to the hospital, in violation of N.C.G.S. § 122C-266. Respondent was not prejudiced by the absence of a written record from the doctor who testified that he had examined respondent the day after respondent had been admitted to the hospital. **In re Spencer, 80.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—valid debt—default—notice—The trial court did not err by authorizing D.A.N. Joint Venture Properties of North Carolina, LLM (DAN) to foreclose on the subject properties. DAN presented competent evidence of: (i) a valid debt of which the party seeking to foreclose was the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled as required under N.C.G.S. § 45-21.16(d). **In re Foreclosure of L.L. Murphrey Co., 544.**

MOTOR VEHICLES

Driving while impaired—unsafe movement—findings of fact—sufficiency— The trial court did not err in an impaired driving and unsafe movement case by making its findings of fact numbers 6, 10, and 19. Each of the findings was supported by competent evidence or was a reasonable inference drawn from the evidence. **State v. Overocker, 423.**

MOTOR VEHICLES—Continued

Knoll motion—secured bond—no written findings—not prejudicial—The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to dismiss based on the magistrate's alleged failure to inform defendant of the charges; his right to communicate with counsel, family, and friends; and of the general circumstances for his release (a Knoll motion). Defendant had several opportunities to call counsel and friends but did not do so and, while the magistrate did not make the required written findings for the secured bond option, defendant was released to his wife on an unsecured bond and suffered no prejudice. **State v. Townsend, 456.**

NEGLIGENCE

Public duty doctrine—investigation of motor vehicle accident—no duty to individual—The trial court did not err by dismissing plaintiff's negligence claim against the City of Whiteville based on the public duty doctrine. The duty to investigate motor vehicle accidents and to prepare accident reports is a general law enforcement duty owed to the public as a whole. This case fell within the scope of the public duty doctrine and plaintiff did not allege the applicability of either the special relationship or the special duty exceptions to the public duty doctrine. **Inman v. City of Whiteville, 301.**

NOTICE

Involuntary commitment hearing—inadequate—no prejudice—The trial court did not err by involuntarily committing respondent to inpatient mental health treatment for a period not to exceed sixty days even though notice of the commitment hearing was inadequate under N.C.G.S. § 122C-264. Respondent failed to establish that he was prejudiced by the inadequate notice. **In re Spencer, 80.**

PARTIES

Easements—owners of properties required to be added—federal judgment—When the focus of a federal proceeding shifted to the 25-foot and 10-foot easements, the owners of the properties over which these easements ran were required to be added as parties before they could be bound by the federal judgment. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 56.**

POSSESSION OF STOLEN PROPERTY

Possession of stolen vehicle—unauthorized use of a motor vehicle—lesser-included offense—The trial court did not err in a possession of a stolen vehicle case by denying defendant's request for a jury instruction on the unauthorized use of a motor vehicle. The Court of Appeals was bound by its decision in *State v. Oliver*, 217 N.C. App. 369 (2011), which relied on *State v. Nickerson*, 365 N.C. 279 (2011), even though the Court of Appeals in Oliver mistakenly relied on Nickerson for a proposition not addressed, nor a holding reached, in that case. The Court of Appeals urged the Supreme Court to take the opportunity to clarify the case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle. **State v. Robinson, 446.**

PUBLIC OFFICERS AND EMPLOYEES

Athletic fan banned from facilities for harassment—not retaliation—no abuse of discretion—The lifetime ban of a fan from University of North Carolina athletic facilities for harassing behavior was not an abuse of discretion. The case relied upon by the fan involved retaliation for criticizing government officials, which was not the case here. **Donnelly v. Univ. of N.C., 32.**

REAL PROPERTY

Boundary—opinion—referee's report—resolution of complaint—The trial court did not err in a case involving a property boundary by allegedly failing to consider the evidence and give its own opinion and conclusion as to the referee's report. By ordering the referee's report to be entered into judgment as the resolution of plaintiffs' complaint, the trial court signaled its opinion and conclusion that based on the evidence presented, the referee's report was the appropriate resolution of plaintiffs' boundary dispute. **Lawson v. Lawson, 576.**

Boundary—referee's report—abandoned issues—competent evidence—The trial court did not err in a case involving a property boundary by concluding that the referee did not err in its findings of fact and conclusions of law. Plaintiffs failed to raise issues 4—10 in their brief, and thus, those arguments were deemed abandoned under N.C. R. App. P. 28(b)(6). Further, the record indicated that the referee's report was supported by competent evidence. **Lawson v. Lawson, 576.**

SCHOOLS AND EDUCTION

Charter school funding—restricted funds—The trial court erred in a charter school funding case by failing to make sufficient findings of fact concerning the origins, purpose, and uses of the various funding sources at issue. The Court defined "restricted" funds as those funds which have been designated by the donor for some specific program or purpose and the matter was remanded for specific findings and appropriate conclusions applying this definition of "restricted" funds. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 207.**

SEARCH AND SEIZURE

Evidence—DNA from cigarette butt—voluntarily relinquished to officer—no reasonable expectation of privacy—The trial court did not err in a first-degree murder case by denying defendant's motion to suppress DNA evidence extracted from the butt of defendant's cigarette. Defendant voluntarily accepted the police officer's offer to throw away the cigarette butt. Because defendant voluntarily gave the officer his cigarette butt, defendant abandoned the cigarette butt and no longer had a reasonable expectation of privacy in the property, even though he placed the cigarette butt in the officer's control inside of the curtilage of his home. As the property was abandoned, the officers' subjective intent in effectuating the valid assault on a female warrant was irrelevant. **State v. Borders, 149.**

Motion to suppress—lack of probable cause—impaired driving—unsafe movement—The trial court did not err by granting defendant's motion to suppress evidence based on a lack of probable cause to arrest defendant for impaired driving and unsafe movement. The findings of fact supported the conclusions of law that the reasons relied upon by the officer for the arrest did not provide the officer with probable cause that defendant was either impaired or had engaged in unsafe movement. **State v. Overocker, 423.**

SEARCH AND SEIZURE—Continued

Motion to suppress drugs—private residence—consent—search warrant— The trial court did not err in a drugs case by denying defendant's motion to suppress the search of his private residence attached to an ABC licensed storefront. The Alcohol Law Enforcement agents first obtained consent to search the living quarters, not including the recording studio, and then obtained a search warrant to search the recording studio. **State v. Allah, 120.**

Motion to suppress evidence—automobile—odor of marijuana—probable cause—The trial court erred by granting defendant's motion to suppress evidence seized after a warrantless search of an automobile, and the case was remanded to the trial court. The officers had probable cause to search the automobile based upon the odor of marijuana emanating from the vehicle, after defendant was restrained in handcuffs and secured in the officers' patrol vehicle, that justified the search of every part of the vehicle and its contents. **State v. Armstrong, 130.**

Overlapping civil and criminal actions—probable cause for warrant—suppression of items necessary to civil action—In a prosecution for computer crimes including unauthorized access against a terminated university employee with an ongoing civil action against the university, there was probable cause for the issuance of a search warrant where defendant objected that the warrant was based on hearsay, that the officer was biased against her, and that items necessary to her ongoing civil litigation were seized. Probable cause may be founded on hearsay, regardless of the officer's attitude, there was information to support the issuance of the warrant, and items necessary to the ongoing civil litigation were suppressed. **State v. Bernard, 134.**

SENTENCING

Colloquy with defendant—not held—harmless error—Defendant was not entitled to a new sentencing hearing where the trial court failed to address him personally and conduct the colloquy required by N.C.G.S. §§ 15A-1022.1(b) and -1022.1(a)(2013), but the error was harmless because defendant did not object or present any argument or evidence contesting the sole aggravating factor. **State v. Edmonds, 588.**

Habitual felon—indictment revealed during substantive felony trial—no curative instruction—new trial—The trial court erred by not intervening ex mero motu to instruct the jury to disregard evidence of defendant's habitual felon indictment, in addition to sustaining the objection. The trial for the substantive felony is held first and the habitual felon indictment is revealed to the jury only after a conviction. **State v. Rogers, 201.**

Larceny from the person—statutory mitigating factors—presumptive range—no findings required—The trial court did not abuse its discretion in a larceny from the person case by failing to find a statutory mitigating factor and by failing to consider mitigating evidence. The trial court was not required to make findings of aggravating or mitigating factors, or to impose a mitigated range sentence, as defendant was sentenced in the presumptive range. **State v. Hull, 415.**

STATUTES OF LIMITATION AND REPOSE

Breach of contract—separation agreement—contract under seal—ten years—Where plaintiff's claim for breach of a separation agreement arose pursuant to a contract under seal, the trial court erred by applying a three-year statute of

STATUTES OF LIMITATION AND REPOSE—Continued

limitations. N.C.G.S. § 1-47(2) provides that a ten-year statute of limitations applies to an agreement under seal. **Crogan v. Crogan, 272.**

Breach of fiduciary claims—knowledge of building defects—summary judgment—The trial court erred by granting summary judgment on statute of limitations grounds for two of the principals in the development of a community and their company, Trillium Links, concerning breach of fiduciary duty claims arising from construction defects. There were issues of fact concerning the date upon which plaintiff homeowners association knew or had reason to believe that extensive defects existed in the condominium buildings. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

Equitable tolling—not a bar—The running of the statute of limitations was not barred on the grounds of equitable tolling or equitable estoppel (treated as interchangeable). Although plaintiff pointed to the statement of defendant's counsel that he would likely depose plaintiff again if she reasserted her claims in state court after a federal dismissal, that statement would not have any tendency to induce plaintiff to refrain from filing her complaint in a timely manner. **Glynne v. Wilson Med. Ctr., 42.**

Foreclosure—ten years after final payment—D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action was not barred by the statute of limitations set forth in N.C.G.S. § 1-47(2) and (3). The statute of limitations does not run until ten years after a final payment is made on an obligation, and L.L. Murphrey Hog Co. made payments pursuant to the terms of the Confirmed Plan through 2011. **In re Foreclosure of L.L. Murphrey Co., 544.**

Fraud—duress—undue influence—three years—The trial court did not err by applying a three-year statute of limitations to claims for fraud, duress, and undue influence. Plaintiff's claims were not counterclaims, and thus, did not involve the provisions of N.C.G.S. § 1-47(2). **Crogan v. Crogan, 272.**

Parallel state and federal actions—dismissal of federal action—tolling of state action—The trial court correctly concluded that plaintiff's complaint was subject to dismissal on statute of limitations grounds where plaintiff initially filed a complaint in federal court asserting numerous claims arising under federal and state law, those claims were dismissed, and plaintiff filed this action one week more than thirty days from the date the federal action was dismissed. Although plaintiff argued that the word "tolled" in the federal statue involved the suspension of the statute of limitations, rather than the extension of the period by a specific number of days, there is binding North Carolina precedent to the contrary. **Glynne v. Wilson Med. Ctr., 42.**

Tolling—reliance on interpretation of federal rules—not excusable neglect—Reliance on an interpretation of federal tolling provisions accepted in many other jurisdictions but not North Carolina did not constitute excusable neglect. Moreover, the only time periods that may be extended based on the authority in N.C.G.S. § 1A-1, Rule 6(b) are those established by the North Carolina Rules of Civil Procedure, which was not the case here. **Glynne v. Wilson Med. Ctr., 42.**

TAXATION

Ad valorem taxes—billboards—valuation method not arbitrary or illegal—The Property Tax Commission did not err by affirming ad valorem tax assessments

TAXATION—Continued

for 2011 and 2012 made by Johnston County regarding sixty-nine billboards that Interstate Outdoor Incorporated (Interstate) owned. Interstate failed to produce substantial evidence that the valuation method used by Johnston County was arbitrary or illegal. **In re Interstate Outdoor Inc., 294.**

TERMINATION OF PARENTAL RIGHTS

Reunification efforts ceased—sufficient findings of fact—permanency planning order—termination of parental rights order—read together—The trial court did not err in a termination of parental rights case by entering a permanency planning review order changing the permanent plan for the minor child to adoption, effectively ceasing reunification efforts. The findings of fact in the termination of parental rights order in conjunction with the permanency planning order satisfied the requirements of N.C.G.S. § 7B-507(b)(1). **In re D.C., 287.**

Termination in child's best interest—no abuse of discretion—The trial court did not abuse its discretion by concluding that the minor child's best interests were served by termination of respondent-mother's parental rights. **In re D.C., 287.**

VENUE

Motion to change venue—defendant failed to meet burden—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to change venue. Defendant did not meet his burden of showing that the trial court improperly denied his motion for a change of venue. **State v. Borders, 149.**

WARRANTIES

Construction defects—knowledge of defects—issue of fact—statutes of limitation and repose—Trillium Links (the developer of a community) was not entitled to summary judgment in its favor on plaintiff's breach of warranty claims based on the statute of limitations or the statute of repose. There was an issue of material fact about the date when plaintiff knew or should have known of construction defects. **Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 478.**

WITNESSES

Cross-examination—limited—verdict not improperly influenced—The trial court's limiting of defendant's cross-examination of a State's witness did not constitute reversible error where defendant did not establish that the cross-examination improperly influenced the verdict. **State v. Edmonds, 588.**

WORKERS' COMPENSATION

Attorney fees—award final—not specific assignment of error—The trial court erred in a workers' compensation case by finding that the Full Industrial Commission denied plaintiff's request for attorneys' fees in its 25 November 2008 opinion and award and, as a result, erred in dismissing his appeal on the grounds of res judicata. The deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. **Adcox v. Clarkson Bros. Constr. Co., 248.**

ZONING

Burden of proof—zoning violation—purchase of property—The superior court erred in a zoning case by placing the burden on petitioner of proving that petitioner's zoning violation dated back to his purchase of the property. Because the burden was inappropriately placed on petitioner, the superior court's order was vacated and the matter was remanded for a new hearing. **Shearl v. Town of Highlands, 113.**