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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRYANT & ASSOCIATES, LLC D/B/A BRYANT ENTERPRISES, LLC, PLAINTIFF
v.
ARC FINANCIAL SERVICES, LLC, D/B/A ARC RISK AND COMPLIANCE, AND LORENZO MASI, DEFENDANTS

No. COA14-527

Filed 16 December 2014

1. Civil Procedure—parallel lawsuits in multiple states—N.C.G.S. § 1-75.12 motion to stay granted—not abuse of discretion

The trial court did not abuse its discretion by granting defendants' motion to stay under N.C.G.S. § 1-75.12 in an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey. Using the factors outlined in *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, the trial court made detailed findings of fact and conclusions of law that a substantial injustice would result if the stay was denied, that the stay was warranted, and that the alternative forum in New Jersey was convenient, reasonable, and fair.

2. Estoppel—judicial estoppel—party did not adopt an inconsistent position

In an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey, defendants were not judicially estopped from arguing in their motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. When defendants previously certified in their New Jersey complaint that the New Jersey action was not the subject of any

other action or contemplated action, they did not know that plaintiff had filed an action in North Carolina. Defendants therefore never adopted a position that was clearly inconsistent with their previous position.

Appeal by plaintiff from order entered 27 January 2014 by Judge Louis Meyer in District Court, Wake County. Heard in the Court of Appeals 9 October 2014.

John M. Kirby, for plaintiff-appellant.

Brown Law LLP by Justin M. Osborn and Seth D. Beckley, for defendants-appellees.

STROUD, Judge.

Bryant & Associates, LLC d/b/a Bryant Enterprises, LLC ("plaintiff") appeals from an order granting ARC Financial Services, LLC d/b/a ARC Risk and Compliance ("ARC") and Lorenzo Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12 (2013). Finding no error, we affirm.

I. Background

On 1 May 2011, plaintiff and ARC executed a Master Services Agreement ("MSA") in which plaintiff agreed to perform anti-money laundering consulting services for ARC. The parties agreed that the MSA is to be construed according to Delaware law. On 3 September 2012, plaintiff sent an invoice of $3,825 to ARC in connection with work performed for ARC's customer Detica NetReveal ("Detica"). On 1 December 2012, after ARC had failed to respond to plaintiff's communications, Kenneth Bryant, plaintiff's principal and managing director, sent Masi, ARC's managing member, a letter indicating that plaintiff would sue ARC to recover the unpaid amount. Masi responded and exchanged voicemails with plaintiff's counsel. On 27 December 2012, plaintiff gave Masi a few days to consider a settlement offer. A few days later, Masi requested additional time to respond. Over the next few days, the parties negotiated over Masi's deadline to respond, but the parties failed to reach an agreement. On 4 January 2013, plaintiff threatened that it would file suit three days later, on 7 January 2013.

A. North Carolina Action

On 10 January 2013, plaintiff sued ARC and Masi for unjust enrichment and quantum meruit in Wake County District Court. On 4 March

2013, ARC and Masi were properly served. On or about 19 March 2013, plaintiff served interrogatories and its first request for production of documents to ARC. On 20 March 2013, plaintiff amended its complaint to add claims for breach of contract and fraud and sought an additional $4,400. On or about 8 April 2013, plaintiff served its second request for production of documents to ARC. ARC requested an extension of time to respond to plaintiff's requests, to which plaintiff consented.

On 22 April 2013, ARC and Masi moved to dismiss plaintiff's action or, in the alternative, moved to stay further proceedings because of a contemporaneous New Jersey action. Masi averred that plaintiff had performed all its work for ARC outside North Carolina. On or about 21 June 2013, plaintiff moved to compel ARC and Masi to respond to its discovery requests. On 16 August 2013, the Wake County District Court compelled ARC and Masi to respond to plaintiff's discovery requests. On 24 September 2013, Bryant averred that plaintiff's principal place of business is in North Carolina and plaintiff performed its work for Detica in North Carolina. Bryant also averred that Detica is headquartered in Massachusetts.

On or about 15 October 2013, the Wake County District Court denied ARC and Masi's motion to dismiss but refrained from ruling on ARC and Masi's motion to stay in order to allow the parties to supplement the record regarding the New Jersey action.[1] A hearing on the motion to stay was set for 15 November 2013.[2] On or about 12 November 2013, ARC and Masi's counsel averred that some witnesses reside in New York, New Jersey, and Massachusetts. On or about 13 November 2013, Bryant averred that he and Masi would be the only necessary witnesses.

B. New Jersey Action

On 11 January 2013, ARC sued plaintiff and Bryant in New Jersey Superior Court for breach of the MSA's confidentiality and non-compete provisions, interference with ARC's contract with Detica, wrongful disclosure of proprietary and confidential information, breach of duty of loyalty, and civil conspiracy. In its complaint, ARC certified that: "The matter in controversy is not the subject of any other action in any Court . . . . No other action or arbitration proceeding is contemplated in regard to the matter in controversy." ARC asserts that plaintiff was properly served in the New Jersey action on or about 16 January 2013. Plaintiff

---

1. The Wake County District Court, however, granted Masi's motion to dismiss plaintiff's claims against him that were based on piercing the corporate veil.

2. We do not have a transcript of this hearing in the record on appeal.

contends that service was not proper. On or about 18 January 2013, the New Jersey Superior Court entered temporary restraints on plaintiff. On or about 8 February 2013, plaintiff and Bryant moved to dissolve the temporary restraints and dismiss ARC's complaint for lack of personal jurisdiction. On 24 May 2013, the New Jersey Superior Court denied plaintiff and Bryant's motion to dismiss.

On or about 24 June 2013, plaintiff and Bryant answered ARC's complaint and included counterclaims that mirrored plaintiff's claims against ARC in the North Carolina action. Plaintiff and Bryant also mentioned the North Carolina action in their answer. On 28 June 2013, ARC answered plaintiff and Bryant's counterclaims. On or about 3 July 2013, the New Jersey Superior Court ordered the parties to mediate.

On 20 September 2013, plaintiff and Bryant filed a third-party complaint against Masi and included claims that mirrored plaintiff's claims against Masi in the North Carolina action. On or about 19 November 2013, the parties failed to reach an agreement at mediation.

C. Wake County District Court's Order Granting Stay

On 27 January 2014, the Wake County District Court, after making many detailed findings of fact, granted ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12. On 21 February 2014, plaintiff gave a timely notice of appeal.

II. Motion to Stay

A. Standard of Review

We review a trial court's grant of a motion to stay for an abuse of discretion. *Muter v. Muter*, 203 N.C. App. 129, 132, 689 S.E.2d 924, 927 (2010).

> We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's [grant] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 134, 689 S.E.2d at 928 (citations and quotation marks omitted).

B. Analysis

[1] Plaintiff challenges the trial court's grant of ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12, which provides:

> If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C. Gen. Stat. § 1-75.12(a). In determining whether trying a case in North Carolina would work a "substantial injustice" on the moving party, the trial court may consider the following factors:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Muter, 203 N.C. App. at 132, 689 S.E.2d at 927 (citing *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371, *appeal dismissed and disc. rev. denied*, 301 N.C. 93, 273 S.E.2d 299 (1980)).

> In considering whether to grant a stay under [N.C. Gen. Stat. § 1-75.12], the trial court need not consider every factor and will only be found to have abused its discretion when it abandons any consideration of these factors. In addition, this Court has held that it is not necessary that the trial court find that all factors positively support a stay.

Id. at 132-33, 689 S.E.2d at 927 (citations and quotation marks omitted). A trial court, however, must find that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair. *Wachovia Bank v. Harbinger Capital Partners Master Fund 1, Ltd.*, 201 N.C. App. 507, 520, 687 S.E.2d 487, 495 (2009).

Plaintiff first complains that, in its order granting the motion to stay, the trial court erred in (1) considering the fact that plaintiff had not moved to stay the New Jersey action; (2) finding that mediation had failed due to ARC and Masi's motion to stay; (3) misstating ARC's

claims against plaintiff and Bryant; (4) finding that most of the parties' contact with each other and with Detica occurred outside North Carolina; (5) finding that ARC and Masi would likely call witnesses from New Jersey, Massachusetts, and New York; and (6) concluding that granting a stay would avoid potentially conflicting results. We, however, do not review these issues individually; rather, we address plaintiff's contentions as a single issue: whether the trial court abused its discretion in granting the motion to stay. *See Muter*, 203 N.C. App. at 131, 689 S.E.2d at 926 (addressing a party's five assignments of error as a single argument that the trial court abused its discretion in denying a motion to stay). In its order, the trial court addressed many of the *Motor Inn Management* factors in its findings of fact and conclusions of law:

> 9. At present, there are parallel lawsuits in New Jersey and North Carolina involving the same parties and essentially the same causes of action[], which are based upon the same subject matter and facts.
>
> 10. The New Jersey lawsuit also contains the claims raised by ARC Financial Services, LLC regarding [plaintiff] and Kenneth Bryant's services performed for Detica pursuant to a Master Services Agreement entered into between the parties and [plaintiff's] relationship with Detica. These claims have not been raised as counterclaims in the North Carolina action, and while it is conceivable that they could be raised in the North Carolina lawsuit, the New Jersey lawsuit, at present, includes these claims plus all claims raised by both sides of parties in the North Carolina lawsuit and, therefore, is slightly broader than the North Carolina action.
>
> 11. [Plaintiff's] contacts with ARC Financial Services, LLC and Lorenzo Masi in New Jersey pertaining to the subject matter of the parallel litigation were minimal. Similarly, ARC Financial Services, LLC's and Lorenzo Masi's contacts with [plaintiff] in North Carolina pertaining to said subject matter were minimal. Most of the parties' contacts with each other and Detica pertaining to said subject matter were in states other than North Carolina and New Jersey, including Detica's home state of Massachusetts as well as New York.
>
> 12. The Master Services Agreement between the parties pertaining to the services [plaintiff] performed for ARC

Financial Services, LLC's customer Detica, which are at issue in the parallel lawsuits, is governed by Delaware law, so each side's breach of contract claims will be governed by Delaware law, and the New Jersey state court is well capable of applying Delaware law as well as any North Carolina law that may apply to [plaintiff's] other claims.

13. [Plaintiff's] principal, Kenneth Bryant, likely will be the sole witness from [plaintiff] in any trial of the parallel lawsuits, and he resides in North Carolina. ARC Financial Services, LLC and Lorenzo Masi likely will call Mr. Masi and at least 1 or 2 other witnesses from ARC Financial Services, LLC in any trial of the parallel lawsuits, and they reside in New Jersey. ARC Financial Services, LLC and Lorenzo Masi intend to call witnesses, located in Massachusetts and employed by Detica, in any trial of the parallel lawsuits, and there may be another witness who resides in New York.

14. The parties have conducted a minimal amount of discovery in each of the respective parallel lawsuits. The New Jersey state court has denied [plaintiff's] motion in the New Jersey lawsuit to dismiss for lack of personal jurisdiction and lack of service of process, and the New Jersey appellate courts denied an appeal of that decision. A mediation was conducted in the New Jersey action but it was impassed, largely due to the motion[ ] to stay in the North Carolina action not being resolved. This Court is unable to conclude that one of the parallel lawsuits is more or less advanced in progress than the other; however, at present, there is no pending motion in the New Jersey lawsuit, nor has there been any effort in the New Jersey lawsuit, to request the New Jersey state court to stay the New Jersey action in favor of the parties proceeding with their dispute in the North Carolina action.

15. The matters being litigated by the parties in the parallel lawsuits are not matters of unique local concern to either North Carolina or New Jersey. There is equal or closely comparable availability to all parties in both the North Carolina and New Jersey forums of compulsory process to produce non-party witnesses at any trial of the parallel lawsuits. All parties have equal or closely comparable

> access in both the North Carolina and New Jersey forums to sources of proof.
>
> 16. [Plaintiff] contends that ARC Financial Services, LLC filed the New Jersey lawsuit knowing the North Carolina action was being filed and in an effort to lay groundwork to have the North Carolina action stayed in favor of the New Jersey lawsuit; however, this Court is unable to conclude that ARC Financial Services, LLC engaged in inequitable conduct in filing the New Jersey lawsuit. Further, this Court is unable to conclude whether or not either party or set of parties on opposing sides of these disputes may have filed their respective lawsuits for an inequitable purpose; rather, it appears that, on their face, each of the parallel lawsuits was filed for a legitimate purpose.
>
> 17. ARC Financial Services, LLC and Masi, through their attorneys in the North Carolina action, have represented to the Court in the above-captioned action and stipulated during the most recent court hearing in the above-captioned North Carolina action that ARC Financial Services, LLC and Lorenzo Masi consent and will submit to the jurisdiction of the New Jersey state court for purposes of proceeding with [plaintiff] and Kenneth Bryant's claims that have been asserted against them in the North Carolina action and the New Jersey lawsuit.

In light of the trial court's reasoned analysis of the *Motor Inn Management* factors and consequent detailed findings of fact and conclusions of law, we hold that the trial court's grant of the motion to stay was not "a patently arbitrary decision, manifestly unsupported by reason." *See id.* at 134, 689 S.E.2d at 928.

[2] Plaintiff next contends that the doctrine of judicial estoppel prevented ARC from asserting, in its 22 April 2013 motion to stay, that the New Jersey action directly related to the subject matter of the North Carolina action, because it had certified, in its 11 January 2013 complaint, that the matter in controversy in the New Jersey action was not the subject of any other action or contemplated action. Judicial estoppel protects the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Powell v. City of Newton*, 364 N.C. 562, 568, 703 S.E.2d 723, 728 (2010). In determining whether to invoke the doctrine, we consider,

among other factors, whether a party's subsequent position is "clearly inconsistent" with its earlier position. *Id.* at 569, 703 S.E.2d at 728.

ARC certified its complaint one day after plaintiff filed its action in North Carolina. ARC was not served with the North Carolina action until 4 March 2013, almost two months later. ARC's certification that the matter in controversy was not the subject of any other action thus accurately reflected ARC's knowledge at the time it was made. It is unclear whether ARC's additional certification that "[n]o other action . . . *is contemplated* in regard to the matter in controversy" refers to the contemplations of the certifying party or the opposing party. (emphasis added). We interpret this certification to require a party to certify its own contemplations, rather than those of the opposing party. We therefore hold that, at the very least, ARC never adopted a position that was "clearly inconsistent" with its position that the New Jersey action directly related to the subject matter of the North Carolina action. *See id.*, 703 S.E.2d at 728. Accordingly, we hold that ARC was not judicially estopped from arguing in its motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. *See id.* at 568, 703 S.E.2d at 728.

Plaintiff further contends that ARC initiated the New Jersey action in bad faith as a "tactical maneuver." But, in its order, the trial court found that ARC had not engaged in "inequitable conduct" and had filed its lawsuit for a "legitimate purpose." Nothing in the record suggests that ARC's complaint is a sham pleading. Accordingly, we hold that the trial court did not abuse its discretion in granting ARC and Masi's motion to stay.

III. Conclusion

Because the trial court did not abuse its discretion in granting ARC and Masi's motion to stay, we affirm the trial court's order.

AFFIRMED.

Judges GEER and BELL concur.

CHARLOTTE PAVILION ROAD RETAIL INVESTMENT, L.L.C., AND
WLA ENTERPRISES, INC., PLAINTIFFS
v.
NORTH CAROLINA CVS PHARMACY, LLC; JEFFREY CARPENTER; CARPENTER
INVESTMENT PROPERTIES, LLC; SUBURBAN GARDENS INCORPORATED; AND
SONNY BOY PROPERTIES, LLC, DEFENDANTS

No. COA14-658

Filed 16 December 2014

Declaratory Judgments—offensive summary judgment—restrictive covenants—construction of parking lot

The trial court did not err in a declaratory judgment action by granting plaintiff developers' offensive summary judgment motion seeking a declaration that their proposed use of the pertinent land did not violate a restrictive covenant. Although the covenant provided that a developer may not build a store that constituted a vitamin store, beauty aid store, or pharmacy, the intent of the grantor was not to outlaw the construction of those things which were integral or essential to the operation of a retail business. Thus, the construction of a parking lot and access easement on the restricted property was not a prohibited use.

Appeal by defendants from order entered 11 March 2014 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2014.

ELLIS & WINTERS LLP, by Matthew W. Sawchak, Thomas D. Blue, Jr., Jeremy M. Falcone, Emily E. Reardon, for North Carolina CVS Pharmacy, L.L.C. and Sonny Boy Properties, LLC.

FERGUSON, SCARBROUGH, HAYES, HAWKINS & DEMAY, PLLC, by James R. DeMay, for Jeffrey Carpenter, Carpenter Investment Properties, LLC, and Suburban Gardens Incorporated.

MULLEN HOLLAND & COOPER, P.A., by John H. Hasty and Justin N. Davis, for Charlotte Pavilion Road Retail Investment, LLC, and WLA Enterprises, Inc.

ELMORE, Judge.

In 2013, Charlotte Pavilion Road Retail Investment, L.L.C. and WAL Enterprises (collectively "developers") filed a declaratory judgment action against North Carolina CVS Pharmacy, L.L.C., Jeffrey Carpenter, Carpenter Investment Properties, LLC, Suburban Garden Incorporated, and Sonny Boy Properties, LLC (collectively "CVS"). The developers sought a declaration that their proposed use of the land at issue did not violate a restrictive covenant. The developers moved for offensive summary judgment and Judge Linwood O. Foust granted the motion. CVS timely appealed. After careful consideration, we affirm.

I. Background

The facts in this case are not in dispute. Jeffrey Carpenter, principal member of Carpenter Investment Properties, LLC, owned a fifteen acre tract of land ("the Carpenter tract") in north Charlotte. In 2006, Mr. Carpenter conveyed approximately two acres of the Carpenter tract to an entity that he controlled, Pavilion at Twenty Nine, LLC ("Pavilion"). Pavilion leased the two acres to CVS Pharmacy ("CVS tract"), which is still operating a pharmacy on the land today. Mr. Carpenter/Pavillion agreed to place a restriction in the CVS lease on the future use of the Carpenter tract to entice CVS to enter the lease agreement.

On 18 August 2008, Mr. Carpenter sold the CVS tract to Sonny Boy Properties, LLC. As part of the sale, Mr. Carpenter implemented the restriction outlined in the CVS lease by encumbering his adjoining land, the Carpenter tract, with a restrictive covenant. The restrictive covenant is recorded and runs with the land. The recorded covenant mirrors the restriction that appears in the CVS lease. It states:

> During the term of the existing CVS lease . . . no owner of any portion of the Carpenter Tract shall allow its parcel to be leased or to be used for the purpose of a health and beauty aids store, a drug store, a vitamin store, and/or a pharmacy. A "pharmacy" shall include the dispensing of prescription drugs by physicians, dentists, or other health care practitioners, or entities such as health maintenance organizations, where such dispensing is for profit or a facility which accepts prescriptions which are filled elsewhere and delivered to the customer. A "health and beauty aids store" shall mean a store which devotes more than 10% of its retail selling space to the display and sale of health and beauty aids.

In 2012, Mr. Carpenter contracted to sell the restricted Carpenter track to the developers. The developers also contracted to purchase

an adjacent tract of land ("the Charter tract") from Charter Properties. The Charter tract is unrestricted. The developers intend to construct a shopping center to be located on both the Carpenter and Charter tracts. Specifically, the developers intend to lease a portion of the Charter tract to Walmart, and Walmart proposes to build a store that would sell, *inter alia*, health and beauty aids, drugs and vitamins, and operate a pharmacy. On the Carpenter tract, the developers intend to build a parking lot and access easement to be used by the shopping center customers and tenants. Although Walmart would share the parking lot with other retail establishments, its customers would be expected to park on the Carpenter tract to access the Walmart store.

When CVS learned that the developers intended to construct a parking lot on the Carpenter tract for Walmart's use, it informed the developers that, in its opinion, such use would violate the restrictive covenant. To be certain, the developers filed a declaratory judgment action against CVS. The developers sought a declaration by the trial court that the proposed use of the land would not violate the restrictive covenant. After a 27 January 2014 summary judgment hearing, Judge Foust granted the developers' motion for summary judgment, concluding that the construction of a parking lot would not violate the terms of the restrictive covenant. CVS and Sonny Boy filed a timely notice of appeal.

II. Analysis

On appeal, CVS argues that the trial court erred in granting the developers' motion for summary judgment since the trial court should have held that the proposed use of the Carpenter tract as a parking lot and access easement for Walmart would violate the restrictive covenant. We disagree and hold that the parking lot is a permitted use and does not violate the particular restrictive covenant.

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(c) (2013). In the instant case, the parties agree that there is no genuine issue of material fact because the facts themselves are not in dispute. Instead, the parties disagree on the legal significance of the established facts. *See, e.g.*, *Alchemy Communications Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 222, 558 S.E.2d 231, 233 (2002) (Plaintiff's claim that whether defendant violated a lease presented "a matter of contract interpretation and thus, a question of law."). We must only consider whether the trial court correctly determined that plaintiffs are entitled to a judgment as a matter of law.

North Carolina courts employ a strict construction rule when interpreting restrictive covenants:

> [W]hile the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.
>
> The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that *nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.*
>
> [C]ovenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous[.] This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. *Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.*

Wein II, LLC v. Porter, 198 N.C. App. 472, 480, 683 S.E.2d 707, 712–13 (2009) (quotations and citations omitted) (emphasis added). "The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). "Restricted property cannot be made to serve a forbidden use even though the enterprise is situated on adjacent or restricted land." *Id.* at 269, 156 S.E.2d at 239.

The covenant at issue provides that the Carpenter tract shall not "be used for the purpose of a health and beauty aids store, a drug store, a vitamin store or a pharmacy." This covenant must be construed according to the plain ordinary meaning of its words. CVS argues that the restrictive covenant on the Carpenter track prohibits the construction of a parking lot that would serve Walmart. It is CVS's position that the purpose of the restrictive covenant is to prohibit the construction of a pharmacy on the restricted parcel that would compete with CVS—this

includes the prohibition of a parking lot which would serve a prohibited use. CVS notes that because the city of Charlotte's ordinance requires Walmart to provide parking for its customers, parking is integral to the store's operation and therefore falls within the purview of the restrictive covenant.

To support its position, CVS primarily relies on case law from jurisdictions outside of North Carolina. For example, in *H.E. Butt Grocery Co. v. Justice*, 484 S.W.2d 628 (Tx. Civ. App. 1972), appellee Coleridge sold appellant Butt (HEB) a parcel of land and at the same time placed a restriction on adjacent land owned by Coleridge "against the use of any portion thereof for the purpose of conducting thereon a foodstore [sic] or food department for the storage or sale for off-premises consumption of groceries, meats, produce, dairy products, frozen foods, [or] baking products[.]" *Id.* at 629. Thereafter, Coleridge sold the adjacent land to plaintiff Justice, who proposed to erect a grocery store on the land not covered by the restriction, and proposed to use the restricted parcel for parking and access to the grocery and other stores in the shopping center. *Id.* Justice sued HEB for declaratory judgment and sought a declaration that a use restriction upon the property encumbered by the restrictive covenant would not preclude the property's use for parking, ingress and egress for a grocery store to be located on unrestricted land, adjacent to the restricted tract. *Id.* In construing the restriction, the Texas court gave effect to the express language, together with that which was necessarily implied, to ascertain the intention of the parties. *Id.* at 630. The Texas Court noted that any ambiguity was to be resolved against favoring the restriction. *Id.* Ultimately, the Texas court determined that constructing a parking lot on the restricted lot to benefit the grocery store violated the restrictive covenant because the parking lot is "an integral part of the proposed operation. The foodstore cannot be conducted without it." *Id.* at 631. CVS contends that the factual situation presented in *Justice* is analogous to the situation at bar and therefore we should adopt the Texas court's holding.

We agree that the factual situation in *Justice* is similar to the situation at issue. However, the express language of the restrictive covenant in this case differs from the restriction in *Justice* such that we cannot adopt the Texas court's holding. Here, the restrictive covenant prohibits the building of a health and beauty aids *store*, a drug *store*, a vitamin *store* or a pharmacy. The covenant goes so far as to describe what constitutes each type of prohibited use *store*. A "store" is defined as a "place where goods are deposited for purchase or sale." Black's Law Dictionary 1460 (8th ed. 2004). Alternatively, the restrictive covenant in *Justice*

prohibited potential buyers from using the property "for the purpose of conducting thereon a foodstore or food department[.]" Thus, the restrictive covenant in *Justice* contemplated and banned the business *activity* of operating a food store, which, as mandated by ordinance, included providing consumer parking.

In the instant case, we interpret the restrictive covenant to prohibit exactly what it purports to ban on the face of the restriction—the erection of a *structur*e on the Carpenter tract that operates as a prohibited type of retail store, namely a pharmacy. Thus, a developer may not build a store—four walls and a roof—that constitutes a vitamin store, beauty aid store, or pharmacy. We do not believe that the intent of the grantor, Mr. Carpenter, was to outlaw the construction of those things which are integral or essential to the *operation* of a retail business. If such prohibition was intended, the drafter could have said as much by incorporating phrases such as "used for store purposes" or "used for purposes incidental to a store." However, without more, we conclude the construction of a parking lot and access easement on the restricted property is not a prohibited use. Accordingly, this Court must affirm the trial court's decision to grant the developer's motion for offensive summary judgment.

Affirmed.

Judges BRYANT and ERVIN concur.

TRACEY CLINE, Plaintiff-Appellant
v.
DAVID HOKE, Individually and as the Custodian of the Public Records Pursuant to N.C.G.S. § 132-2, Defendant-Appellee

No. COA14-428

Filed 16 December 2014

1. Public Records—action to compel production of emails—defendant named in individual capacity—action properly dismissed

The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts in his individual capacity for the production of emails pursuant to North Carolina's Public Records Act. To compel a custodian of public records to permit inspection of those records, a party must sue the custodian in his or her official capacity.

2. Public Records—action to compel production of emails—assistant director not custodian of records

The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts (AOC) in his official capacity for the production of emails pursuant to North Carolina's Public Records Act. Because the public official in charge of an office having public records is the custodian of those records, the *assistant* director of AOC was not the proper party to sue to compel production of the emails.

Appeal by Plaintiff from order entered 1 November 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 25 September 2014.

Tracey Cline, Plaintiff-Appellant, pro se.

Attorney General Roy Cooper, by Special Deputy Attorneys General Melissa L. Trippe and Amar Majmundar, for Defendant-Appellee.

McGEE, Chief Judge.

Tracey Cline ("Plaintiff") filed an action against David Hoke ("Defendant"), individually and in his official capacity as assistant director of the North Carolina Administrative Office of the Courts ("AOC"), in order to obtain certain AOC emails pursuant to North Carolina's public

records law. The trial court dismissed Plaintiff's case, in part, for failure to state a claim upon which relief could be granted. We conclude that Defendant is not the designated custodian of the AOC's public records, and thus we affirm the trial court's dismissal.

I. Background

Plaintiff, a former Durham County district attorney, sought to obtain some emails related to her service as district attorney in preparation to defend a complaint filed against her by the North Carolina State Bar. In the present action, Plaintiff sought certain email exchanges that she alleged were in Defendant's custody. Plaintiff made repeated requests to Defendant and to AOC's general counsel, Pamela Weaver Best ("General Counsel"), between June and December of 2012 to obtain these emails. Although Plaintiff initially corresponded with both Defendant and General Counsel regarding her public records request, Plaintiff eventually corresponded almost exclusively with General Counsel. During that period of time, Defendant did send Plaintiff a number of the emails she had requested. However, Plaintiff always contended there were additional relevant emails that Defendant had not sent her. Plaintiff filed this action against Defendant, individually and in his official capacity as the purported custodian of the public records she was seeking.

Defendant moved to dismiss Plaintiff's case pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), in part, on the grounds that Plaintiff had failed to state a claim upon which relief could be granted. The trial court granted Defendant's motion to dismiss by order entered 1 November 2013. Plaintiff appeals.

II. Standard of Review

> The standard of review of an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(6) is 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, whether properly labeled or not. In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of [her] claim which would entitle [her] to relief.

Grant v. High Point Reg'l Health Sys., 184 N.C. App. 250, 252, 645 S.E.2d 851, 853 (2007) (citations and internal quotation marks omitted).

Moreover, the North Carolina Supreme Court held in *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010), that

> the policy rationale underpinning the Public Records Act . . . strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that . . . public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.
>
> The only task at hand for purposes of Rule 12(b)(6) is to test the legal sufficiency of the complaint.

(citation omitted).

III. Suing Defendant in His Individual Capacity

[1] N.C. Gen. Stat. § 132-6(a) (2013) provides that a custodian of public records has a statutory duty to permit reasonable inspection of those records by the public. In order to compel an unresponsive custodian to fulfill this statutory duty, a party must sue the custodian of those records in the custodian's official capacity. *See Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) ("If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity."); *cf. Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 223, *supersedeas and disc. review allowed on other grounds*, __ N.C. __, 758 S.E.2d 862 (2014) (plaintiffs suing the director of the AOC in his official capacity for public records); *State Employees Ass'n of N.C.*, 364 N.C. at 206, 695 S.E.2d at 93 (plaintiff suing the Treasurer of the State of North Carolina in his official capacity for public records). In the present case, if Plaintiff wanted to sue Defendant specifically as a custodian of AOC's public records, she must have sued him in his official capacity. Therefore, Plaintiff's suit against Defendant in his individual capacity was properly dismissed under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013).

IV. Suing Defendant in His Official Capacity

[2] Plaintiff next contends that she properly sued Defendant in his official capacity as the custodian of some of the AOC's public records. As

already discussed, if Defendant was the custodian of the AOC's public records, Plaintiff could sue him in his official capacity to obtain access to the public records she was seeking. *See generally* N.C. Gen. Stat. §§ 132-1 *et seq.* (2013). If Defendant was not the custodian, however, he could not be compelled by law to provide access to public records as the custodian.

Plaintiff contends that Defendant was the custodian of all public records responsive to her public records request. Defendant, both in his emails to Plaintiff and in his brief before this Court, contends that he was the custodian of some, but not all, of the public records Plaintiff was seeking. General Counsel, generally acting on Defendant's behalf, informed Plaintiff, on several occasions, that "the AOC is not the custodian" of its employee's emails, but rather that "[u]nder [North Carolina's] Public Records law, each individual employee is the custodian of his/her emails." At times, General Counsel's stated opinion to Plaintiff was that it was only "the individual *writer* of [a requested] email who is the custodian" and that "requests for emails or correspondence should be made of each person [who created those public records] individually." (emphasis added).

The AOC made an analogous argument earlier this year in *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts*, __ N.C. App. __, __, 754 S.E.2d 223, 225, *supersedeas and disc. review allowed*, __ N.C. __, 758 S.E.2d 862 (2014), involving the AOC's administration, support, and maintenance of the state's Automated Criminal/Infraction System database ("ACIS"), a "real-time criminal records database" that compiles the criminal court records for all of the superior courts in North Carolina. In response to a public records request for a copy of all the records within the ACIS database, the AOC erroneously contended that it was not the custodian of the records within ACIS and, instead, argued that each county clerk of court who input data into ACIS was the custodian of the individual records created by that respective county clerk of court; thus, the plaintiffs would need to contact every county clerk of court in the state in order to obtain the records they were seeking. *Id.* at __, 754 S.E.2d at 225–26. However, this Court held that, because the AOC "created, maintains, and controls ACIS and is the only entity with the ability to copy the database[,] . . . ACIS is a record *of the AOC* and *in the AOC's custody*." *Id.* at __, 754 S.E.2d at 228.

Similarly, in the present case, Defendant contends that the emails of AOC employees are not within the custody of the AOC. Instead, Defendant essentially argues that these emails are the responsibility of a multitude of "custodians" — individual employees who created emails,

and who are diffused throughout the AOC. In support of this position, Defendant directs this Court to materials developed by the North Carolina Department of Cultural Resources ("DCR"), which state that

> [i]n most cases, the author, or originator, of [an] e-mail message is responsible for *maintaining* the "record" copy. However, cases in which the recipient has altered the message (made changes, added attachments, etc.), or when the message is coming from outside the agency (and therefore not documented anywhere within the agency); the recipient is the one responsible for *retaining* the message.

Who is Responsible for That E-mail Message?, State Archives of North Carolina, www.history.ncdcr.gov/SHRAB/ar/tutorials/Tutorial email_20120501/index.html (from DCR's online e-mail management training tutorial for state employees) (emphasis added). However, Defendant appears to have confused the duty of public records custodians to *provide access to* public records with the rules that state employees must follow to *preserve* those records.

N.C. Gen. Stat. § 132-8.1 (2013) designates the DCR as the agency that oversees the state's records management program, but only for the "creation, utilization, maintenance, retention, preservation, and disposal of official records[.]" According to the DCR, "individual [employees] are responsible for managing state records[.]" Dep't of Cultural Res., E-mail as a Pub. Record in N.C.: A Policy for Its Retention and Disposition 4 (July 2009). However, the DCR also has expressly stated that "[l]egal custody of [state employees'] electronic mail rests with *the office* of the sender or recipient." *Id.* at 10 (emphasis added). Thus, each individual state employee who creates a public record is not automatically the custodian thereof.

Instead, N.C. Gen. Stat. § 132-2 (2013) provides that "[t]he public official in charge of an office having public records shall be the custodian thereof." N.C.G.S. § 132-2 has rarely been interpreted by our appellate Courts. However,

> [i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

Frye Reg'l Med. Ctr. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990)). By using the singular word "[t]he" public official and in connection with that public official being "*in charge* of an office having public records," the statute designates a particular person within an office as being the designated custodian for that office's public records. *Accord generally* N.C. Att'y Gen. Office, Guide to Open Gov't and Pub. Records 4 (2008) ("Each office should have a 'custodian' of public records who is required to allow those records to be inspected."). As the *assistant* director of the AOC, Defendant is not *the person* in charge of the AOC and thus not the designated custodian of the AOC's records per N.C.G.S. § 132-2. *Cf. State Employees Ass'n of N.C.*, 364 N.C. at 206, 695 S.E.2d at 93 (noting that the Treasurer of the State of North Carolina is the designated custodian for public records of the North Carolina Department of State Treasurer). Thus, the parties herein have misinterpreted North Carolina's public records law. Moreover, Plaintiff failed to pursue her action against the public official in charge of AOC's public records, who is the custodian thereof. Plaintiff's suit against Defendant in his official capacity is without merit and was properly dismissed.

Affirmed.

Judges GEER and STROUD concur.

DAVID COX, Plaintiff/Father
v.
MICHELLE COX, Defendant/Mother
v.
BETTY JO LAYNE, Intervenor/Paternal Grandmother

No. COA14-314

Filed 16 December 2014

1. Appeal and Error—preservation of issues—constitutional issues not considered for first time on appeal

Although defendant argued that the trial court violated her constitutional right to due process in a child custody case by failing to allow her a full opportunity to be heard at trial, this issue was dismissed because constitutional issues are not considered for the first time on appeal. Further, defendant failed to preserve her statutory argument that the trial court failed to control the presentation of evidence during trial in violation of N.C.G.S. § 1A-1, Rule 611.

2. Child Custody and Support—findings of fact—sufficiency

The trial court's 19 November 2013 permanent child custody and visitation order was supported by adequate findings of fact. The Court of Appeals addressed and overruled defendant's challenges to the pertinent findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody within the restrictions placed upon plaintiff was in the best interests of the minor children.

3. Child Custody and Support—future modifications-improper waiver of analysis

The trial court erred in a child custody case by issuing an order waiving analysis for future modifications. That portion of the order was contrary to law as it predetermined what amounted to a substantial change in circumstances. Therefore, this portion of the order was remanded to the trial court to strike the improper language.

4. Appeal and Error—preservation of issues—failure to argue judicial bias

The trial court did not abuse its discretion in a child custody case by awarding joint custody to plaintiff father, by denying defendant mother's request to return to California, and by elevating intervenor grandmother to parental status based on alleged judicial bias. Defendant failed to preserve her argument of judicial bias because

she has not argued that the trial court had any sort of personal bias or prejudice against her, nor did she move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor grandparent visitation order.

Appeal by defendant from order entered 19 November 2013 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 9 September 2014.

Arnold & Smith, PLLC, by Matthew R. Arnold and Kyle A. Frost, for plaintiff-appellee.

Church Watson Law, PLLC, by Kary C. Watson and Seth A. Glazer, for defendant-appellant.

Weaver, Bennett & Bland, P.A., by William G. Whittaker, for intervenor-appellee.

BRYANT, Judge.

Where defendant-mother raises a constitutional argument for the first time on appeal, we dismiss the argument. Where the trial court's findings of fact are adequately supported by the record, we uphold the findings of fact. Where the trial court's order includes language establishing what would amount to a preemptive modification to custody of the minor children, we remand for the trial court to strike the improper language from the order. And, where defendant-mother's argument of judicial bias was not raised before the trial court, we dismiss this argument on appeal.

On 14 August 2012, in Iredell County District Court, plaintiff-father David Cox filed a verified complaint for child custody and motion for an emergency *ex parte* custody order. The complaint named as defendant the children's mother, Michelle Cox. In his allegations, plaintiff-father stated that from December 2010 to 3 June 2012, he and defendant-mother resided in Mooresville, North Carolina with their two minor children. Plaintiff-father alleged that on 3 June 2012, defendant-mother and their two minor children (born in 2008 and 2009) flew to California under a pretext of attending a family wedding. Defendant-mother had been scheduled to return to North Carolina on 10 June but failed to do so. On 3 August 2012, plaintiff-father was served with defendant-mother's request for a domestic-violence restraining order and a petition

for separation and request for child custody and visitation order.[1] In her request for a domestic violence restraining order, defendant-mother alleged that plaintiff-father struggled with thoughts of suicide. In his complaint, plaintiff-father acknowledged that he was under the treatment of a therapist and a psychiatrist, and he attended weekly group therapy sessions. However, plaintiff further asserted that he never told defendant-mother or either of the minor children he had thoughts of hurting them. Plaintiff-father sought a temporary order compelling defendant-mother to return the children to North Carolina. Defendant-mother filed a motion for *ex parte* temporary emergency custody relief as well as her answer, counterclaims, and a response to plaintiff-father's motion for an emergency *ex parte* custody order.

On 24 August 2012, the trial court entered a memorandum of judgment/order memorializing a temporary agreement between the parties wherein defendant-mother would have temporary custody of the minor children and plaintiff-father would have supervised visitation. A consent order regarding temporary child custody was entered 18 October 2012.

On 1 October 2012, the minor children's paternal grandmother Betty Jo Layne filed a motion for permission to intervene and for visitation. Intervenor-paternal grandmother requested that she be granted visitation with the minor children and that she be the minor children's day-care provider. On 3 January 2013, the trial court granted intervenor-grandmother's motion to intervene.

On 19 November 2013, following a hearing during which all parties were present and represented by counsel, the trial court entered an order on permanent child custody and grandparent visitation. The trial court concluded that both plaintiff-father and defendant-mother were fit and proper persons to share joint legal and physical custody and that the intervenor-grandmother had a substantial relationship with the minor children. The trial court awarded defendant-mother permanent primary joint custody and plaintiff-father secondary joint physical custody which he could exercise through visitation. If plaintiff-father could not exercise his parenting time, intervenor-grandmother could exercise time in his stead. Further, the trial court ordered that plaintiff-father's custodial schedule was to be dependent on his residing with intervenor-grandmother.

Defendant-mother appeals.

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1. The California court declined to exercise jurisdiction over child custody under the UCCJEA and no custody order was ever entered in California.

On appeal, defendant raises the following issues: whether the trial court (I) violated defendant's due process rights; (II) entered an order establishing permanent custody and grandparent visitation not supported by adequate findings of fact; (III) erred in issuing an order waiving analysis for future modifications of the order; and (IV) abused its discretion in awarding joint custody to plaintiff.

I

[1] Defendant first argues that the trial court violated her constitutional right to due process by failing to allow her a full opportunity to be heard at trial. Specifically, defendant contends the trial court failed to intervene when plaintiff's counsel effectively limited her testimony. We dismiss this argument.

Despite defendant's contention that she was denied her constitutional due process rights, we note that defendant did not raise such an objection or argument at trial. Defendant is raising her constitutional argument for the first time on appeal.

"A constitutional issue not raised at trial will generally not be considered for the first time on appeal. Furthermore, the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citations omitted). Therefore, we will not address defendant's constitutional argument.

Defendant also contends the trial court failed to fulfill its statutory duty to control the presentation of evidence during trial in violation of our Rules of Civil Procedure, Rule 611.

Pursuant to our Rules of Civil Procedure, "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . . and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2013). As noted previously, defendant failed to note an objection or preserve this argument before the trial court. *See* N.C. R. App. P. 10(a) (2014) ("In 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."); *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) ("This subsection of Rule 10 is directed to matters which occur at trial

and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." (citation omitted)). Accordingly, because defendant's constitutional and statutory arguments were not properly preserved for our review, they are hereby dismissed.

II

[2] Next, defendant argues that the trial court's 19 November 2013 permanent custody and visitation order is not supported by adequate findings of fact. We disagree.

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact.

Peters v. Pennington, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citations and quotations omitted).

A.

As to findings of fact 23, 24, 28, and 30, defendant contends that these are mere recitations of testimony and cannot be used to support the trial court's conclusions of law. Pursuant to Civil Procedure Rule 52, "[i]n all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2013). Defendant cites *Long v. Long*, for the proposition that "findings that merely recapitulate the testimony or recite what witnesses have said do not meet the standard set by the rule." 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (citation omitted).

Finding 23 summarizes some testimony from plaintiff's witnesses regarding his demeanor prior to and after the parties' separation, but essentially the same information is included in detail in other findings of fact which defendant has not challenged, so to the extent that this finding is simply a "recitation," it is not necessary to support the trial court's conclusions of law. Defendant also challenges Finding 24, which is odd, since this finding is entirely favorable to her. It states that "all of

the plaintiff's and defendant's witnesses testified as to the fact that the Defendant is a very good mother who takes very good care of the minor children. There is no dispute that the Defendant has been the minor children's primary caregiver." But again, this finding is simply a summary of evidence which has been set forth in more detail in other findings of fact and even if it is a recitation, it is not necessary to support the trial court's conclusions. Finding 28 is not a recitation of evidence but is a finding regarding the Intervenor's assistance and care for the minor children which is supported by the testimony of several witnesses. Finding 30 is a summary of testimony of Plaintiff's step-father, but again, other extensive and detailed findings of fact which are not challenged support the trial court's conclusions of law.

In addition, despite defendant's assertion that these findings of fact cannot be used to support the trial court's conclusions of law or decree, defendant fails to identify or argue what, if any, particular conclusion of law would be unsupported if findings of fact 23, 24, 28, and 30 were stricken. Regardless, these findings provide a summary of witness observations which give background information about plaintiff and defendant that is valuable in a determination of child custody and visitation. Defendant's argument is overruled.

B.

Defendant contends that findings of fact 8, 10, 25, 27, and 28 are not supported by evidence presented at trial. These findings indicate that after the birth of plaintiff and defendant's first child, other than feedings, plaintiff "share[d] in all other child rearing aspects, such as bathing, diaper changing, etc. [] Plaintiff was also primarily responsible for cooking the family meals." The findings also indicate that while plaintiff and defendant lived in North Carolina, the intervenor aided in the care of the minors: babysitting during plaintiff's "numerous doctor visits," reading to them, taking them to the movies, and taking them on outdoor adventures. A review of the record provides ample support for the trial court's findings of fact. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Therefore, defendant's arguments are overruled.

C.

Defendant challenges the trial court's findings of fact 12, 16, 17, 21, 22, and 25. These findings of fact revolve around plaintiff's treatment for his mental health issues.

As to finding of fact 16, defendant contends the trial court's findings failed to reflect the severity of plaintiff's suicidal ideation. Defendant

contends the trial court found plaintiff was admitted to the hospital on two occasions but that plaintiff testified it was at least three occasions. Defendant contends that the trial court found that plaintiff was "simply seeking attention from [defendant] by stating he had a 'bad day.' However, . . . [plaintiff] repeatedly expressed detailed suicide plans, including driving off a bridge and shooting himself." We note that the trial court's finding of fact 16 acknowledges that plaintiff felt despondent "and had racing thought patterns and thoughts of suicide." The trial court also found that the evidence disclosed a pattern of behavior: "Plaintiff would seek attention from the Defendant by saying he was 'having a bad day' and thinking of harming himself. The Defendant would then insist that [plaintiff] check himself into a psychiatric facility or have his [psychiatrist] change his medications." We note testimony that prior to one commitment to a psychiatric center plaintiff informed defendant he was "having a real bad day"; plaintiff then swallowed four magnesium pills. Upon review, the trial court's finding of fact 16 appears to focus on plaintiff's pattern of conduct. Also, throughout the order, it is clear the trial court acknowledged plaintiff's history of suicidal ideation; therefore, we find defendant's contention that the trial court minimized the significance of this unsustainable. Thus, as to this contention, defendant is overruled.

Defendant further challenges finding of fact 17. Defendant argues the trial court's findings indicate that plaintiff's mental illness was "manufactured by [defendant]." Finding of fact 17 states that defendant accompanied plaintiff to the majority of his psychiatric appointments and "tended to do most of the talking," and when plaintiff's psychiatrist failed to diagnose plaintiff in accordance with defendant's conclusions as to plaintiff's illness, "Defendant found another psychiatrist . . . to treat [] Plaintiff." The record provides testimony that defendant noted events that led her to believe plaintiff was bi-polar "[a]nd she was looking for this sort of diagnosis . . . ." There was also testimony that defendant attended almost all of plaintiff's psychiatric counseling sessions. However, in the context of the trial court's order, this finding was less relevant to a diagnosis of plaintiff's mental illness than it was illustrative of the relationship between the parties. We overrule defendant's contention.

Defendant also challenges the trial court's finding of fact number 22 which states that after plaintiff and defendant separated, plaintiff and intervenor "decided to start weaning [] Plaintiff off his psychiatric medications. By December 2012, [] Plaintiff reported feeling like his old self, and with the concurrence of Dr. Masters, he discontinued all

medications." We note that the record does not reflect any testimony by Dr. Masters. Plaintiff testified that the general consensus in intervenor's family was that plaintiff was over-medicated. Plaintiff further testified that during a conversation with his mother, intervenor informed him that she had been stepping down his medication. Plaintiff admitted to being shocked and reluctant, but testified "she would say: Just try it. Just do it for this amount of time. If it works, it works. If it doesn't, we'll go back on it, whatever. Just do this." Plaintiff testified that he began seeing Dr. Masters for treatment in December 2012, after this weaning process had begun. By July 2013, plaintiff had stopped taking medication. He testified absent objection that Dr. Masters was aware of this and did not object but rather wanted to see how plaintiff was managing without the medication. We hold that the evidence of record sufficiently supports the trial court's finding of fact. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Thus, defendant's argument is overruled.

As to the remaining findings of fact listed in this subsection of defendant's argument, defendant does not specifically support her challenge with any contention, and we deem those arguments 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.").

D.

Defendant challenges the trial court's finding of facts 13, 14, and 31 which generally state that plaintiff and defendant's move from California to North Carolina was intended to be permanent. Defendant contends the evidence establishes this move was intended to be temporary. Plaintiff's testimony, however, supports the trial court's findings of fact.

> Q. Now, when y'all decided to move to North Carolina was that intended to be a temporary thing?
>
> A. No, not at all.

Testimony from plaintiff also states that he and defendant looked at several houses. The house they selected to purchase was right down the street from both an elementary and middle school and within three miles of a high school. "And we thought that would be a great location because [the elder child, (age 5 at the time of trial)] wouldn't have to drive far to school and – when she did get her license." As the record provides substantial evidence in support of the trial court's finding, we overrule defendant's argument. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733.

E.

Next, defendant contends that finding of fact 38 is not supported by evidence. Finding of fact 38 includes five subparagraphs and over a page of single-spaced text. Defendant challenges only one small portion of this finding, which addresses the *Ramirez-Diaz* factors in considering the best interests of the children as to defendant's relocation to California. Defendant challenges the trial court's finding that she is "manipulative and controlling" and that there is little likelihood that she would comply with the trial court's order if allowed to relocate her family to California. In essence, defendant's argument attacks the trial court's assessment of her credibility and weighing of the evidence of both parties. However, there is abundant evidence in the record to support the trial court's findings and numerous unchallenged findings which also support the trial court's characterization of plaintiff as unlikely to comply with the court's orders.

We note that defendant does not challenge the trial court's finding that she "took the minor children to California on the false pretense of attending a wedding. . . . Defendant kept her intentions to divorce a secret for several months after she left for California, and did not admit her intentions until [] Plaintiff was served with the paperwork from California." Moreover, defendant failed to challenge the trial court's finding that "Defendant refused to return the minor children to North Carolina, despite [the trial court's order], until [] Plaintiff agreed to sign a Consent Order [regarding temporary child custody granting plaintiff only supervised visitation.]" We also note the trial court's unchallenged finding that plaintiff's therapist testified that after defendant left for California, she saw improvement in plaintiff: he lost weight, was more energetic, smiled more, and began looking for jobs. "[Plaintiff's therapist] attributed the change to the discontinuance of the medications, the change in Plaintiff's environment, and [plaintiff] being able to take control over his own life rather than being controlled and manipulated by [] Defendant." This argument is overruled.

F.

Defendant next challenges the trial court's finding of fact 37.

> Both [] Plaintiff and [] Defendant are fit and proper persons to have the care and custody of their minor children, and at this time it is in the best interest and welfare of said children that their custody be granted jointly to both [] Plaintiff and Defendant with [] Defendant having the

> primary physical custody of the children, and [] Plaintiff having secondary joint custody of the children.

Defendant argues that the evidence does not support a finding that plaintiff is a fit and proper person to care for the minor children or that it is in their best interest for plaintiff to have joint legal and physical custody, since plaintiff suffers from an untreated bi-polar disorder and has been repeatedly hospitalized for suicidal ideation.

First, we note that finding 37 is actually a conclusion of law and, despite its label, we review it as such; so, we review it to determine if the findings of fact support this conclusion of law. *See In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) ("We note the trial court classified multiple conclusions of law as 'findings of fact.' We have previously recognized the classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact. When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." (internal citations and quotations omitted)).

Again, defendant's argument attacks the trial court's assessment of the credibility of various witnesses and of the severity of plaintiff's mental illness and capacity to care for the minor children. The order's extensive findings, most of which are unchallenged, show that the trial court carefully considered plaintiff's history of mental illness and concluded that he has improved sufficiently enough to care for the children with Intervenor's assistance.

The trial court's unchallenged findings of fact indicate that plaintiff was not on medication at the time of the custody proceeding and, based on defendant's testimony, he had improved appearance, communication skills, and interaction with his minor children. Based on the testimony of plaintiff's therapist, the trial court found that by January 2013, plaintiff was no longer reporting thoughts of suicide and the therapist "had no concerns about [] Plaintiff being a threat to himself or the minor children." As previously discussed, the trial court also found that there was evidence of a close, loving, and caring relationship between plaintiff and his minor children. We note that the trial court granted defendant primary physical custody and plaintiff secondary physical custody. The

terms of plaintiff's secondary joint physical custody established visitation with the understanding that plaintiff was to reside with intervenor so that should plaintiff's mental condition deteriorate, intervenor would be present to monitor and care for the minor children. These unchallenged findings support the trial court's conclusion of law that its award of custody is in the best interest of the minor children. Therefore, we overrule defendant's argument.

G.

Defendant argues that absent the challenged findings of fact, the trial court had no basis to determine that plaintiff is a fit and proper parent and that the minor children's best interests are served by granting him joint custody. As we have addressed and overruled defendant's challenges to the aforementioned findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody (within the restrictions placed upon plaintiff) was in the best interests of the minor children, we overrule defendant's argument.

III

[3] Defendant argues that the trial court committed error by issuing an order waiving the requirement of further analysis before the order can be modified. Specifically, defendant contends the trial court erred by including a provision in its order wherein a showing that plaintiff's therapist "has no concerns about his mental health or his ability to care for the minor children if living on his own" is predetermined to be a substantial change in circumstances. We agree.

In paragraph 22 of the decretal portion of its order, the trial court stated the following:

> [Plaintiff] is presently residing with the Intervenor. The custodial schedule set forth herein is dependent upon [plaintiff] continuing to reside with Intervenor. [Plaintiff] shall reside with Intervenor and although [plaintiff] may take short outings during the day with the children (i.e., pool, movies, shopping, park) the Court wants to ensure that should Plaintiff's [sic] mental health deteriorate, that Intervenor is present to monitor and care for the minor children. [Plaintiff] may petition the Court for a hearing to lift this residency requirement thus permitting, him to continue this custodial schedule after no longer living with Intervenor, and it shall be lifted pursuant to an Order

> of the Court upon a showing by [plaintiff] that a therapist who has currently evaluated [plaintiff] has no concerns about his mental health or his ability to care for the minor children if living on his own. *If [plaintiff] makes such a showing then it is hereby deemed to be a substantial change in circumstances affecting the well-being of the minor children and warranting the lifting of this residency requirement.*

(Emphasis added).

Pursuant to General Statutes, section 50-13.7, "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2013). "A 'change of circumstances,' as applied to N.C. Gen. Stat. § 50–13.7 means such a change as affects the welfare of the child." *Balawejder v. Balawejder*, 216 N.C. App. 301, 308, 721 S.E.2d 679, 684 (2011) (citation and quotations omitted).

> This Court has held that the trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child. A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact.

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443-44 (2011) (citations and quotations omitted). To predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any findings of fact. *See generally Register v. Register*, 18 N.C. App. 333, 335, 196 S.E.2d 550, 551 (1973) ("It is error to modify or change a valid prior order with respect to support or custody absent findings of fact of changed circumstances."). The italicized portion of decretal paragraph 22 of the trial court's order in effect allows for a preemptive modification of custody. That portion of the order is contrary to law as it predetermines what amounts to a substantial change in circumstances. Therefore, we remand this order to the trial court to strike the aforementioned language.

IV

[4] Defendant argues the trial court abused its discretion in awarding joint custody to plaintiff, in denying defendant's request to return to

California, and elevating intervenor to parental status. Defendant contends that the trial court "entered her order with a clear bias against [defendant]." She contends "[t]he presence of this bias, coupled with the numerous erroneous Findings and Conclusions discussed above, calls into question whether [the trial court's] decision was in fact the product of logical reasoning and the proper application of law to fact." We dismiss this argument.

Defendant's argument confuses the trial court's duty to weigh the credibility of the evidence and to resolve the disputes raised by the evidence with improper judicial bias. *See Carpenter v. Carpenter*, ___ N.C. App. ___, ___, 737 S.E.2d 783, 790 (2013) ("The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state. *See Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) ("As is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. . . ."). The findings of fact should resolve the disputed issues clearly and relate these issues to the child's welfare; the conclusions of law must rest upon the findings of fact.").

Defendant bases her argument of bias primarily on a colloquy that occurred between the trial court, counsel, and defendant during her testimony when the trial court overruled an objection by her counsel and directed her to answer a question. Defendant has not challenged the trial court's ruling on this evidentiary issue on appeal. Defendant also bases her argument on the fact that the trial court ruled against her by granting plaintiff primary custody and not permitting her to take the children to live in California. This is not the sort of "judicial bias" that is prohibited by law; in fact, trial judges are required to rule on evidentiary issues, to assess the credibility of witnesses, and to make rulings which will, in most cases, be adverse to one party or the other. The type of judicial bias which is considered to be improper is bias based upon the judge's "personal bias or prejudice concerning a party."

> Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518, specifically states that
>
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

> (a) The judge has a personal bias or prejudice concerning a party.

Sood v. Sood, ___ N.C. App. ___, ___, 732 S.E.2d 603, 608, *cert. denied*, *review denied*, *appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336, 339 (2012).

> This Court has held that an alleged failure to recuse is not considered an error automatically preserved under N.C. R. App. P. 10(a)(1). . . . Where appellant failed to move that the trial judge recuse himself, [she] cannot later raise on appeal the judge's alleged bias based on an undesired outcome.

Id. at ___, 732 S.E.2d at 608 (citation omitted).

Defendant has not argued that the trial court had any sort of personal bias or prejudice against her; she did not move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor-grandparent visitation order. Defendant has failed to preserve her argument of judicial bias. Accordingly, this argument is dismissed.

The order of the trial court is affirmed in part and remanded in part.

Affirmed in part; remanded in part.

Chief Judge McGEE and Judge STROUD concur.

BRYAN DEBAUN, Plaintiff
v.
DANIEL J. KUSZAJ, also known as D.J. KUSZAJ, a Durham police officer in his individual and official capacity; CITY OF DURHAM, NORTH CAROLINA, Defendants

No. COA12-1520-2

Filed 16 December 2014

Civil Rights—direct claim under North Carolina Constitution—action permitted only when no adequate remedy under state law—tort claims provided adequate remedy—affirmative defense does not negate adequacy

In an action for plaintiff's injuries resulting from an encounter with a police officer, the trial court did not err by granting summary judgment for defendants on plaintiff's claim under the North Carolina Constitution. A cause of action under the state Constitution is permitted only when there is no adequate remedy under state law. Even though plaintiff would have to overcome the affirmative defense of public officer immunity for his common law tort claims, his claim under the state Constitution was barred because he could seek a remedy on the common law tort claims.

Appeal by plaintiff from order entered 5 September 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 April 2013. Unpublished opinion filed 6 August 2013. Petition for discretionary review allowed by the North Carolina Supreme Court for remand to this Court for reconsideration 23 December 2013.

M. Alexander Charns, for plaintiff-appellant.

Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellee City of Durham.

Kennon Craver, PLLC, by Joel M. Craig, for defendant-appellee Daniel J. Kuszaj.

CALABRIA, Judge.

Bryan DeBaun ("plaintiff") appeals from the trial court's order granting summary judgment in favor of Daniel J. Kuszaj ("Officer Kuszaj") and the City of Durham (collectively "defendants") with respect to plaintiff's claims for assault and battery, use of excessive force, malicious

prosecution, and violation of plaintiff's rights under the North Carolina Constitution. Initially, this Court filed an unpublished opinion which affirmed the trial court's order. *Debaun v. Kuszaj*, ___ N.C. App. ___, 749 S.E.2d ___, 2013 N.C. App. LEXIS 795, 2013 WL 4007747 (2013) (unpublished). Plaintiff then filed a petition for discretionary review ("PDR") with the North Carolina Supreme Court, which entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)." Upon reconsideration, we affirm.

On the evening of 23 July 2009 and in the early morning hours of 24 July 2009, Officer Kuszaj of the Durham Police Department ("DPD") was on patrol and observed plaintiff standing or walking in a turning lane, carrying a twelve-pack of beer. Officer Kuszaj approached plaintiff and asked him for identification, which plaintiff provided. Since plaintiff appeared to Officer Kuszaj to be intoxicated, Officer Kuszaj decided to take plaintiff into custody for his own safety. When Officer Kuszaj began to restrain plaintiff with handcuffs, plaintiff asked whether he was under arrest, and Officer Kuszaj said no. Officer Kuszaj then continued trying to restrain plaintiff, but plaintiff attempted to run away. Officer Kuszaj then directed his electronic impulse device ("taser") into plaintiff's back. As a result, plaintiff immediately fell down, hitting his face on the concrete and breaking his nose and jaw. Plaintiff incurred medical and dental expenses in excess of $30,000.00 for permanent injuries he sustained in the fall.

Plaintiff was transported to Duke Hospital, where Officer Kuszaj issued plaintiff a citation for impeding the flow of traffic, drunk and disorderly conduct, and resisting, delaying or obstructing an officer ("resisting an officer"). After a trial in Durham County District Court, plaintiff was found not guilty of drunk and disorderly conduct and resisting an officer, but found guilty of impeding traffic.

On 14 July 2011, plaintiff filed a complaint seeking damages and permanent injunctive relief. Plaintiff asserted claims of assault and battery, use of excessive force, and malicious prosecution against the City of Durham and against Officer Kuszaj in both his official and individual capacities. In the alternative, plaintiff claimed defendants violated his rights under Article I, Sections 19, 20, 21, and 35 of the North Carolina Constitution. Defendants filed an answer denying the material allegations of the complaint and asserting the affirmative defenses of governmental immunity and public officer immunity.

On 25 July 2012, defendants filed a motion for summary judgment. After a hearing, the trial court granted defendants' motion with respect to all of plaintiff's claims. The court based its ruling on the "insufficiency of the forecast of evidence as to the elements of each such claim" and made no ruling with respect to Officer Kuszaj's affirmative defense of public official immunity. Plaintiff appealed the trial court's ruling to this Court, which on 6 August 2013 filed an opinion affirming the trial court's order. Plaintiff then filed a PDR with the North Carolina Supreme Court on 6 September 2013. On 23 December 2013, our Supreme Court entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)."

The *Craig* decision is relevant to only one of plaintiff's arguments from his initial appeal to this Court. Specifically, *Craig* would apply to plaintiff's contention that the trial court erred by granting summary judgment in favor of defendants with respect to plaintiff's direct claim for relief under the North Carolina Constitution. Accordingly, we limit our analysis in this opinion to that issue.

"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) (citation omitted).

"[A] direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state remedy.' " *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). In *Craig*, our Supreme Court considered whether a separate constitutional claim was available when the plaintiff's common law negligence claim was barred by the absolute defense of sovereign immunity. 363 N.C. at 338, 678 S.E.2d at 354. The Court held that "plaintiff's common law negligence claim is not an 'adequate remedy at state law' because it is entirely precluded by the application of the doctrine of sovereign immunity. To hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury." *Id.* at 342, 678 S.E.2d at 356-57.

In *Wilcox v. City of Asheville*, ___ N.C. App. ___, 730 S.E.2d 226 (2012), *disc. rev. denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d

363 (2013), this Court applied *Craig* in the context of excessive force claims against law enforcement officers who asserted the defense of public official immunity. The decedent in *Wilcox* was shot and killed while traveling as a passenger in an automobile that was involved in a high speed chase with law enforcement officers, and the appeal involved the plaintiff's claims against the law enforcement officers in their individual capacities. *Id.* at ___, 730 S.E.2d at 229. The trial court had denied the defendant-law enforcement officers' motion for summary judgment with respect to these claims based upon the existence of a genuine issue of material fact regarding whether the officers acted with malice, but granted their motion for summary judgment with respect to the plaintiff's constitutional claim pursuant to *Corum* and *Craig*. *Id.* at ___, 730 S.E.2d at 229-30.

On appeal, this Court reversed the trial court's ruling as to the individual capacity claim against one officer, and affirmed the denial of summary judgment with respect to the remaining officers. *Id.* at ___, 730 S.E.2d at 236. The Court then considered the plaintiff's appeal regarding her constitutional claim. Specifically, the Court addressed "whether a state common law claim that *may*, at trial, ultimately fail based on a defense of public official immunity is an adequate remedy." *Id.* at ___, 730 S.E.2d at 237. The *Wilcox* Court concluded that the common law claims were adequate, even if public official immunity was available as a defense to the claims:

> Our Supreme Court stated in *Craig* that an adequate remedy must give the plaintiff "at least the *opportunity* to enter the courthouse doors and present his claim" and must "provide the *possibility* of relief under the circumstances." *Id.* at 339-40, 678 S.E.2d at 355 (emphasis added). Thus, adequacy is found not in success, but in chance. Further, when discussing the *inadequacy* of the remedy in that case, the Supreme Court used the language of impossibility, noting that governmental immunity stood as "an absolute bar" to the plaintiff's claim, "entirely" and "automatically" precluded recovery, and made relief "impossible." *Id.* at 340-41, 678 S.E.2d at 355-56. As we have concluded that there is a genuine issue of material fact as to the applicability of public official immunity, it follows that Wilcox still has a chance to obtain relief and that her claims against the Individual Defendants in their individual capacities are not absolutely, entirely, or automatically precluded. Therefore, because the Supreme

> Court's decision in *Craig* indicates that such a possibility warrants a finding of adequacy, we conclude that Wilcox's claims against the Individual Defendants in their individual capacities serve as an adequate remedy.

Id. (footnote omitted). The Court further explained that

> while the Individual Defendants have not lost their ability to assert the immunity defense at trial, the normal effect of the immunity — to deny a plaintiff the opportunity to present her claim — is lost. As this "effectively lost" immunity defense is not operating to prevent Wilcox from presenting her claim, but only as a usual affirmative defense, it cannot be said that the Individual Defendants' assertion of the public official immunity defense entirely precludes suit and renders Wilcox's common law claims inadequate.

Id. Finally, this Court held that the additional requirement of demonstrating malice that is necessary to overcome public official immunity did not render common law tort claims inadequate: "this Court has already rejected a similar argument in a similar case, holding that a remedy is still an adequate alternative to state constitutional claims where the plaintiff must show that the defendant acted with malice, despite the fact that 'such a showing would require more evidence.' " *Id.* at ___, 730 S.E.2d at 238 (quoting *Rousselo v. Starling*, 128 N.C. App. 439, 448-49, 495 S.E.2d 725, 731-32, *disc. rev. denied*, 348 N.C. 74, 505 S.E.2d 876 (1998)).

In *Rousselo*, which the *Wilcox* Court specifically relied upon to reach its holding regarding malice, this Court upheld the trial court's grant of summary judgment in favor of the defendant-law enforcement officer with respect to the plaintiff's state constitutional claim, despite the plaintiff's inability to overcome the defense of public official immunity. 128 N.C. App. at 448-49, 495 S.E.2d at 730-31. The *Rousselo* Court concluded:

> In the present case, however, there is not an absence of a remedy – the common law action of trespass to chattel provides a remedy to the wrong of an unlawful search. We decline to hold that Rousselo has no adequate remedy merely because the existing common law claim might require more of him. As the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches, we hold

> that the trial court did not err in granting summary judgment to [defendant] on this claim.

Id. at 449, 495 S.E.2d at 732 (internal citation omitted). Thus, pursuant to *Rousselo*, a common law claim that also requires the plaintiff to demonstrate that the defendant acted with malice is still considered an adequate remedy which precludes a state constitutional claim.

While we recognize that *Rousselo* predated our Supreme Court's opinion in *Craig*, the *Wilcox* Court specifically held that "we are bound by this previous decision[.]" *Wilcox*, ___ N.C. App. at ___, 730 S.E.2d at 238. Based upon this holding, we are compelled to also conclude that the *Rousselo* Court's holding that the affirmative defense of public official immunity does not render common law tort claims inadequate remains good law after *Craig*. *See In the Matter of 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.").

Ultimately, since plaintiff could seek a remedy for his alleged injuries through his claims of assault and battery, use of excessive force, and malicious prosecution, he cannot bring a cause of action under the State Constitution against either the City of Durham or Officer Kuszaj. Pursuant to *Rousselo* and *Wilcox*, the fact that plaintiff must overcome the affirmative defense of public officer immunity to succeed on his tort claims does not negate their adequacy as a remedy. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants as to plaintiff's claim under the State Constitution.

Affirmed.

Judges ERVIN and DILLON concur.

EASTERN CAROLINA REGIONAL HOUSING AUTHORITY, Plaintiff
v.
SHERBREDA LOFTON, Defendant

No. COA14-212

Filed 16 December 2014

1. Appeal and Error—standard of review—ejectment—federally subsidized housing

In cases involving federally subsidized housing, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible. The trial court's findings are binding on appeal if supported by competent evidence, while trial court's conclusions are subject to de novo review.

2. Landlord and Tenant—ejectment—federal subsidized housing—unconscionable

In an action for summary ejectment from a federally subsidized apartment after marijuana and other drug-related materials belonging to defendant's babysitter were found in her apartment, plaintiff did not establish that summarily ejecting defendant from the apartment would not produce an unconscionable result. After analyzing the totality of the surrounding facts and circumstances, the Court of Appeals concluded that evicting defendant based solely upon the actions of her babysitter would be excessive and shockingly unfair or unjust, where defendant had no knowledge of her babysitter's actions, did nothing to encourage or even tolerate them, and eviction would put defendant and her small children on the street.

3. Landlord and Tenant—ejectment—unconscionability requirement—not preempted by federal statute

North Carolina's unconscionability requirement in its summary ejectment statute is not preempted by federal law, and the trial court here did not err by concluding that plaintiff had failed to establish the existence of a right to have defendant summarily ejected from her apartment. Although plaintiff argued that *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, recognized the existence of a strict liability rule that cannot be reconciled with a prohibition against unconscionable evictions, *Rucker* specifically stated that 42 U.S.C. § 1437d(l)(6) did not require eviction but left that decision to the local public housing authority.

Appeal by plaintiff from order and judgment entered 29 August 2013 by Judge David B. Brantley in Wayne County District Court. Heard in the Court of Appeals 11 August 2014.

Ward and Smith, P.A., by Thomas E. Stroud, Jr., E. Bradley Evans, and Cheryl A. Marteney, for Plaintiff.

Legal Aid of North Carolina, Inc., by John R. Keller, Theodore O. Fillette, III, and Andrew Cogdell, for Defendant.

ERVIN, Judge.

Plaintiff Eastern Carolina Regional Housing Authority appeals from a judgment denying its motion for summary judgment and its request to summarily eject Defendant Sherbreda Lofton from an apartment that she occupied under a lease agreement between herself and Plaintiff. On appeal, Plaintiff argues that the trial court erred by denying its request to summarily eject Defendant from the premises in question and by refusing to order that Plaintiff be put into possession of the premises instead. After careful consideration of Plaintiff's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual Background

A. Substantive Facts

Defendant is a resident of Brookside Manor, which is owned and operated by Plaintiff. Defendant began renting an apartment located in Brookside Manor, in which she lived with her three minor children, from Plaintiff in November 2011. Defendant regularly relied upon her friend, Corey Smith, to babysit for her children while she was at work.

On 26 April 2013, Defendant was scheduled to begin work at 11:00 p.m. As a result, Defendant asked Mr. Smith to babysit for her children. Mr. Smith arrived at Defendant's apartment several hours before 11:00 p.m. in order to permit Defendant to get some sleep before going to work. After his arrival, Defendant went to sleep in her bedroom while Mr. Smith and her children remained in the living room.

At approximately 8:30 p.m., Defendant was awakened by her daughter, who informed her that officers from the Goldsboro Police Department had arrested Mr. Smith. The officers in question had come to Defendant's apartment for the purpose of serving outstanding child support warrants upon Mr. Smith. In the course of serving these

warrants, the police officers searched Mr. Smith and found marijuana on his person.

After the officers discovered marijuana on Mr. Smith's person, Defendant authorized the officers to search her apartment. During the ensuing search, the police officers found marijuana and several plastic baggies with torn corners of a type regularly used in drug transactions in the kitchen. According to Mr. Smith, the marijuana and other drug-related materials found in Defendant's apartment belonged to him. In light of Mr. Smith's admission, the officers charged him with possession of marijuana with the intent to sell and deliver.

At trial, Defendant testified that she did not know that Mr. Smith had brought marijuana into her apartment or that Mr. Smith was involved in any drug-related activity. In view of the fact that the officers believed that Defendant had no involvement in Mr. Smith's marijuana-related activities, she was not charged with having committed any crime.

The rental payments that Defendant made in order to occupy her apartment were federally subsidized. Paragraph 16(a) of the lease that governed the circumstances under which the lease could be terminated provided that Plaintiff had the right to terminate Defendant's lease in the event that "any drug-related criminal activity[1] [occurred] on or off the premises by Tenant . . . or another person under Tenant's control."[2] In addition, the lease provided that "Tenant will be obligated to Management . . . [t]o assure that person(s) under Tenant's control will not engage in . . . [a]ny drug-related criminal activity on the premises."

Yolanda Bell, a housing manager employed by Plaintiff, received a police report stemming from the discovery of marijuana and other drug-related items in Defendant's apartment and talked with law enforcement officers about the incident. After concluding that drug-related criminal activity by a person under Defendant's control had occurred in Defendant's apartment, Plaintiff notified Defendant on 22 May 2013 that her lease would be terminated. According to the termination notice, Defendant was required to either vacate her apartment by 1 June 2013 or be subject to an eviction proceeding. After Defendant failed to vacate

1. The lease defined "[d]rug-related criminal activity" as "the illegal manufacture, sale, distribution, or use of a drug, or possession of a drug with intent to manufacture, sell, distribute, or use" the drug.

2. The lease defined a "[p]erson under Tenant's control" as "a person not staying as a guest in the dwelling unit, but [who] is or was present on the premises at the time of the activity in question because of an invitation from Tenant or other member of the household with authority to consent on behalf of Tenant."

her apartment on or before the date specified in the termination notice, Plaintiff initiated the present summary ejectment proceeding.

B. Procedural History

On 3 June 2013, Plaintiff filed a complaint seeking to have Defendant summarily ejected from her apartment. On 13 June 2013, Magistrate C.R. Howard entered a judgment ordering that Defendant be summarily ejected from the apartment. Defendant noted an appeal from the Magistrate's judgment to the District Court on 21 June 2013.

On 12 July 2013, Defendant filed a responsive pleading in which she denied the material allegations of Plaintiff's complaint, asserted a number of affirmative defenses stemming from Defendant's lack of control over Mr. Smith and lack of knowledge of his activities, and sought an award of damages from Plaintiff based upon an alleged failure on Plaintiff's part to adjust her rent after Defendant lost her job. On 22 July 2013, Plaintiff filed a reply to Defendant's counterclaim in which it denied the material allegations of Defendant's counterclaim and asserted as an affirmative defense that it had properly adjusted Defendant's rent following her loss of employment. On 20 August 2013, Defendant voluntarily dismissed her counterclaim with prejudice.

On 6 August 2013, Plaintiff filed a motion seeking the entry of summary judgment in its favor. Plaintiff's summary judgment motion came on for hearing before the trial court at the 20 August 2013 civil session of the Wayne County District Court. Following the conclusion of the summary judgment hearing, a trial on the merits of the remaining issues raised by the pleadings was conducted before the trial court. On 29 August 2013, the trial court entered a judgment denying Plaintiff's motion for summary judgment and rejecting Plaintiff's request that Defendant be summarily ejected from her apartment. Plaintiff noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

In its brief, Plaintiff argues that the trial court erred by denying Plaintiff's request that Defendant be summarily ejected from her apartment on the grounds that this result was sanctioned by federal law and the United States Supreme Court's decision in *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). Defendant, on the other hand, argues that Plaintiff failed to meet the requirements established in N.C. Gen. Stat. § 42-26(a)(2) that must be met as a prerequisite for the termination of Defendant's lease. We find Defendant's argument to be the more persuasive of the two.

A. Standard of Review

[1] "In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible." *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555, 464 S.E.2d 68, 71 (1995). "A trial court's findings of fact are binding on appeal if supported by competent evidence." *Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011). A trial court's conclusions of law, on the other hand, are subject to *de novo* review. *Id.* at 592, 720 S.E.2d 427. " '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)).

B. Controlling Law

[2] 42 U.S.C. § 1437d(l)(6) provides that each "public housing agency shall utilize leases . . . provid[ing] that . . . any drug-related criminal activity on or off [federally assisted low-income housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination[3] of tenancy."[4] In *Rucker*, the Oakland Housing Authority threatened to evict the plaintiffs from their federally subsidized housing unit as a result of the fact that household members or guests engaged in drug-related criminal activity. *Rucker*, 535 U.S. at 128, 122 S. Ct. at 1232, 152 L. Ed. 2d at 265. In response, the plaintiffs argued that 42 U.S.C. § 1437d(l)(6) did not permit evictions based on drug-related criminal activity engaged in by a tenant's household members, guests or other persons under the tenant's control in the absence of a showing that the tenant knew that such activity was occurring. The United States

3. In its brief, Plaintiff repeatedly asserts that the language to the effect that activities of the nature described in the relevant lease provision "shall be grounds for termination" indicates that termination would be mandatory in the event that such conduct occurred. The fact that a particular development constitutes "grounds for termination" does not, however, mean that termination becomes obligatory in the event that the specified development actually occurs. Instead, the fact that something is a "grounds for termination" simply means that the landlord is empowered, if it otherwise chooses to do so, in the event that development in question takes place.

4. Plaintiff and Defendant agree that Mr. Smith was a "person under [Defendant]'s control" who engaged in "drug-related criminal activity" on the premises.

Supreme Court rejected the plaintiffs' argument, holding that "42 U.S.C. § 1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." *Rucker*, 535 U.S. at 130, 122 S. Ct. at 1233, 152 L. Ed. 2d at 266. In spite of its admission that Defendant had no knowledge of or involvement in Mr. Smith's drug-related activity, Plaintiff argues that 42 U.S.C. § 1437d(l)(6) as construed in *Rucker* authorized, and in fact required, Defendant's eviction.

Defendant, on the other hand, asserts that the trial court's decision to reject Plaintiff's request that Defendant be summarily ejected from her apartment was correct on the basis of principles of North Carolina law, which provides that the basis for and scope of summary ejectment proceedings is established and governed by N.C. Gen. Stat. § 42-26. *Morris v. Austraw*, 269 N.C. 218, 221, 152 S.E.2d 155, 158 (1967). According to N.C. Gen. Stat. § 42-26(a)(2), a tenant may be summarily ejected from a particular premises when the tenant has "done or omitted any act by which, according to the stipulations of the lease, his estate has ceased." "In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable." *Charlotte Hous. Auth. v. Fleming*, 123 N.C. App. 511, 513, 473 S.E.2d 373, 375 (1996) (citing *Morris*, 269 N.C. at 223, 152 S.E.2d at 159). In view of the fact that "[o]ur courts do not look with favor on lease forfeitures," *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988), this Court has required public housing authorities to comply with the requirements of N.C. Gen. Stat. § 42–26(a)(2) in order to summarily eject a tenant. *Lincoln Terrace Associates, Ltd. v. Kelly*, 179 N.C. App. 621, 623, 635 S.E.2d 434, 436 (2006); *Fleming*, 123 N.C. App. at 513, 473 S.E.2d at 375.

In its judgment, the trial court concluded that Plaintiff had failed to prove by a preponderance of the evidence that it was entitled to summarily eject Defendant pursuant to N.C. Gen. Stat. § 42–26(a)(2). Although the lease between the parties gave Plaintiff the right to evict Defendant based upon the undisputed evidence that Mr. Smith was a "person under [Defendant]'s control" who engaged in "drug-related criminal activity" on the premises, Defendant argues that Plaintiff has failed to show that summarily ejecting Defendant would not be unconscionable.

Neither this Court nor the Supreme Court have defined the circumstances under which it would or would not be unconscionable for a landlord to summarily eject a tenant who was otherwise subject to eviction. In fact, we have not been able to identify any case in which the extent to which a landlord did or did not satisfy the fourth criteria set out in *Morris* and its progeny has been directly addressed by either of North Carolina's appellate courts. Under such circumstances, we are entitled to look to a reputable dictionary in order to understand the reference to "unconscionability" as it appears in our summary ejectment jurisprudence. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993) (stating that "[c]ourts may use the dictionary to determine the definition of words"). As a result, after consulting such a reference, we conclude that the term "unconscionable" as used in *Morris* and similar decisions means "excessive, unreasonable" or "shockingly unfair or unjust." *Merriam–Webster Online Dictionary* 2014 .[5]

As we have already noted, the undisputed record developed at trial tends to show that Defendant was not aware that Mr. Smith was involved in any drug-related criminal activity in her apartment, with the police having accepted her denials of involvement in Mr. Smith's conduct in the course of deciding not to charge her with the commission of any criminal offense. Instead of attempting to conceal any evidence relating to the drug-related activities in which Mr. Smith engaged in her apartment, Defendant cooperated with the investigating officers by consenting to a search of her residence, an action that led to the discovery of additional evidence upon which the charge subsequently brought against Mr. Smith was, at least in part, predicated. As the trial court found, the undisputed evidence tends to show that Defendant had not been accused of any criminal conduct, much less convicted of any criminal charges, while she occupied her apartment in Brookside Manor or of violating any lease provision during the term of the lease agreement between the parties. In fact, Defendant had never even been the subject of any complaints from the occupants of nearby units during the time that she resided in the Brookside Manor complex. Since the date of Mr. Smith's arrest, Defendant has not had any contact with Mr. Smith or invited him to enter her apartment. Finally, Defendant was unemployed on the date that Plaintiff initiated this action, having lost her job due to the inability to obtain care for her children, has three small children who live with her, and has no ability to move in with relatives in the area in the event that she and her children are evicted.

5. http://www.merriam-webster.com/dictionary/

Ms. Bell testified that, given the fact that Mr. Smith had engaged in criminal activity in Defendant's apartment, she had no alternative except to seek Defendant's removal from the apartment regardless of other surrounding facts and circumstances.[6] As a result, the trial court found as a fact that Plaintiff decided to evict Defendant based solely on the fact that Mr. Smith had engaged in criminal activity in the apartment without giving any consideration to any of the surrounding facts and circumstances that tended to mitigate, if not completely excuse, her conduct in allowing Mr. Smith to enter the premises. After analyzing the totality of the surrounding facts and circumstances, we have no hesitation in concluding that evicting Defendant based solely upon the actions of Mr. Smith, of which Defendant had no knowledge and which she had done nothing to encourage or even tolerate when doing so would put Defendant and her three small children "on the street," would be "excessive" and "shockingly unfair or unjust" and that Plaintiff has not, for that reason, established that summarily ejecting Defendant from the apartment would not produce an unconscionable result.

C. Preemption

[3] Although Plaintiff does not dispute the fact that it must establish that summarily ejecting Defendant from her apartment pursuant to N.C. Gen. Stat. § 42-26(a)(2) requires a showing that the proposed eviction is not unconscionable,[7] it does argue that the necessity for

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6. Although Plaintiff repeatedly asserts that Ms. Bell did, in fact, make a discretionary decision concerning whether to evict Defendant based upon a consideration of all relevant factors, the trial court found that Ms. Bell treated the fact that Mr. Smith had engaged in drug-related activity in Defendant's apartment as rendering Defendant's eviction mandatory and the record contains evidence that supports this determination.

7. Plaintiff does, however, argue that N.C. Gen. Stat. § 42-63(a) (providing that "the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit" where "[c]riminal activity has occurred on or within the individual rental unit leased to the tenant"; "[t]he individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity"; or "[t]he tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises") indicates that North Carolina mandates the eviction of tenants in or near whose apartments drug-related activity occurs. The force of Plaintiff's argument as applied to situations like the one at issue here is, however, completely undercut by N.C. Gen. Stat. § 42-64(a)(1), which provides that "[t]he court shall refrain from ordering the complete eviction of a tenant" where "[t]he tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises."

a showing that the eviction would not be unconscionable has been preempted by the applicable provisions of federal law.[8] We do not find this argument persuasive.

A principle of state law is subject to preemption by federal law in situations in which (1) Congress explicitly provides for the preemption of state law; (2) Congress implicitly indicates the intent to occupy an entire field of regulation to the exclusion of state law; or (3) the relevant state law principle actually conflicts with federal law. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S. Ct. 1145, 1150-51, 99 L. Ed. 2d 316 (1988). "Whether federal law preempts state law under any of these theories is essentially a question of Congressional intent." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 45, 681 S.E.2d 465, 476 (2009) (citing *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509, 109 S. Ct. 1262, 1273, 103 L. Ed. 2d 509, 527 (1989)).

In this case, Plaintiff argues that the North Carolina state law requirement that Plaintiff prove that summarily ejecting Defendant would not be unconscionable conflicts with 42 U.S.C. § 1437d(l)(6) as construed in *Rucker* and is, for that reason, preempted in situations like this one. "Conflict preemption exists when compliance with both state and federal requirements is impossible, or 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990)). We do not believe that the provisions of North Carolina summary ejectment law conflict with or stand as an obstacle to the achievement of the purpose and objectives sought to be achieved by 42 U.S.C. § 1437d(l)(6) as construed in *Rucker*.

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8. Defendant has filed a motion in this Court seeking to have the portion of Plaintiff's brief addressing the preemption issue stricken on the grounds that Plaintiff did not raise the issue of preemption at any time prior to the filing of its reply brief and was, for that reason, precluded from advancing this argument on appeal by virtue of N.C.R. App. P. 10(a)(1) (stating 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 grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). However, given the fact that our review of the record demonstrates that the issue of whether state or federal law controlled the resolution of this case was the subject of extensive discussion before the trial court, we conclude that the preemption issue has been properly presented for our consideration. As a result, Defendant's motion is hereby denied.

Congress enacted the Anti–Drug Abuse Act of 1988 for the purpose of reducing the amount of drug-related crime in public housing projects and ensuring the availability of "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, 535 U.S. at 134, 122 S. Ct. at 1235, 152 L. Ed. 2d at 268 (quoting 42 U.S.C. § 11901(1)). In order to achieve this objective, the Act requires public housing agencies to "utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(l)(6). As we have already noted, the United States Supreme Court has interpreted this statutory language to mean that local public housing authorities have "the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." *Rucker*, 535 U.S. at 130, 122 S. Ct. at 1233, 152 L. Ed. 2d at 266. As a result, *Rucker* stands for the proposition that the relevant statutory provisions authorize public housing authorities to evict "innocent" tenants on whose premises criminal activity occurred even though those tenants were not aware that the criminal activity in question was occurring.

In seeking to persuade us that North Carolina's state law "unconscionability" requirement is subject to conflict preemption, Plaintiff argues that *Rucker* recognizes the existence of a strict liability rule that cannot be reconciled with a prohibition against "unconscionable" evictions. The fundamental problem with Plaintiff's argument is the fact that *Rucker* specifically states that "[42 U.S.C. § 1437d(l)(6)] does not *require* the eviction of any tenant who violated the lease provision" and, instead, "entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' . . . 'the seriousness of the offending action,' . . . and 'the extent to which the leaseholder has [] taken all reasonable steps to prevent or mitigate the offending action.' " *Rucker*, 535 U.S. at 133-34, 122 S. Ct. at 1235, 152 L. Ed. 2d at 268 (emphasis in original). In addition, Plaintiff has not provided any additional support for its assertion that Congress and the United States Department of Housing and Urban Development require housing authorities to evict any and all tenants whose household members or guests engage in the types of criminal activity enumerated

in 42 U.S.C. § 1437d(l)(6), including unlawful drug activity.[9] On the contrary, HUD appears to encourage local housing authorities to engage in an individualized consideration of the surrounding circumstances in each instance in which eviction is being considered and "to be guided by compassion and common sense in responding to cases involving the use of illegal drugs," with eviction being "the last option explored, after all others have been exhausted."[10] As a result, given this emphasis on the need for local housing authorities to make individualized eviction determinations and the absence of evidence tending to show the existence of any sort of *per se* eviction requirement in the relevant statutory provisions or administrative rules, we are unable to see how North Carolina's unconscionabilty requirement "stands as an obstacle to the accomplishment and execution," *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476, of the established federal policy of ensuring the availability of "federally assisted low-income housing that is decent, safe, and free from illegal drugs." *Rucker*, 535 U.S. at 134, 122 S. Ct. at 1235, 152 L. Ed. 2d at 269.

In seeking to persuade us to reach a different result, Plaintiff argues that compliance with both state and federal law is impossible in instances like this one because there is no distinction between the innocent tenant defense rejected in *Rucker* and the unconscionability requirement that exists under North Carolina law. We do not find this argument persuasive, however, given that *Rucker* merely authorizes the

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9. Plaintiff does, on a number of occasions, argue that the fact that evictions for drug-related activities are exempt from the usual internal dispute resolution process available to public housing tenants indicates that drug-related lease violations are subject to a strict liability rule under which eviction is mandatory in the event that such a lease violation occurs. However, we do not find this argument persuasive given that the availability of an alternative remedy under which a tenant is entitled to contest a proposed eviction says nothing about the nature of the conduct for which eviction is an appropriate response.

10. The statements quoted in the text of this opinion were contained in a 16 April 2002 letter from HUD Secretary Mel Martinez to local public housing authorities that was sent in the aftermath of *Rucker* in which he urged local public housing authorities to exercise the right to evict innocent tenants in a responsible manner and to avoid a rigid application of the relevant lease provision. In addition, Assistant HUD Secretary Michael Liu corresponded with local public housing authorities on 9 June 2009 for the purpose of noting that they were not required to evict an entire household every time a violation of the relevant lease provision occurs and were free to consider a wide range of factors in making eviction-related decisions, including "the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy," and "urg[ing local public housing authorities] to consider such factors and to balance them against the competing policy interests that support the eviction of the entire household."

eviction of an "innocent" tenant while the fact that the tenant is unaware of the criminal activity being engaged in in his or her apartment is only one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an "innocent" tenant. For example, we are unable to see how it would be unconscionable for a local public housing authority to evict a tenant who, despite an initial lack of awareness of the fact that criminal activity was occurring in his or her unit, refused or failed to cooperate with any subsequent investigation into the drug-related criminal activity in question. As a result, given our determination that simultaneous compliance with both state and federal law is not impossible in this instance and that enforcement of North Carolina's unconscionability requirement does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476, we conclude that North Carolina's unconscionability requirement is not preempted by federal law and that the trial court did not err by concluding that Plaintiff had failed to establish the existence of a right to have Defendant summarily ejected from her apartment pursuant to N.C. Gen. Stat. § 42-26(a)(2).[11]

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 judgment should be, and hereby is, affirmed.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

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11. As a result of our determination that North Carolina law governs the resolution of this case and that Plaintiff has not established that it was entitled to have Defendant summarily ejected pursuant to N.C. Gen. Stat. § 42-26(a)(2), we need not consider the extent, if any, to which "good cause" must be shown as a matter of federal law before a tenant can be evicted from a federally subsidized housing unit or the extent to which the trial court erred by determining that Plaintiff was required to consider any applicable mitigating factors prior to seeking to have Defendant evicted from her apartment.

GEORGE GILBERT, PLAINTIFF
v.
GUILFORD COUNTY; GUILFORD COUNTY BOARD OF COMMISSIONERS; LINDA O. SHAW, CHAIR; BILL BENCINI, VICE-CHAIR; ALAN BRANSON; KAY CASHION; CAROLYN Q. COLEMAN; BRUCE E. DAVIS; HANK HENNING; JEFF PHILLIPS; AND RAY TRAPP, EACH SUED IN HER OR HIS OFFICIAL CAPACITY AS A MEMBER OF THE GUILFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA14-523

Filed 16 December 2014

Public Officers and Employees—county director of elections—salary—statutory requirements

There was sufficient evidence to support the trial court's conclusion that the Guilford County Board of Elections failed to comply with N.C.G.S. § 163-35(c) in setting the salary of its former Director of Elections (Plaintiff). The statute requires that the salary of a county director of elections "be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." The evidence showed that, among the seven largest counties in North Carolina, Guilford County ranked third in voter population, third in voter registration, and first in election complexity; Plaintiff ranked highest in years of service; and Plaintiff's salary ranked last from 2006 to 2012.

Appeal by Defendants from judgment entered 12 December 2013 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 7 October 2014.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for Plaintiff-appellee.

Office of the Guilford County Attorney, by County Attorney J. Mark Payne, for Defendants-appellants.

DILLON, Judge.

Guilford County, the Guilford County Board of Commissioners, and the nine individual members of that Board in their official capacities ("Defendants") appeal from the trial court's judgment in favor of its former Director of Elections, George Gilbert, ("Plaintiff"), in the amount of $38,503.00, plus interest and costs. For the following reasons, we affirm the trial court's judgment.

I. Summary

Plaintiff was employed by Guilford County as its Director of Elections. He brought this action claiming that Defendants breached his employment contract because his salary did not comply with N.C. Gen. Stat. § 163-35(c). A county is afforded some measure of discretion to set the salary of its director of elections; however, the salary must be in accordance with State law. State law requires, in part, that the salary of a county director of elections "shall be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." *Id.* We believe there was sufficient evidence in the record to sustain the decision of the trial court who, sitting as a jury, found for Plaintiff.

II. Background

Plaintiff brought this action claiming Defendants breached his employment contract by not meeting the requirements of N.C. Gen. Stat. § 163-35(c). At a bench trial on the matter, the evidence presented tended to show as follows: Plaintiff was Director of Elections for Guilford County for twenty-five years, from 1988 until his retirement in 2013. His salary was set by the Guilford County Board of Commissioners based on a recommendation by the local board of elections after the local board performed a performance review of his work. From 2008 through 2012, Plaintiff received the highest rating in his performance reviews, a "5[,]" meaning that his work "[c]onsistently exceeds expectation for [his] job[.]"

Plaintiff presented evidence using eight tables he had prepared from data comparing salary information for the election directors of the seven largest counties in the state, which included Guilford County.

Gary Bartlett, the former Executive Director for the North Carolina State Board of Elections, who served from 1993 to 2013, testified for Plaintiff. After counsel questioned him regarding his resume and qualifications, Mr. Bartlett was tendered as an expert in North Carolina elections law and procedure. He stated that during his tenure he had daily contact with various county election directors and opined that Plaintiff was the "best county director" in the State. Mr. Bartlett received numerous contacts from various county officials regarding the salary provision in N.C. Gen. Stat. § 163-35(c) and, in answering those concerns, he relied upon a 1987 opinion letter from the North Carolina Attorney General's Office which recited factors to be considered in setting the salary of a county election director. Mr. Bartlett applied these factors in making recommendations to county officials regarding the salaries of election

directors and their adherence to G.S. 163-35(c). He opined that Guilford County was similar in complexity to Wake and Mecklenburg Counties. He stated that it was his opinion that Plaintiff's salary was paid much lower than it should have been paid.

Defendants did not present any evidence at trial.

On 12 December 2013, the trial court entered a written judgment finding that Plaintiff's salary was not commensurate with those of other directors in counties similarly situated and similar in population and number of registered voters for fiscal years 2010 through 2012, in violation of N.C. Gen. Stat. § 163-35(c), and ordered Defendants to pay the amount of $38,503.00, plus interest and costs "as provided by law." Defendants filed timely notice of appeal from the trial court's judgment.

III. Standard of Review

The standard of review of a judgment rendered following a bench trial 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." *Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted). "Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Id.*

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a), a trial court need not make "a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[;]" however, "it does *require specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (emphasis in original).

IV. N.C. Gen Stat. § 163-35(c)

The key issue in this case is whether the trial court erred in its conclusion that Plaintiff's salary was not in accord with N.C. Gen. Stat. § 163-35(c), which sets forth mandatory guidelines which counties must follow in setting the compensation of their election directors.

G.S. 163-35(c) is divided into three paragraphs. The first paragraph provides that a county which maintains full-time registration (five days per week), such as Guilford, must provide a salary to its director of elections (1) "in an amount recommended by the county board of elections and approved by the Board of County Commissioners" and (2) which

"shall be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." N.C. Gen. Stat. § 163-35(c) (2013).

The second paragraph of G.S. 163-35(c) states, *inter alia*, that the compensation must be "at a minimum rate of twelve dollars ($ 12.00) per hour[.]" *Id.*

The final paragraph of G.S. 163-35(c) provides that a county shall also provide its election director with "the same vacation leave, sick leave, and petty leave as granted to all other county employees." *Id.*

There is little case law interpreting G.S. 163-35, and no case law explaining the salary requirements of the current version of subsection (c).[1] Accordingly, we must apply our rules of statutory interpretation. "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (citation omitted).

We find the portion of subsection (c) of the statute in question to be clear and unambiguous; therefore, we will give effect to its plain meaning.

We agree with the trial court that an intent or "purpose of N.C.G.S. § 163-35[c] is to ensure the integrity of elections in North Carolina[]" by preventing fluctuations in election directors' salaries based on political reasons by requiring that the election director's salary be based on the salary of election directors in similar counties and setting a minimum salary for that position in the amount of $12.00 per hour. The language, counties "similar in population and number of registered voters[,]"

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1. Defendants cite to *Goodman v. Wilkes County Board of Commissioners*, 37 N.C. App. 226, 245 S.E.2d 590 (1978) as interpreting G.S. 163-35(c). This case interpreted a prior version of subsection (c). Also, *Goodman*, did not interpret the key phrase of subsection (c) before us but merely determined that this statute did not provide for overtime pay and it was up to the board of commissioners to determine the salary of the election secretary once the minimum limit of $20 per day was met. *Id.* at 227-28, 245 S.E.2d at 591. The current version of subsection G.S. 163-35(c) addresses overtime. Therefore, *Goodman* is inapplicable.

has a clear meaning. While the term "similarly situated" is less clear, we believe that the factors in the Attorney General's 1987 opinion letter clarifying the term "similarly situated," which Plaintiff relied upon in his evidentiary presentation, is instructive. *See Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681-82, 652 S.E.2d 251, 252-53 (2007). We believe, therefore, that in adhering to the salary mandate of G.S. 163-35(c), counties should consider — in addition to comparison of county population and registered voters — other factors, which may include the county's electoral "situation[,]" including the "percentage of population registered; the unusual degree of transience of population; the relative strength of political parties and the level of dissention between or among them; the complexity of the electoral districts for state, county and municipal offices; and generally speaking, the comparable sophistication, politically and otherwise, of population" and "the degree of experience, effectiveness of work, and level of dedication exhibited by particular affected supervisors in this and in all future situations."

The trial court considered many of these factors in making its ruling, as the judgment states it considered "specifically the testimony of [Plaintiff] and Mr. Bartlett, [P]laintiff's expert witness, Exhibit 3 (a series of tables generated by [Plaintiff]) and [P]laintiff's Exhibit 4, (an affidavit of Mr. Bartlett, which included his expert report and an opinion from the North Carolina Attorney General dated July 31, 1987.)"

We note that the order contains findings which appear to be recitations of some of the evidence presented by Plaintiff or, at best, ultimate findings of fact without any specific findings of fact regarding the similarity of population or voter registration or any of the similarly situated factors from the opinion letter. *See Quick*, 305 N.C. at 452, 290 S.E.2d at 658. "[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (emphasis in original). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000) (citation omitted). However, "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999). The

better practice would have been for the trial court to make specific findings regarding the evidence and testimony it considered. Here, however, Defendants did not present any evidence, and only one inference can be drawn from applying these factors to Plaintiff's evidence; therefore, we need not remand for further findings.

Regarding the evidence, Plaintiff presented a series of tables which compared the data from the seven largest counties in North Carolina, which includes Guilford County. One table showed that Guilford County was ranked third in both population and voter registration, behind Mecklenburg and Wake counties. Moving to the "similarly situated" factors, Plaintiff presented another table which showed that Guilford County ranked first in election complexity, and Mr. Bartlett added more complexity considerations relating to Guilford County that would support this conclusion. Evidence showed that Plaintiff ranked highest in years of service among the seven county directors, and Mr. Bartlett opined that Plaintiff was the "best" county director in the State. Evidence showed that Plaintiff was paid at the midpoint of his salary range and that five of the other compared directors were paid above the midpoint salary range. One of Plaintiff's tables showed that Guilford County ranked third for election director's salary in 2006-2007 but fell to fifth from 2008 until 2012. From 2006 until 2012, Guilford County ranked last in the annual average salary growth over this period of time. Mr. Bartlett opined that Plaintiff was paid much lower than he should have been paid.

After considering Guilford County's population and the number of registered voters, and weighing the "similarly situated" factors, the evidence supports the trial court's ultimate finding that Plaintiff's "salary for fiscal years 2010-2012 was not commensurate with the salaries paid to directors in counties similarly situated and similar in population and number of registered voters" and the conclusion that Plaintiff's salary for 2010 to 2012 violated the requirements of G.S. 163-35(c).[2]

We are not persuaded by Defendants' argument that they were only required to pay Plaintiff the minimum $12.00 per hour as set forth in the second paragraph of G.S. 163-35(c) because there was no county which was "similar" enough to Guilford County to make a salary comparison.

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2. N.C. Gen. Stat. § 1-52(2)(2013) sets a three year statute of limitation "[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." Accordingly, the trial court's damages were limited to only three years, from 2010 to 2012.

First, Defendant's interpretation goes against the plain meaning of the statute. "Similar" does not mean identical. Second, Defendants' interpretation would lead to absurd results: If a large county was determined to be far and away much more complex than any other, then that county could legally pay its director of elections $12.00 per hour, even if all other directors in large counties made substantially more.

Likewise, we are not persuaded by Defendants' argument regarding Plaintiff's car allowance not being considered as part of his salary. The trial court was free to consider this information and Plaintiff's explanation in making its determination as to whether Plaintiff's salary complied with the statute.

Finally, we address Defendants' argument that G.S. 163-35(c) gives each county discretion to set the compensation for its director of elections. We agree that a county is afforded some measure of discretion in that the statute does not provide the specific salary or a definitive formula for fixing the salary. However, a county's discretion must be exercised within the parameters set forth in the statute. *See*, *e.g.*, *Sanders v. State Personnel Director*, 197 N.C. App. 314, 320-21, 677 S.E.2d 182, 187 (2009) (holding that the laws and regulations concerning State employees become part of the State employees' employment contracts), *disc. review denied*, 363 N.C. 806, 691 S.E.2d 19 (2010). For instance, no county has the discretion to pay its director less than $12.00 per hour since State law mandates that the salary must be at least $12.00 per hour. Here, the Defendants did not present any evidence showing how Plaintiff's salary complied with G.S. 163-35(c). Accordingly, Defendants' arguments are overruled.

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

HARVEY LYNWOOD MONTAGUE, JR., Plaintiff
v.
TERESA MONTAGUE, Defendant

No. COA14-382

Filed 16 December 2014

1. Divorce—equitable distribution—LLC—post-separation distributions from LLC to husband

In an equitable distribution action involving an LLC and a commercial building, the trial court erred by characterizing two post-separation distributions from the LLC to the husband as management fees and treating them as the husband's separate property The husband was bound by the manner in which these distributions were characterized on the LLC tax returns.

2. Divorce—equitable distribution—commercial building—post-separation appreciation—separate property—parties bound by tax returns

In an equitable distribution action involving an LLC and a commercial building, the trial court's findings supported its treatment of a portion of an LLC's post-separation appreciation as the husband's separate property. Although there is a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property, in this case the wife and the husband were bound by the manner in which the distributions to the husband were treated on the LLC tax returns.

3. Divorce—equitable distribution—LLC—lawn mower—loan payments—distribution from corporation—sufficiency of evidence

In an equitable distribution action involving an LLC and a commercial building, the trial court did not err by treating loan payments on a mower as distributions to the husband from the LLC. There was no evidence of the amount of debt still owed on the mower at the date of distribution or of how much the mower had depreciated in value; without those valuations in the record, the trial court was not required to distribute the mower and did not abuse its discretion in not including it within the equitable distribution scheme.

4. Divorce—equitable distribution—estate plans—donor's intention

In an equitable distribution action involving an LLC and a commercial building, it was within the trial court's discretion to consider the husband's parents' estate plans in making its equitable distribution determination. A trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations.

5. Divorce—equitable distribution—LLC—distribution to husband

In an equitable distribution action involving an LLC and a commercial building, the court's distribution of the LLC to the husband was supported by the trial court's application of the distribution factors and its findings, which were supported by the evidence. Although the wife challenged the trial court's finding that she did not contribute to the LLC, noting that she signed a loan guaranty along with the husband for the loan which financed the purchase of the building from the husband's parents, the trial court's reference to contributions was read as equity contributions toward the LLC.

6. Divorce—equitable distribution—weight given to factors—explanation of balance

In an equitable distribution action involving an LLC and a commercial building, the trial court was not required to show how it balanced the distribution factors. The weight given to each factor is in the trial court's discretion and there is no need to show exactly how the trial court arrived at its decision regarding unequal division.

7. Divorce—equitable distribution—assets co-owned by husband—motion in limine

In an equitable distribution action in involving an LLC and a commercial building, the trial court did not abuse its discretion by granting the husband's motion in limine to prohibit the introduction of evidence regarding assets the husband co-owned with his father. The trial court found that there was not sufficient evidence to value these assets.

Appeal by Defendant from judgment entered 15 August 2013 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 21 October 2014.

Sandlin Family Law Group, by Deborah Sandlin, for Plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for Defendant-appellant.

DILLON, Judge.

Defendant Teresa Montague appeals from a trial court's equitable distribution judgment which awarded an unequal division of marital and divisible assets. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

In 1986, Harvey Lynwood Montague, Jr. ("Husband") and Teresa Montague ("Wife") were married. Husband is active in the commercial real estate business.

In 2010, Husband commenced this action seeking absolute divorce and equitable distribution. Wife filed her answer and asserted counterclaims. The parties were granted a divorce.

In 2012, a bench trial on the equitable distribution claim was conducted with the parties presenting testimony and evidence regarding certain assets. On 15 August 2013, the trial court entered its equitable distribution judgment/order granting unequal distribution in favor of Husband. Wife filed timely notice of appeal from this judgment.

II. Standard of Review

In its judgment, the trial court entered extensive findings of fact and conclusions of law with regard to the classification, valuation, and distribution of assets. Our standard of review of such judgments is well-settled: "[W]hen 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." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and quotation marks omitted). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Id.* (citation omitted). The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Best v. Gallup*, ___ N.C. App. ___, ___, 715 S.E.2d 597, 598 (2011) (citation omitted), *appeal dismissed and disc. review*

denied, 365 N.C. 559, 724 S.E.2d 505 (2012). The trial court is the sole judge of the weight and credibility of the evidence. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). "[W]hen 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." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359-60 (citations omitted), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

III. Analysis

"The trial court must classify, value, and distribute marital property and divisible property in equitable distribution actions." *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 353-54, 588 S.E.2d 905, 907 (2003). On appeal, Wife argues that the trial court erred in its judgment in its classification and distribution of certain property. We address each one in turn below.

A. L.T. Montague Properties, LLC

In Wife's first two arguments, she contends that the trial court misclassified as Husband's separate property certain property associated with a limited liability company, known as L.T. Montague Properties, LLC (the "LLC"). This LLC was formed by Husband and Wife during their marriage — with Husband owning 51% and Wife owning 49% — for the purpose of owning and operating a multi-tenant commercial building known as the Montague Center which was being transferred to them by Husband's parents.

Specifically, Wife argues that the trial court misclassified two assets. She contends that the trial court erred in treating two post-separation distributions made by the LLC to Husband totaling $31,210.00 as Husband's separate property. Further, she contends that the trial court erred in classifying $32,063.53 of the post-separation appreciation of the Montague Center (and, therefore, of the LLC)[1] as Husband's separate property.

1. Post-Separation Distributions to Husband

[1] Wife contends that the trial court erred in treating two post-separation distributions made to Husband by the LLC as his separate property by

1. The trial court found that the Montague Center appreciated $127,063.53 post-separation; that $95,000.00 of this appreciation was passive and, therefore, divisible property; but that $32,063.53 was due to Husband's efforts and, therefore, his separate property.

characterizing these distributions as "management fees" he earned for managing the Montague Center after the parties separated. Specifically, the trial court treated as Husband's separate property a $5,010.00 distribution made to him in 2009 and a $26,200.00 distribution made to him in 2010. The key finding in the judgment with regard to these distributions states as follows:

> 48. [Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any "fit-up" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. *Plaintiff pays himself a management fee for this work in the form of a distribution.*

(Emphasis added.)

We agree with Wife that our holding in *Hill v. Hill*, ___ N.C. App. ___, 748 S.E.2d 352 (2013), compels us to conclude that the trial court should have classified these distributions as divisible property rather than treating them as Husband's separate property. As divisible property, they must be distributed by the trial court. Accordingly, we reverse the trial court's classification of these distributions and remand the matter, directing the trial court to reclassify these distributions as divisible property and to make a distribution of this property.

In *Hill*, the parties set up a Subchapter S corporation as a vehicle for the wife's speech pathology practice. *Id.* at ___, 748 S.E.2d at 357. The corporate tax returns showed that the wife took money from her practice in two ways: (1) in the form of a low salary; and (2) in the form of shareholder distributions. *Id.* at ___, 748 S.E.2d at 358. Evidence was presented that she took shareholder distributions for the purpose of avoiding federal taxes for Social Security and Medicare. *Id.* The trial court re-characterized the post-separation shareholder distributions to the wife as salary that she earned and, therefore, classified them as her separate property. *Id.* On appeal, however, our Court reversed, stating that "[t]he parties are bound by their established methods of operating the corporation." *Id.* Our Court essentially determined that since the parties elected to treat a portion of the money paid to the wife as shareholder distributions, rather than treating it as salary expenses of the corporation, these funds were part of the retained earnings of the corporation. *Id.* Our Court then held that since "[t]he retained earnings of a Subchapter S corporation, upon distribution to shareholders, are

marital property[,]" the wife was bound by the treatment of these shareholder distributions to her as divisible property. *Id.*

In the present case, the LLC is taxed as a partnership. The two distributions to Husband at issue here are treated on the LLC's 2009 and 2010 federal tax returns as withdrawals of partnership capital, and *not* as expenses of the partnership for property management services. Therefore, these distributions were part of the capital of the LLC and, therefore, belonged to the LLC. Had the distributions been treated as "management fees" on the federal tax returns, they would have been LLC expenses, which would have reduced the LLC's net income for 2009 and 2010 by $31,210.00, which potentially would have reduced Wife's personal tax liability.[2]

We note that Husband may have, in fact, earned these distributions as management fees; however, we are compelled by *Hill* to conclude that Husband, being the majority owner and a manager of the LLC, is "bound" by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. Accordingly, we strike the trial court's finding that Husband was paid for his efforts in managing the LLC, reverse the portion of the judgment treating the post-separation distributions from the LLC to Husband as his separate property, and remand the matter to the trial court to classify them as divisible property and to distribute this property.

2. Post-Separation Appreciation of the Montague Center

[2] Wife argues that the trial court erred in classifying a portion of the post-separation appreciation of the Montague Center (and, therefore, of the LLC) as Husband's separate property. We disagree.

Our General Assembly has determined that all appreciation of marital property which occurs "after the date of separation" shall be classified as "divisible property" EXCEPT that any appreciation resulting from the post-separation "actions or activities of a spouse" shall not be classified as divisible property. N.C. Gen. Stat. § 50-20(b)(4)(a) (2011). We have recognized that this statute creates a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property:

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2. We note that, like in *Hill*, Husband's motivation here to treat the distributions as withdrawals of capital rather than as earned management fees may have been to avoid payment of federal taxes for Social Security and Medicare.

> [A]ll appreciation and diminution in value of marital and divisible property is *presumed* to be divisible property *unless the trial court finds* that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control.

Wirth v. Wirth, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original).

In the present case, the trial court found that Husband had rebutted this presumption in that $32,063.59 of the post-separation appreciation of the Montague Center "was due to [post-separation] activities" of Husband. The only post-separation "activities" of Husband described in the judgment are contained in the trial court's Finding of Fact No. 48, in which the court found that Husband "actively manages the [Montague Center] (negotiates all leases, collects all rent payments, arranges for "fit-ups" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation."

In the context of N.C. Gen. Stat. § 50-20(b)(4)(a), active appreciation "refers to the 'financial or managerial [post-separation] contributions' of one of the spouses" and would not be classified as divisible property. *Brankney v. Brankney*, 199 N.C. App. 375, 386, 682 S.E.2d 401, 408 (2009). We note that in the present case, though, the trial court also found that the Husband was paid "a management fee for *this work*." We further note that there is no finding that Husband performed any post-separation activities for which he was not paid a fee or that the amount of the fee did not represent fair compensation to perform these services. However, it is not necessary to determine whether under N.C. Gen. Stat. § 50-20(b)(4)(a) the post-separation appreciation of a marital asset caused by the activities of a spouse should be treated as the separate property of that spouse *where the spouse was paid a fee from marital assets to perform the very services causing the post-separation appreciation to occur*. Rather, we believe that in this case Wife — like Husband — is "bound" by the manner in which these distributions to Husband were treated on the LLC tax returns. Specifically, as the trial court found, Wife is a manager of the LLC; and, further, Wife has only argued in this appeal that the post-separation distributions to Husband should *not* be treated as fees he earned for managing the LLC, but rather as unearned distributions of LLC capital.

Accordingly, after striking the trial court's finding that Husband was paid for his efforts in managing the LLC, we are left with the trial court's findings that Husband performed post-separation activities with respect to the Montague Center – without any finding that he was paid to perform these activities - and that his activities resulted in a portion of the LLC's post-separation appreciation. We believe that these findings support the trial court's treatment of a portion of the LLC's post-separation appreciation as Husband's separate property, and, therefore, Wife's argument is overruled.

B. Classification of Lawnmower

[3] Wife argues that the trial court erred classifying the Kubota lawnmower as Husband's separate property because it found that the mower was paid for with LLC funds.

Here, the trial court found that the mower was purchased post-separation in Husband's name for $14,433.12, with the entire purchase price being financed. The trial court also found that the LLC made the loan payments for the mower. "Under the source of funds rule, an asset purchased after separation with marital funds is marital property to the extent that marital funds were used toward its purchase." *Freeman v. Freeman*, 107 N.C. App. 644, 657, 421 S.E.2d 623, 630 (1992) (citation omitted). Therefore, as the LLC was marital property, it might appear that at least some portion of the mower would qualify as divisible property since the loan payments were made from marital funds. However, missing from the evidence is the amount of debt still owed on the mower at the date of distribution. Further, there was no evidence as to how much the mower had depreciated in value. In an equitable distribution action, the court is required to classify, value, and distribute marital and divisible property. *Ubertaccio*, 161 N.C. App. at 353-54, 588 S.E.2d at 907. We have also noted that "divisible property must be valued *as of the date of distribution.*" *Helms v. Helms*, 191 N.C. App. 19, 31, 661 S.E.2d 906, 914, (citing N.C. Gen. Stat. § 50-21(b) and emphasis in original), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008). Without these valuations in the record, the trial court was not required to distribute the mower and, accordingly, did not abuse its discretion in not including it within the equitable distribution scheme, as he testified that it was titled in his name. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83 (1993) (holding that the burden of proof on valuation rests on the spouse seeking to have the property classified as marital or divisible property); *Grasty v. Grasty*, 125 N.C. App. 736, 738-39, 482 S.E.2d 752, 754 (1997) (holding that to meet her burden the spouse must offer credible evidence of value and if fails to do so, the trial court has no

obligation to find the value). The trial court did not err in treating the loan payments on the mower as distributions to Husband from the LLC from which *he* made the loan payments on the mower. We note that the trial court considered in its judgment as a distributional factor under N.C. Gen. Stat. § 50-20(c)(12) that the LLC had "paid certain personal expenses of Husband since the parties separated."

C. Distributional Factor-Transfer by Husband's parents

[4] Next, Wife contends that the trial court erred in considering the intent of Husband's parents to transfer the Montague Center commercial building to the LLC as part of their estate planning as a distributional factor. We disagree.

Our General Assembly has provided by statute that a trial court shall divide the net value of marital and divisible property equally between divorcing spouses "unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c). This statute also provides that if the trial court "determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably" and "shall consider" the distributive factors enumerated therein. *Id.* We have held that where a trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010).

Here, the trial court determined that an unequal distribution was equitable and applied several statutory distributional factors in reaching its award. In this appeal, Wife challenges the trial court's application of the factors contained in N.C. Gen. Stat. § 50-20(c)(10) and (12) regarding the Montague Center and the LLC:

> e. **N.C. Gen. Stat § 50-20(c)(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.** Specifically, the Court considered . . . [t]he history and acquisition of the building call for [Husband] to retain this asset rather than [Wife].
>
> . . . .
>
> g. **N.C. Gen. Stat. § 50-20(c)(12). Any other factor which the court finds to be just and proper.** Specifically, the Court considered the following:

> i. The commercial building owned by [the] LLC was conveyed to the LLC by the [Husband's] parents. The conveyance of the commercial building owned by the LLC was intended to be part of [Husband's] parents' estate planning. The purchase price [paid by the LLC for] the property was significantly less than the appraised value of the property at the time of the conveyance.
>
> ii. [Wife] did not make any contributions to or provide services to the acquisition of [the] LLC and its assets. The equity in the building was a gift from [Husband's] parents . . . .

(Emphasis in original.)

This Court has determined that a trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations. For instance, in *Hunt v. Hunt*, in determining whether checks written by a wife's grandmother to both the wife and her husband used to purchase a home was the wife's separate property, this Court held that the trial court could consider the origin of the funds and the donor's intent in determining whether an equal division would be equitable. 85 N.C. App. 484, 488-89, 355 S.E.2d 519, 522 (1987). Therefore, we believe that it was within the trial court's discretion to consider Husband's parents' estate plans in making its equitable distribution determination.

[5] Wife further challenges the trial court's finding that she did not "contribute" to the LLC, noting that she signed a loan guaranty along with Husband for the loan which financed the purchase of the Montague Center from Husband's parents. However, we read the trial court's reference to "contributions" in this finding as "equity" contributions toward the LLC. It is undisputed that neither party made any equity contributions to effect the acquisition of the Montague Center from Husband's parents. Notwithstanding, we believe the trial court's application of the factors and the findings it made, which are supported by record evidence, supported the trial court's distribution of the LLC to Husband in the equitable distribution order.

[6] Wife also makes a general argument that the trial court did not fully explain in its findings its unequal distribution in favor of Husband. However, the trial court is not required to show how it balanced the factors; the weight given to each factor is in the trial court's discretion;

and there is no need to show exactly how the trial court arrived at its decision regarding unequal division. *Fox v. Fox*, 103 N.C. App. 13, 21-22, 404 S.E.2d 354, 358 (1991). After thorough review of the trial court's order and the eighty-nine findings of fact, including those specific findings related to the unequal division of marital property, we find that the trial court properly considered and balanced the factors upon which evidence was presented supporting an unequal division. Wife's arguments are overruled.

D. Distributional Factor of Husband's interest in certain assets

[7] Lastly, Wife contends that the trial court erred in failing to distribute the value of Husband's interest in two entities he co-owns with his father, namely HLM Builder Group and Braxton Village. The trial court found that there was not sufficient evidence for it to value these assets. However, as stated above, it was Wife's burden of proof to value these companies to have the property classified as marital or divisible property. *Albritton*, 109 N.C. App. at 40-41, 426 S.E.2d at 83. Contrary to her arguments, the record shows that throughout this proceeding Wife failed to list a value for these companies on her Equitable Distribution Inventory Affidavit and failed to supplement discovery requests with these valuations. Even after continuances and the filing of motions to compel, she failed by the time of trial to offer a value of these businesses during argument on the motion *in limine*. Even in her amended equitable distribution affidavit, served four days before trial, she failed to provide estimated values for these assets. Wife failed to meet her burden in valuing these companies, and the trial court did not abuse its discretion in granting Husband's motion *in limine* to prohibit the introduction of evidence regarding these assets.

In conclusion, we note that the trial court did account for these assets in its unequal division. Accordingly, Wife's arguments are overruled.

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

AFFIRMED in part, and REVERSED AND REMANDED in part.

Judge HUNTER, Robert C. and Judge DAVIS concur.

[238 N.C. App. 72 (2014)]

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Plaintiff
v.
ANDREW BURNS, GRAYSON BURNS, and JACKSON BURNS, a minor by and through his Guardian ad Litem, JOEL GATES HARRIS, Defendants

No. COA14-741

Filed 16 December 2014

Declaratory Judgments—liability insurance—summary judgment—voluntary worker

The trial court did not err in a declaratory judgment action requesting that the court declare the rights and obligations of the parties pursuant to a Commercial General Liability Insurance Policy by granting defendant Jackson Burns' motion for summary judgment, denying plaintiff's motion for summary judgment, and concluding that Jackson Burns was not a "volunteer worker" as a matter of law. Because eleven-year-old Jackson was compelled by parental authority to sweep the grain bin, and did so not out of his own free will but out of obligation and obedience, he was not considered to have "donated" his work.

Appeal by plaintiff from order entered 1 May 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 17 November 2014.

Young Moore and Henderson, P.A., by Robert C. deRosset and Brian O. Beverly, for Plaintiff-Appellant.

Coy E. Brewer, Jr. for Defendant-Appellee Jackson Burns.

BELL, Judge.

Plaintiff filed a declaratory judgment action against Defendants, requesting that the court declare the rights and obligations of the parties pursuant to a Commercial General Liability Insurance Policy, including that Defendant Greyson Burns[1] was not an insured under the policy for any personal injury claim made against him by Defendant Jackson Burns in relation to an accident that occurred on 13 February 2009. The trial

1. Defendant's name is spelled "Grayson" in this case caption pursuant to Court policy requiring case captions to reflect the caption of the judgment or order appealed from. We do, however, note the correct spelling of Greyson's name.

court granted Defendant Jackson Burns' motion for summary judgment and denied Plaintiff's motion for summary judgment, concluding that Jackson Burns was not a "volunteer worker" as a matter of law. Plaintiff gave timely appeal to this Court. After a careful review of the record and the applicable law, we affirm the decision of the trial court.

I. Factual Background

A. Substantive Facts

Defendant Andrew Burns is married to Brenda Burns and the two have three sons: Greyson, the oldest, Dillon, the middle child, and Jackson, the youngest. Andrew and Brenda Burns own J-Ham Farms, a business started by Andrew Burns' parents. J-Ham Farms engages primarily in the purchasing and re-selling of grain. Andrew Burns is the named insured of Plaintiff's Commercial General Liability Insurance policy number GL0446104.

In 2009, twenty-year-old Greyson was employed by J-Ham Farms. His job duties included, among other duties, cleaning grain bins. Although both sixteen-year-old Dillon and eleven-year-old Jackson helped out around the business, neither was paid for any labor provided in 2009.

On 13 February 2009, Greyson went inside one of the business's grain bins to clean it out. The grain bin was designed with three holes in the floor. Grain would be pulled through the open holes by an auger[2] below the bin. Between 5:00 p.m. and 6:00 p.m., Mr. Burns told Jackson "to go around and help his brothers finish up the grain bin because [they were] going to have to leave shortly to go to [a] meeting" that was scheduled to begin at 6:00 p.m. Greyson did not have to give any instructions to his brothers on cleaning the bin other than telling them on which side of the bin to begin cleaning because all of the brothers had been trained by their father and had helped sweep the bins in the past. It was typical for Jackson to be asked to help clean the grain bins.

As Jackson was sweeping, he accidentally stepped into one of the holes in the floor of the bin. Jackson's left foot and leg became caught in the auger and it began pulling him down. Dillon grabbed Jackson, while Greyson leaped out of the bin to turn off the auger. Jackson's leg was torn off from below the knee. Mr. and Mrs. Burns heard a commotion from inside the house and ran outside. Mrs. Burns called 911 while Mr. Burns tied his belt around Jackson's leg as a tourniquet. Mr. Burns and Greyson returned to the grain bin and began to tear apart the auger in

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2. An auger is a device that moves material by means of a rotating helical part.

an attempt to retrieve the amputated portion of Jackson's leg. Jackson was transported by ambulance to a local high school football field, then airlifted to UNC Chapel Hill Hospital. Efforts to retrieve the severed leg were unsuccessful and Mr. Burns eventually received a phone call from the hospital telling him to not continue efforts to recover Jackson's leg because it had been "too long" and, even if found, the leg could not be reattached. As a result of his injuries, Jackson has undergone extensive medical treatment, including multiple surgeries, and has been provided multiple prosthetic legs.

B. Procedural Facts

Plaintiff filed a complaint on 14 May 2013 in Wake County Superior Court seeking a declaration of the parties' rights and obligations under the insurance policy, including that Greyson was not an insured under the policy with respect to any cause of action brought against him by Jackson arising out of the 13 February 2009 accident. Through his Guardian *ad Litem*, Jackson filed an answer and counterclaim on 13 June 2013, also seeking a declaration of the parties' rights and obligations under the policy, including that Greyson qualified as an insured under the policy for any claim made by Jackson stemming from his 2009 injuries.

Jackson, through his Guardian *ad Litem*, filed a separate action on 7 November 2013 in Robeson County Superior Court against Greyson, seeking damages under the theory that his injuries were the direct and proximate result of Greyson's negligence. In response, Plaintiff amended its initial complaint on 12 December 2013 to reflect that it was providing Greyson with a defense under a reservation of rights and further seeking a declaration that it owed no duty to defend Greyson in the action brought by Jackson. Plaintiff moved for summary judgment on 4 April 2014. Defendant filed a cross-motion for summary judgment on 11 April 2014.

The motions for summary judgment were heard by the trial court on 15 April 2014. The court entered an order 1 May 2014 concluding as a matter of law that Jackson was not a volunteer worker under the policy, denying Plaintiff's motion for summary judgment, and granting summary judgment in favor of Jackson Burns.

II. Legal Analysis

A. Standard of Review

Summary judgment may be granted in favor of a party "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(c). This Court reviews an order granting summary judgment utilizing a *de novo* standard of review. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

B. Substantive Legal Analysis

The insurance policy in place at the time of the accident was for a coverage period of 20 January 2007 to 30 January 2010. In it, Plaintiff contracted to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' " except those "to which [the] insurance does not apply." The policy defines the term "insured" to include both employees and volunteer workers. However, under Section II(2)(a)(1) of the policy, neither are considered to be an "insured" for bodily injury to " 'volunteer workers' while performing duties related to the conduct of [the] business." The policy defines "volunteer worker" as

> a person who is not your "employee", [sic] and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

"In interpreting insurance policies, our appellate courts have established several rules of construction. Of these, the most fundamental rule is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994) (citation omitted), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). Our Supreme Court has stated:

> As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved

> against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06, 246 S.E.2d 773, 777 (1978). Utilizing this framework, we first look to the definition provided by the policy itself. *See id.* (stating that "[w]here a policy defines a term, that definition is to be used"). The policy defines the term "volunteer worker" as an individual that (1) is not an "employee"; (2) "donates his or her work"; (3) "acts at the direction of and within the scope of duties determined by" the named insured; and (4) "is not paid a fee, salary or other compensation" for his work performed for the business. It is undisputed that Jackson was not paid for his work, acted at the direction of Mr. Burns and was not an employee. The issue for this Court is whether or not Jackson *donated* his work to the business and whether, under the terms of the policy, "donate" means simply "to give without pay or compensation," as Plaintiff argues.

The policy does not define the term "donate." This Court has noted that "nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Id.* at 506, 246 S.E.2d at 777. We recognize that the term "donate" can be defined as to perform work "without receiving consideration." Black's Law Dictionary 526 (8th ed. 2004). However, we also note that the policy uses conjunctive language, stating, "donates his work . . . *and* is not paid a fee, salary or other compensation" (emphasis added). Therefore, if the "various terms of the policy are to be harmoniously construed, and if possible, every word and every provision . . . given effect," *Woods*, 295 N.C. at 506, 246 S.E.2d at 777, we conclude that the term "donate" must encompass more than working without receiving payment. Otherwise, the policy language that the work must be without "fee, salary or other compensation" would be superfluous and the term "donate" would have no effect.

Having determined that the term "donate" as used in the policy must mean more than "without compensation," and in order to give effect to every provision of the policy definitions, we consider the context in which the term is used: defining "volunteer worker." We note that the common everyday meaning of the word "volunteer" is characterized by

not only lack of compensation, but also choice and free will.[3] Therefore, considering its common definitions, its use in the context of working as a volunteer, and the policy language as a whole, we conclude that to "donate" one's work under the terms of the policy at issue necessitates the presence of choice and free will.

The evidence in this case tended to establish that Jackson acted not of his own free will but in response to parental instruction. Jackson's deposition reflects the following exchange:

> [Mr. Brewer]: All right. Jackson, on the day that the accident happened, when your father told you to go work in the grain bin, did you believe you had any choice but to obey him and go work in the grain bin?
>
> [Jackson]: No.

When asked if he had ever been asked to help out with the family business and refused, Jackson stated that he had not, and that if his father and brothers asked him to help, he would do it. When asked why he had not worked in the grain bin since the accident, Jackson stated, "they haven't told me to, so I haven't."

It is clear from reviewing the entire record that Jackson's "work" on 13 February 2009 was performed at the direction of his father. Because eleven-year-old Jackson was compelled by parental authority to sweep the grain bin, and did so not out of his own free will but out of obligation and obedience, we do not consider him to have "donated" his work. Therefore, the trial court correctly concluded that, as a matter of law, Jackson was not a volunteer worker and that he was entitled to summary judgment.

III. Conclusion

For the reasons set forth above, we conclude that the trial court did not err in granting summary judgment in favor of Defendant Jackson Burns and denying Plaintiff's motion for summary judgment. Therefore, the trial court's order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

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3. "Volunteer" is defined as "[a] person who performs or gives his services of his own free will. A person who . . . performs a service . . . voluntarily." "Voluntary" is defined as "[a]rising from one's own free will. Acting on one's initiative." The American Heritage Dictionary 1355 (Second College Edition 1982).

SAMMY R. PRUETT, Plaintiff
v.
JOEL D. BINGHAM and JEAN'S BUS SERVICE, INC.,
Defendants and Third-Party Plaintiffs
v.
GREGORY ALAN WIGGINS, MATTHEW BRACKETT and MOUNTAIN HOME FIRE & RESCUE DEPARTMENT, INC., Third-Party Defendants.

No. COA14-191

Filed 16 December 2014

1. Immunity—governmental immunity—emergency medical services—claim barred

The trial court did not err by dismissing an action for claims against a fire department and its employee resulting from an automobile accident. The claims were barred by governmental immunity because the fire department was providing emergency medical services pursuant to its contract with the county.

2. Immunity—governmental immunity—action dismissed—failure to allege waiver of immunity through purchase of insurance

The trial court did not err by dismissing an action for claims against a fire department and its employee. Plaintiff failed to allege that the department waived governmental immunity by purchasing insurance.

3. Immunity—governmental immunity—defense adequately pleaded

The trial court did not err by dismissing an action for claims against a fire department and its employee. Defendants adequately pleaded the affirmative defense of governmental immunity by stating in their answer and motion to dismiss that, as a fire and rescue department and its employee, they were entitled to governmental or sovereign immunity.

4. Immunity—governmental immunity—oral motion to amend complaint—properly denied

The trial court did not err by denying plaintiffs' oral motion to amend their third-party complaint in an action against a fire department and its employee. The fire department raised the defense of governmental immunity in its answer, giving plaintiffs notice of the defense. Moreover, plaintiff could have obtained the fire department's contract with the county from the public record.

Judge STROUD dissenting.

Appeal by third-party plaintiffs from order entered 8 October 2013 by Judge Hugh B. Lewis in Rutherford County Superior Court. Heard in the Court of Appeals 12 August 2014.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr., and Katherine M. Barber-Jones, for defendant and third-party plaintiff-appellants.

Meghann K. Burke and Michael E. Casterline for third-party defendant-appellees Matthew Brackett and Mountain Home Fire & Rescue Department, Inc.

BRYANT, Judge.

Because incorporated fire departments contracted to provide fire prevention, emergency medical, rescue, and ambulance services are granted governmental immunity, we affirm the trial court's dismissal of claims as to Mountain Home Fire & Rescue Department, Inc., and Brackett based on governmental immunity and public official immunity. Where plaintiffs had adequate notice of defendants' affirmative defenses but failed to timely amend their complaint accordingly, plaintiffs' oral motion to amend their complaint was properly denied.

On 28 January 2013, plaintiff Sammy R. Pruett brought suit against defendants Joel D. Bingham and Jean's Bus Service, Inc. The allegations in the complaint assert that on 8 February at 7:00 a.m., Pruett was driving a pickup truck in Hendersonville along I-26 West approaching the U.S. Highway 25 intersection. At the same time, defendant Joel Bingham was driving a commercial bus owned by defendant Jean's Bus Service, also traveling west on I-26 approaching the U.S. Highway 25 intersection. Plaintiff alleged that Bingham's commercial bus rear-ended Gregory Wiggins' 2009 GMC pickup truck. Wiggins' truck was then propelled forward and into the back of a 2006 Ford pickup driven by Edward Burnett. Bingham's bus and Wiggins' truck travelled into the right lane of I-26 where they then collided with plaintiff Pruett's vehicle. Pruett sought a recovery against Bingham and Jean's Bus Service (Bingham and Jean) for damages as a result of the collision.

Bingham and Jean answered Pruett's complaint and filed a third-party complaint against Gregory Wiggins, Matthew Brackett, and Mountain Home Fire & Rescue Department, Inc., as third-party defendants. Bingham and Jean alleged that at the time of the collision,

third-party defendant Brackett was operating a vehicle owned or leased by Mountain Home Fire & Rescue Department. Just prior to the collision, Brackett entered onto I-26 and moved his vehicle into the far left lane. Brackett then stopped his vehicle in the left hand lane in order to make a left turn onto a section of the median. The vehicles traveling in the left hand lane behind Brackett attempted to stop suddenly, resulting in several collisions.

Brackett and Mountain Home Fire & Rescue Department responded that Brackett was driving a fire department vehicle owned by Mountain Home Fire & Rescue Department in the course and scope of his employment and was responding to an emergency call when he positioned the vehicle in the "emergency use" median. Brackett and Mountain Home Fire & Rescue Department made a motion to dismiss contending that the claims were barred by governmental or sovereign immunity and by "public officer / official immunity."

On 26 August 2013, third-party defendants Brackett and Mountain Home Fire & Rescue Department ("defendants") moved for summary judgment. Hearings were held on 26 May and 30 September 2013, during which counsel for defendants indicated that Brackett was responding to an emergency call indicating a motorist was suffering chest pains. By order entered 17 October, the trial court granted defendants' motion to dismiss with prejudice. Bingham and Jean appeal.

On appeal, Bingham and Jean raise the following issues: whether the trial court erred in (I) granting defendants' motion to dismiss; and (II) failing to allow Bingham and Jean's oral motion to amend the third-party complaint.[1]

I

[1] Bingham and Jean first argue the trial court erred in granting defendants' motion to dismiss. Specifically, Bingham and Jean claim the trial court erred in granting defendants' motion to dismiss because: (1) defendants are not governmental entities and, thus, not entitled to such immunity; (2) even if defendants were subject to governmental immunity, such immunity was waived by defendants' liability insurance; and (3) defendants failed to timely produce documents concerning their immunity defense. We disagree.

1. We note that Bingham and Jean's appeal is properly before us where the trial court entered a final judgment as to some but not all of the parties and pursuant to Rule 54(b) certified there was no reason for delay.

> [Summary] judgment sought shall be rendered forthwith 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(c) (2013). "We review an order allowing summary judgment *de novo.*" *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 108, 664 S.E.2d 326, 328 (2008) (citation omitted).

Bingham and Jean contend that because of the negligent act alleged in the third-party complaint, defendants are not entitled to immunity.

"In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999) (citations omitted). "One cannot recover for personal injury against a government entity for negligent acts of agents or servants while they are engaged in government functions." *Id.* at 585, 518 S.E.2d at 524 (citations omitted). "Historically, government functions are those activities performed by the government which are not ordinarily performed by private corporations." *Id.* at 586, 578 S.E.2d at 525 (citation omitted). "The test to determine if an activity is governmental in nature is whether the act is for the common good of all without the element of pecuniary profit." *Id.* at 587, 518 S.E.2d at 525 (citation and quotations omitted). "Activities which can be performed *only* by a government agency are shielded from liability, while activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity." *Id.* at 587, 518 S.E.2d at 526 (citation omitted).

"[T]he organization and operation of a fire department is a governmental function." *Willis v. Town of Beaufort*, 143 N.C. App. 106, 109, 544 S.E.2d 600, 603 (2001) (quoting *Ins. Co. v. Johnson, Com'r. of Revenue*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)) (considering the affirmative immunity defense of a town fire department).

Within Chapter 153A of our General Statutes ("Counties"), our legislature has established that "[a] county may establish, organize, equip, support, and maintain a fire department . . . [or] may contract for fire-fighting or prevention services with . . . incorporated volunteer fire departments . . . ." N.C. Gen. Stat. § 153A-233 (2013) ("Fire-fighting and prevention services"). The county board of commissioners may define

service districts for the purpose of fire protection. *See id.* § 153A-301(a)(2). "If a service district is established . . . for fire protection purposes . . . the board of county commissioners may, by resolution, permit the service district to provide emergency medical, rescue, and/or ambulance services . . . ." *Id.* § 153A-309(a).

In *Luhmann v. Hoenig*, 358 N.C. 529, 597 S.E.2d 763 (2004), our Supreme Court addressed the question of whether the defendant, Cape Carteret Volunteer Fire and Rescue Department, was immune from suit for injuries the plaintiff sustained while the defendant's fire fighters were fighting a brush fire. The plaintiff brought a claim for negligence. A trial court found the defendant liable and awarded the plaintiff damages. On appeal, a divided panel of this Court reversed the trial court's judgment on the basis that General Statutes, section 58-82-5 limited the liability of rural fire departments.[2] In pertinent part, the dissent argued that the defendant was entitled to immunity conferred under section 69-25.8 "which provides sovereign immunity for fire protection districts." *Id.* at 531, 597 S.E.2d at 764 (citation omitted). The plaintiff appealed to our Supreme Court, which looked to the relationship between the County and the defendant fire department. The Court observed that pursuant to Chapter 69, a county's board of commissioners was authorized to provide fire protection services for a district by contracting with an incorporated nonprofit volunteer fire department and that the board was authorized to fund its fire protection services by a tax levy. *Id.* at 533, 597 S.E.2d at 765 (citing N.C. Gen. Stat. §§ 69-25.4(a), 69-25.5(1) (2003)). The Carteret County Board of Commissioners had contracted the defendant fire department to provide fire protection services within the Cape Carteret Fire and Rescue Service District in exchange for compensation generated by the levy of an ad valorem tax on property within the district. *Id.* Our Supreme Court held that the defendant constituted a fire protection district within the meaning of General Statutes, Chapter 69. *Id.* And, "[a]s such, the fire department [was] entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8." *Id.*

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2. "A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman . . . ." *Id.* at 531-32, 597 S.E.2d at 764-65 (quoting N.C. Gen. Stat. § 58-82-5(b) (2003)).

Pursuant to General Statutes, Chapter 69 ("Fire Protection"), Article 3A ("Rural Fire Protection Districts"), section 25.8 ("Authority, rights, privileges and immunities of counties, etc., performing services under Article"),

> [a]ny county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county[.]
>
> . . .
>
> Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights . . . when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county . . . .

Id. § 69-25.8.[3,4]

The record before us reflects that Henderson County established the Mountain Home Fire Protection District in 1965. On 22 May 2002, Henderson County contracted Mountain Home Fire & Rescue Department to provide fire protection services in the district. Per the contract, "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina non-profit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." Based on this agreement, defendant Mountain Home Fire & Rescue Department—a

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3. N.C. Gen. Stat. § 69-25.4 (Tax to be levied and used for furnishing fire protection). "For purposes of this Article, the term 'fire protection' and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death[.]" N.C. Gen. Stat. § 69-25.4(b) (2013).

4. N.C. Gen. Stat. § 58-82-5 (entitled "Liability limited" within Article 82—"Authority and Liability of Fireman," of Chapter 58—"Insurance"). "Any member of a volunteer fire department or rescue squad who receives no compensation for his services as a fire fighter or emergency medical care provider, who renders first aid or emergency health care treatment at the scene of a fire to a person who is unconscious, ill, or injured as a result of the fire shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to gross negligence, wanton conduct or intentional wrongdoing." N.C. Gen. Stat. § 58-82-5(c) (2013).

nonprofit corporation—constitutes a fire protection district within the meaning of Chapter 69. *See Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

Bingham and Jean contend that while *Luhmann* supports the proposition that section 69-25.8 confers immunity on a fire department and its agents for conduct occurring during the course of fighting a fire, Chapter 69 does not provide immunity for a fire department and its agents when providing emergency medical and rescue services outside of the context of fighting fires. *Compare Geiger v. Guilford Coll. Cmty. Volunteer Firemen's Ass'n, Inc.*, 668 F. Supp. 492 (M.D.N.C. 1987) (holding the defendant fire department was immune from liability for injury caused in the course of providing a rescue service not in conjunction with fighting a fire as the rescue service was within the scope of activities fire departments engaged in as recognized by General Statutes, Chapter 69 ("Fire prevention")).

Bingham and Jean direct our attention to section 69-25.4, also within Article 3A ("Rural Fire Protection Districts") of Chapter 69 ("Fire Protection"), which states that a county's Board of Commissioners may levy a tax for "the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death[.] . . . *In providing these services the fire district shall be subject to G.S. 153A-250* [('Ambulance services')]." N.C. Gen. Stat. § 69-25.4(b) (2013) (emphasis added).

While General Statutes, section 153A-250 does not specifically confer immunity, this Court has held that a county-operated ambulance service providing for the health and care of the citizenry was performing a historically governmental function. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. Thus, the ambulance service was engaged in "a governmental activity shielded from liability by governmental immunity." *Id.*

Here, Henderson County has the authority to contract for fire prevention and emergency medical, rescue, and ambulance services. *See* N.C.G.S. §§ 153A-233, 153A-309(a). Henderson County contracted with defendant Mountain Home Fire & Rescue Department to provide fire protection services, including "such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina nonprofit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." In accordance with *Luhmann*, Mountain Home Fire & Rescue Department "[is] entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8." *Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

It is undisputed that Mountain Home Fire & Rescue Department is entitled to governmental immunity for conduct performed in the course of fighting a fire. *See id.* Also, this Court has held that a county-operated ambulance service was entitled to governmental immunity for providing a historically governmental function to citizens. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. To hold that Mountain Home Fire & Rescue Department is not entitled to governmental immunity while providing emergency medical services to the extent supported by its license and training when Henderson County contracted with defendant for such services would be inconsistent with our common law and unsupportable. For these reasons, we overrule Bingham and Jean's argument that defendant Mountain Home Fire & Rescue Department and its agents are not entitled to immunity.

[2] Bingham and Jean further contend the trial court erred in granting defendants' motion for summary judgment because even if defendants were entitled to sovereign immunity, defendants waived their immunity through purchasing liability insurance. However, Bingham and Jean have failed to raise this argument before the trial court. "If a plaintiff [fails] to allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000) (citation omitted).

[3] Additionally, Bingham and Jean argue that defendants failed to adequately plead or produce documents related to defendants' claim of immunity. Bingham and Jean's argument is without merit, for defendants clearly stated in their answer and motion to dismiss that defendants, as a fire and rescue department, were entitled to governmental or sovereign immunity.[5] As such, there was sufficient information in defendants' answer to give Bingham and Jean adequate notice of defendants' affirmative defense. Bingham and Jean's arguments are, therefore, overruled.

II

[4] Bingham and Jean also contend the trial court erred in failing to allow their oral motion to amend the third-party complaint. We disagree.

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5. It appears the entire premise on which the dissent is based concerns an acknowledgment that, even though defendants did plead the affirmative defense of governmental immunity, they "did not reveal any specific reason for governmental immunity" and that "the legal basis for [the] claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss." The majority, however, notes that this pleading was sufficient to put plaintiffs on notice of the defense of governmental immunity and the trial court's denial of plaintiff's motion to amend the pleadings, raised almost three months after the immunity was asserted, was not an abuse of discretion by the trial court.

When reviewing the denial of a motion to amend, the standard of review is whether the trial court's denial amounted to a manifest abuse of discretion. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). A trial court's denial of a motion to amend a complaint can only be reversed upon proof by "a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

Bingham and Jean argue that the trial court erred by not permitting their oral motion to amend their complaint. Specifically, Bingham and Jean assert that because they did not have adequate or proper notice of the basis of the alleged immunity for defendants, who were not a government entity or a public official, they should have been allowed to amend their complaint. Plaintiffs cite *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994), in support of their argument.

In *Gunter*, the plaintiffs sued the Surry County Board of Education. After the trial court granted the Board of Education's motion to dismiss and denied the plaintiffs' motion to amend, the plaintiffs appealed. *Id.* at 64, 441 S.E.2d at 169. This Court held that the order dismissing the action was proper because the plaintiffs had adequate notice during the filing of their original complaint that the Board of Education had liability insurance, and that the plaintiffs could have amended their complaint but failed to do so in a timely fashion. *Id.* at 65, 441 S.E.2d at 170.

We agree that *Gunter* is applicable to the instant case, as Bingham and Jean had the opportunity to amend their complaint but failed to do so. Despite the contention that they received defendants' insurance policy only a month prior to the hearing and were made aware of the legal basis for asserting governmental immunity only days before the hearing, Bingham and Jean still had adequate notice to respond to the motion to dismiss. As stated previously, Mountain Home Fire & Rescue Department answered the third-party complaint by moving to dismiss the action as to them based on the affirmative defenses of governmental/sovereign immunity and public officer/official immunity, and these defenses were repeated throughout the answer. *See supra* note 5. As such, Bingham and Jean had adequate notice of defendants' affirmative defenses such that an issue of waiver by purchase of insurance could have been timely raised as a matter of due course. Moreover, Mountain Home Fire & Rescue Department's contract with the county was a matter of public record and could therefore have been obtained even prior to the filing of Bingham and Jean's third-party complaint. Therefore, the trial court's denial of the oral motion to amend was not an abuse of discretion. Accordingly, Bingham and Jean's argument is overruled.

Affirmed.

Chief Judge McGEE concurs.

STROUD, Judge, dissenting.

In their third-party complaint, defendants, Joel D. Bingham and Jean's Bus Service, Inc. ("third-party plaintiffs"), sued Mountain Home Fire and Rescue Department, Inc., ("MHFR") and Matthew Brackett, collectively ("third-party defendants"), and identified MHFR as "a non-profit corporation duly organized in the laws of the State of North Carolina with its principal place of business in Henderson County, North Carolina."[1] MHFR admitted this allegation in third-party defendants' "Motion to Dismiss, Motion for Change of Venue, and Answer to Third-Party Complaint" filed on or about 5 June 2013. Third-party defendants' motion to dismiss was based upon North Carolina Rule of Civil Procedure 12(b)(6) and stated that third-party plaintiffs' action failed "to state a claim upon which relief can be granted on the grounds that [third-party plaintiffs'] claims are barred by governmental or sovereign immunity and by public officer/official immunity." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). But MHFR failed to provide any factual or legal basis for this claim of immunity. Mountain Home is not an incorporated municipality, and MHFR at this point was identified only as a "non-profit corporation" and not as having any sort of association with a governmental entity that could confer some form of immunity. Third-party defendants' answer also alleges that third-party defendant, Matthew Brackett, drove MHFR's "fire department vehicle" in the course and scope of his employment, on an "emergency call."

On 20 June 2013, MHFR served its responses to interrogatories and requests for production from third-party plaintiffs. These responses made no mention of any basis for immunity but did identify the liability insurance policy for MHFR. A copy of the insurance policy was provided in a supplement to the discovery responses on or about 11 July 2013. On 26 August 2013, third-party defendants moved for summary judgment on the basis that the pleadings and discovery raised no genuine issue of material fact. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). On the same day, they filed a notice of hearing upon their motion to dismiss and motion for summary judgment, which was set for 30 September 2013.

1. Third-party plaintiffs also sued Gregory Alan Wiggins, but Wiggins is not a party to this appeal.

On 23 September 2013, third-party plaintiff Bingham filed an affidavit describing how the accident occurred. He claimed that the MHFR vehicle gave "no observable signal" and no warning before slowing down from about 65 miles per hour "suddenly and abruptly[,]" causing three vehicles and his bus to slam on their brakes, resulting in the collision. North Carolina law requires that an emergency vehicle that is on an emergency call to use its lights and audible signal to alert other drivers that it is on an emergency call:

> The driver of a vehicle upon the highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances . . . when the operators of said vehicles are giving a warning signal by appropriate light and by bell, siren or exhaust whistle audible under normal conditions from a distance not less than 1,000 feet. When appropriate warning signals are being given, as provided in this subsection, an emergency vehicle may proceed through an intersection or other place when the emergency vehicle is facing a stop sign, a yield sign, or a traffic light which is emitting a flashing strobe signal or a beam of steady or flashing red light.

N.C. Gen. Stat. § 20-156(b) (2009). Bingham's affidavit raises the question whether the MHFR vehicle was actually on an "emergency call" at the time of the accident, since he claimed that the vehicle did not give any signal or warning of an intention to stop suddenly and cut through the median. An ambulance with flashing lights and sirens is clearly on an emergency call, whereas an ambulance driving down the road with lights and sirens off is just another vehicle. *See id.*

On 30 September 2013, the trial court heard third-party defendants' motions. Just five days before this, on 25 September 2013, third-party defendants served on third-party plaintiffs, as an attachment to a memorandum in support of their motion to dismiss and motion for summary judgment, MHFR's "Contract for Fire Protection" dated 22 May 2002, which third-party defendants claim establishes their right to governmental immunity based upon MHFR's provision of emergency medical and fire services for Henderson County. Our record does not include any affidavits other than Bingham's and no documentary evidence other than the responses to third-party plaintiffs' discovery requests, MHFR's liability insurance policy, and the Contract for Fire Protection. Third-party plaintiffs objected to the trial court's consideration of the Contract.

At the hearing, the trial court told counsel that he wanted to take the motions one by one, so as not to "blur" the issues. Third-party defendants' motion to dismiss, which was a motion under Rule 12(b)(6) contained in its answer, was the first and only motion addressed, since the trial court found it to be dispositive. Third-party defendants' counsel argued that governmental immunity applied based upon the Contract and counsel's oral description of the facts surrounding the accident, most of which do not appear to be contained in our record on appeal. Counsel concluded by noting that third-party plaintiffs' complaint "does not specifically plead that [MHFR has] waived [its] governmental immunity by purchase of insurance. And for that reason, [third-party defendants are] entitled to be dismissed from this case on those grounds."

But, when the third-party complaint was filed, there was no reason for the complaint to specifically plead governmental immunity, since no governmental entity was named as a party. In addition, third-party plaintiffs' counsel objected to consideration of the Contract because it was not properly before the court, as it had not been previously produced in discovery and was not attached to any affidavit that had been filed with the court. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218-19, 706 S.E.2d 310, 314-15 (2011) (holding that, under North Carolina Rule of Civil Procedure 56(e), the trial court could not consider unauthenticated documents at a summary judgment hearing). From the transcript, it appears that third-party defendants' counsel simply handed up the Contract during the hearing, and the trial court accepted it without comment despite third-party plaintiffs' objection. Third-party plaintiffs' counsel also noted that there was no witness testimony presented regarding the contract. Third-party plaintiffs' counsel asked that if the court were to consider the Contract, that it also allow his oral motion to amend the complaint to allege waiver of governmental immunity by purchase of liability insurance. The liability insurance policy was already in the record before the court, as it had previously been provided in discovery, long before the Contract had been provided to third-party plaintiffs.

Basing its ruling entirely upon the Contract and third-party plaintiffs' failure to "specifically plead that the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of 'governmental immunity' by purchasing liability insurance[,]" the trial court dismissed the complaint as to third-party defendants "pursuant to Rule 12(b)(6)." The trial court did not reach the motion for summary judgment, since the trial court held that dismissal based upon governmental immunity was proper.

Despite the trial court's admirable attempt not to "blur" the issues raised by the various motions, the parties' arguments and even the trial court's order did in fact blur the issues to the point that bringing them into focus is the first challenge in this case. I must determine the legal basis for third-party defendants' motion to dismiss and the basis upon which the trial court ruled, since that will control the standard of review and what information the trial court should have considered. In ruling upon a Rule 12(b)(6) motion, the trial court may consider only the pleadings and cannot make any findings of fact. *See Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). In ruling upon a motion for summary judgment, the trial court may consider discovery responses, affidavits, and other information, but all must be viewed in the light most favorable to the non-moving parties, here the third-party plaintiffs. *See In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); N.C. Gen. Stat. § 1A-1, Rule 56(c). And, in any event, a motion to dismiss based on governmental immunity normally is not based upon Rule 12(b)(6); it is based upon Rule 12(b)(1) or (2). *M Series Rebuild v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012).

The correct standard of review should guide appellate review of the issues. This Court is not reviewing an order for summary judgment, as the majority opinion has done, because the trial court's order very specifically addressed only the motion to dismiss based upon governmental immunity.[2] It is true that in some cases, a hearing upon a motion to dismiss may be converted into a summary judgment hearing, where the trial court has considered documents outside the pleadings, but that did not happen in this case.

> When a trial court converts a party's 12(b)(6) motion to dismiss into one for summary judgment under Rule 56, all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. This is because Rule 12(b) clearly contemplates the case where a party is "surprised" by the treatment of a Rule 12(b)(6) motion as one for summary judgment; it

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2. Third-party defendants contend that we must review the order as a motion to dismiss based upon Rule 12(b)(6) and argue that the complaint on its face fails to plead waiver of governmental immunity. But third-party plaintiffs did not sue a governmental entity and thus were not on notice that they must plead waiver of governmental immunity. Third-party defendants also argue that the trial court's consideration of the Contract, which was not included in the pleadings, was proper. But on a Rule 12(b)(6) motion, we consider only the pleadings. *Guyton*, 199 N.C. App. at 33, 681 S.E.2d at 469.

> affords such a party a reasonable opportunity to oppose the motion with her own materials made pertinent to such a motion.

Timber Integrated Investments, LLC v. Welch, ___ N.C. App. ___, ___, 737 S.E.2d 809, 815 (2013) (citations and quotation marks omitted).

Here, the trial court was explicit that it was considering only the motion to dismiss, and the order says the same. Also, it would be improper for the trial court to make findings of fact in a summary judgment order, especially since some of the findings here did not reflect the evidence in the light most favorable to the non-moving party, which would be appropriate for a summary judgment ruling. *See Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

The trial court was actually addressing a motion to dismiss based upon governmental immunity.

> A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina. N.C. Gen. Stat. § 1A–1, Rule 12(b)(1) permits a party to move for dismissal based on lack of jurisdiction over the subject matter, and Rule 12(b)(2) permits dismissal based on lack of jurisdiction over the person.
>
> Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court. The standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate.

M Series Rebuild, ___ N.C. App. at ___, 730 S.E.2d at 257 (citations, quotation marks, and footnote omitted).

Here, third-party defendants' motion to dismiss referred to Rule 12(b)(6), which is "[f]ailure to state a claim upon which relief can be granted," although this motion would properly fall under subsections (1) or (2) of Rule 12(b). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. The trial court also specifically announced when rendering judgment in open court that

the dismissal was based on Rule 12(b)(6)and mentioned this rule in its order. But since we treat motions as to their substance, and this motion was clearly based upon a claim of governmental immunity, I would treat it as a motion under Rule 12(b)(1) or (2), despite its lack of any factual allegations to demonstrate why the private entities claiming immunity would be entitled to it. *See Lee v. Jenkins*, 57 N.C. App. 522, 524, 291 S.E.2d 797, 798 (1982) (treating a motion as to its substance, rather than form). Unfortunately, it is unclear whether we should review the trial court's order under Rule 12(b)(1) or (2), and the standards of review are different for these two subsections. *See M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. But either way, under *de novo* review as applicable to 12(b)(1) or under review of the record evidence to support the trial court's ruling as applicable to 12(b)(2), I would come to the same conclusion and would reverse.

First, there was no need for third-party plaintiffs to specifically plead waiver of governmental immunity in their third-party complaint against third-party defendants because they did not sue a governmental entity that would have immunity. In addition, a defendant should plead the affirmative defense of governmental immunity with some specificity. *See Bullard v. Wake County*, ___ N.C. App. ___, ___, 729 S.E.2d 686, 689, *disc. rev. denied*, 366 N.C. 409, 735 S.E.2d 184 (2012). Even after third-party defendants' answer, the pleadings did not reveal any specific reason for governmental immunity. At that point, the pleadings revealed only that a vehicle owned and operated by a "non-profit corporation" that claimed to be on "emergency call" was involved in the automobile accident. There was no mention of provision of emergency services for any governmental entity or any other factual or legal basis for governmental immunity.

The trial court can rule only upon the pleadings or evidence which have been properly submitted to the court and which may legally be considered for the purposes of the motion before the court. Here, the motion at issue was third-party defendants' motion to dismiss and not a motion for summary judgment. The legal basis, if any, for MHFR's claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss, when third-party defendants' counsel emailed a copy of the Contract to third-party plaintiffs' counsel. The only "evidence" relevant to the trial court's ruling was this Contract, and it was not properly before the trial court. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Third-party defendants seem to recognize this problem in their appellate brief and argue that the trial court could take judicial notice of the Contract under North Carolina Rule of

Evidence 201, because it is "a publicly available record." Rule 201 actually provides, in relevant part, as follows:

> (b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . . .
>
> (e) Opportunity to be heard. — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201 (2013).

Even assuming that this Contract was "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"—a proposition I would question—it is clear that the trial court did not take judicial notice of the Contract and that plaintiff had no "opportunity to be heard as to the propriety of taking judicial notice." *See id.* § 8C-1, Rule 201(b), (e). In fact, judicial notice was never mentioned, and third-party plaintiffs objected to the trial court's consideration of the Contract, which had just been provided by email only five days prior to the hearing. In addition, the Contract itself was entered in 2002 and was effective for one year, subject to automatic annual renewals. It also included provisions for cancellation by either party on eight months' written notice. Even if the Contract were properly before the trial court, there is no evidence to indicate that the Contract was still effective on the date of the accident which is the basis of the claims raised. In addition, third-party plaintiffs asked to amend the complaint to allege the waiver of immunity by purchase of liability insurance, and if the trial court were going to consider documents outside the pleadings, despite the fact that the transcript indicates that the court was considering only the motion to dismiss under Rule 12(b)(6), the liability insurance policy could properly be considered by the court as part of the responses to discovery. *See id.* § 1A-1, Rule 56(c). I cannot discern why the trial court would consider one document outside the pleadings but not the other.

In its order, the trial court made findings of fact, which would seem to support review of the order as an order under Rule 12(b)(2). The standard of review for a Rule 12(b)(2) order is "whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. The findings are as follows:

> 1. That on February 8, 2010 the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were responding to a medical emergency when the motor vehicle accident at issue in this case occurred;
>
> 2. That the Third-Party Defendant, Matthew Brackett, was operating the Mountain Home Fire & Rescue Department emergency vehicle within the course and scope of his employment with said department and in his official capacity;
>
> 3. That there exists a contract between the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., and Henderson County under which Mountain Home Fire & Rescue Department, Inc. operates and said contract contains provisions detailing the fire protection services to be provided by Mountain Home Fire & Rescue Department, Inc.;
>
> 4. That Paragraph 3 of the above-referenced contract states; "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the Fire Department is licensed and trained to provide in order to protect the persons within the District from injury or death.";
>
> 5. That at the time of the motor vehicle accident at issue in this lawsuit the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were engaged in a recognized and legitimate governmental function;
>
> 6. That the Third-Party Plaintiff[s] did not specifically plead that the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of "governmental immunity" by purchasing liability insurance[.]

Finding 1 purports to resolve a factual dispute in favor of third-party defendants. Bingham's affidavit seems to indicate that MHFR was not responding to an "emergency call" since the vehicle did not have its lights and siren on at the time. But even if this is correct, Findings 3, 4, and 5 are based upon the Contract, which was not properly before the court as noted above. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Also, even if the Contract could be considered by the trial court, there was still no evidence that the Contract was in effect on the date of the incident, other than third-party defendants' counsel's representations in his argument to the trial court. "[I]t 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). Finding 6 is based upon an assumption that third-party plaintiffs should have known before receiving the Contract that MHFR, a "non-profit corporation," would have governmental immunity.

But it is undisputed that Mountain Home is not an incorporated municipality possessing governmental immunity. Third-party plaintiffs thus had no way to discern, from the pleadings alone, that MHFR, a "non-profit corporation," had any sort of relationship with a governmental entity that could confer governmental immunity. To require that third-party plaintiffs affirmatively allege that MHFR, a non-governmental entity, had waived its governmental immunity by the purchase of liability insurance even before MHFR had provided any factual or legal basis for this defense defies logic.

Under these unusual circumstances, I would also find that the trial court's implicit denial of third-party plaintiffs' motion to amend was an abuse of discretion. Contrary to third-party defendants' assertion, we have jurisdiction to review a trial court's implicit denial of a party's motion. *See Zagaroli v. Pollock*, 94 N.C. App. 46, 52, 379 S.E.2d 653, 656-57 (reviewing the trial court's denial of the defendants' motion to set aside the verdict implicit in its judgment against the defendants), *disc. rev. denied*, 325 N.C. 437, 384 S.E.2d 548 (1989). By granting third-party defendants' motion to dismiss, the trial court implicitly denied third-party plaintiffs' oral motion to amend.

> Our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and

> repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Williams v. Owens, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011). None of these reasons apply here. Third-party defendants disclosed the basis for their defense of governmental immunity only five days before the hearing, so third-party plaintiffs did not cause undue delay or unfairly prejudice third-party defendants by moving to amend. Amending their pleadings to add the allegation that MHFR had purchased liability insurance would not have been futile, as it would have immediately cured the defect in their pleadings. Because amendments to pleadings are to be freely allowed and we are to decide cases on substantive grounds instead of technicalities, I would reverse the trial court's order. *See Chicora Country Club, Inc. v. Town of Ervin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) ("Our courts have consistently held that a motion to amend a pleading should be freely allowed by the trial court."), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("An appellate court has a strong preference for deciding cases on their merits."). Accordingly, I dissent from the majority opinion and would reverse the trial court's order of dismissal.

STATE OF NORTH CAROLINA
v.
DARRETT CROCKETT

No. COA14-403

Filed 16 December 2014

1. Appeal and Error—petition for certiorari—insufficient

Defendant's petition for certiorari was denied because it did not meet the requirements of Rule 21 of the Rules of Appellate Procedure. Defendant merely stated that he had identified potentially meritorious issues to present to the Court of Appeals, including issues involving the judgment for attaining the status of habitual felon, but he did not explain what those issues were or address them.

2. Indictment and Information—sexual offenders—registration—changing address—not properly notifying sheriff

The trial court did not err by denying defendant's motion to dismiss two charges of failing to register as a sex offender where defendant argued that the State did not present sufficient evidence that defendant changed his address and did not provide proper written notice to the sheriff. N.C.G.S. §§ 14-208.9 and 14-208.11 are properly read together when charging a defendant with a violation of the sex offender registration statute.

3. Sexual Offenders-registration—change of address—willfulness—email notice to sheriff—Urban Ministry

N.C.G.S. § 14-208.11(a) is a strict liability offense if analyzed under the 2005 version of the statutes; however, in 2006, the General Assembly amended the statute to add the requirement that the State must show that defendant willfully failed to comply with the registration requirements. Although defendant argued that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address, an email in lieu of defendant completing and signing paperwork with his address was not sufficient to constitute registration as statutorily prescribed. Even if the email had been sufficient to constitute registration, Urban Ministry (where defendant claimed residence) was not a valid address for compliance with the sex offender registration statute because Defendant could not live there.

4. Sexual Offenders—registration—subsequent release from jail—change of address

A registered sex offender's January 2011 release from jail was a change of address falling within the purview of N.C.G.S. § 14-208.9 rather than § 14-208.7 because defendant had been a registered sex offender since April 1999.

5. Sexual Offenders—registration—change of address—willful failure to notify sheriff

The record contained sufficient evidence that a registered sex offender changed his address and failed to notify the sheriff's office and sufficient evidence defendant willfully failed to report his changes of address.

6. Evidence—relevance—sheriff's office policy—sexual offender registration

There was no prejudicial error in a prosecution for violating the sexual offender registration statutes from the admission of the

Mecklenburg County Sheriff's Office policy that Urban Ministry was not a valid address for compliance with the sex offender registration. The sheriff's office policy was relevant in that it tended to show that no one could live at Urban Ministry and that defendant's actual address was not the one he had registered. Even assuming that this policy lacked relevance, defendant did not show that the error was prejudicial.

7. Sexual Offenders—registration—jury unanimity

The requirement of jury unanimity was satisfied in a prosecution for violating the sexual offender registration statutes where any of several alternatives satisfied the third element of the jury instruction, that defendant changed his address and failed to notify the sheriff within the requisite time period.

Appeal by Defendant from judgment entered 3 July 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2014.

Roy Cooper, Attorney General, by Catherine F. Jordan, and Kimberly N. Callahan, Assistant Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Jason Christopher Yoder, Assistant Appellate Defender, for defendant-appellant.

BELL, Judge.

Darrett Crockett ("Defendant") appeals from his conviction of two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11.[1] Defendant argues on appeal that the trial court erred by

1. **[1]** We note that Defendant also filed a petition for writ of certiorari seeking review of that part of the judgment relating to his guilty plea for having attained habitual felon status on the grounds that he failed to give timely notice of appeal on this issue. Rule 21 of the North Carolina Rules of Appellate Procedure provides that a "writ of certiorari may be issued in appropriate circumstances by either appellate court 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 . . . ." N.C.R. App. P. 21(a)(1) (2013). However, a petition for writ of certiorari must contain "a statement of the reasons why the writ should issue." N.C.R. App. P. 21(c) (2013). Here, Defendant merely states in his petition for writ of certiorari that he "has identified potentially meritorious issues to present to this Court in a brief, including issues that involve the judgment for attaining the status of habitual felon" but does not explain what these issues are nor does he address them in his brief. As such, Defendant's petition for writ of certiorari fails to meet the requirements of Rule 21.

(1) denying his motion to dismiss based on the State's failure to prove the offenses alleged in the indictment; and (2) admitting irrelevant evidence that the Mecklenburg County Sheriff's Office had a policy that the Urban Ministry Center for the Homeless was not a valid address for the purpose of statutorily required sex offender registration. He also argues that the trial court violated his right to a unanimous jury verdict under Article I, § 24 of the North Carolina Constitution. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

Defendant stipulated at trial that on 8 October 1997, he was convicted of a reportable offense for which he was required to register as a sex offender and comply with the North Carolina Sex Offender Registration requirements, including the time period on and between 20 January 2011 and 23 February 2012. The State's evidence at trial tended to establish the following facts: On 9 April 1999, Defendant signed initial registration paperwork at the Mecklenburg County Sheriff's Office entitled "Requirements for Sex Offender and Public Protection Registration." This paperwork was provided to Defendant to assist him in understanding his registration requirements throughout the registration period. One of the statutory requirements listed on the registration form states that

> [w]hen an offender required to register changes address, he/she must provide written notification of this address change to the Sheriff in the county where he/she most currently registered. This notification must be sent to the Sheriff within 10 days of the address change. This written notification may be made in the form of a letter, or by going personally to the Sheriff's department and completing a Change of Address Form.

Defendant completed a similar registration form again on 10 December 2004. In compliance with the statute, Defendant reported changes of address in writing to the Mecklenburg County Sheriff's Office on the following dates: 1 March 2005, 30 May 2006, and 4 October 2006.

Accordingly, Defendant's petition for writ of certiorari is denied. *State v. McCoy*, 171 N.C. App. 636, 638-39, 615 S.E.2d 319, 321, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005) (holding that the Rules of Appellate Procedure are mandatory and failure to comply with Rule 21 subjects a petition to dismissal).

On 27 June 2007, Defendant returned an "Address Verification Notice" form[2] to the Mecklenburg County Sheriff's Office indicating that he had changed his address to 945 North College Street, Charlotte, North Carolina. 945 North College Street is the address of the Urban Ministry Center ("Urban Ministry"), a non-profit organization that provides various services to the homeless community. The facility is open from 8:30 a.m. until 4:00 p.m. during the week and 9:00 a.m. until 12:30 p.m. on weekends. It provides services such as food, shower facilities, counseling, restrooms, laundry, phones, changing rooms, a post office box, and transportation. However, there are no beds at Urban Ministry and visitors are prohibited from staying there overnight. At trial, Laura Stutts ("Ms. Stutts"), an administrative assistant with the Mecklenburg County Sheriff's Office, testified that the Mecklenburg County Sheriff's Office does not allow sex offenders to use Urban Ministry as an address for registration purposes.

From 15 April 2009 through 20 January 2011, Defendant was incarcerated in Mecklenburg County. Upon his release, he refused to sign a "Notice of Duty to Register" form and did not provide the sheriff's office with written confirmation of an address at which he would reside. The sheriff's office received an email from the Mecklenburg County jail stating that Defendant was going to live at 945 North College Street. That was the last time the sheriff's office received any information concerning Defendant's address until 7 November 2011.

On 11 February 2011, Defendant filed a Petition and Order for Termination of Sex Offender Registration on which he listed 945 North College Street as his current mailing address. The petition was dismissed when Defendant failed to appear for court.

On 7 November 2011, Defendant was arrested and incarcerated in Mecklenburg County. On 17 November 2011, he was released from the Mecklenburg County jail and signed a "Notice of Duty to Register" form, on which he listed 945 North College Street as his address. Defendant reported his address as 945 North College Street again on 17 January 2012.

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2. N.C. Gen. Stat. § 14-208.9A provides that, beginning on the date of his initial registration and every six months thereafter, a person required to register under the Sex Offender Registration Act must submit a verification form to the sheriff of his county of residence within three business days of receiving it. The form must be signed and must indicate "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A (2013).

Defendant mailed a letter postmarked 15 February 2012 to the Honorable Yvonne Evans, Resident Superior Court Judge at the Mecklenburg County Courthouse. The envelope listed the York County Detention Center in South Carolina as Defendant's return address. In the letter, Defendant mentioned that he had been living at his cousin's house in Rock Hill, South Carolina. The Mecklenburg County Sheriff's Office did not receive any written notification from Defendant informing them of this change of address.

On 28 November 2011, Defendant was indicted on one count of failing to register as a sex offender, as required by N.C. Gen. Stat. § 14-208.11, for the time period from 24 January 2011 until 6 November 2011. On 9 January 2012, Defendant was indicted for attaining habitual felon status. On 12 March 2012, Defendant was indicted on a second count of failing to register as a sex offender for the time period from 1 December 2011 until 23 February 2012.

A jury trial commenced on 1 July 2013 in Mecklenburg County Superior Court. On 3 July 2013, the jury returned a verdict finding defendant guilty of both counts of failing to register as a sex offender. Defendant pled guilty to attaining habitual felon status. The trial court sentenced Defendant to an active term of 60 to 81 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

I. Motion to Dismiss

[2] Defendant first contends that the trial court erred by denying his motion to dismiss both charges of failing to register as a sex offender because the State did not present sufficient evidence to prove that Defendant committed the offenses charged in the indictments. We disagree.

The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33, (2007). When ruling on a motion to dismiss for insufficient evidence, "[t]he only issue before the trial court . . . is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (citation and internal quotation marks omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*,

355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). "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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

The North Carolina Sex Offender Registration Program is codified in Article 27A of Chapter 14 of the North Carolina General Statutes (hereinafter "Article 27A" or "the sex offender registration statute"). N.C. Gen. Stat. § 14-208.9 sets forth the requirements with which a registered sex offender must comply should he change his address. N.C. Gen. Stat. § 14-208.9 provides, in pertinent part, as follows:

> [i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. . . .
>
> If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least three business days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

N.C. Gen. Stat. § 14-208.9(a),(b) (2013).

N.C. Gen. Stat. § 14-208.11 enumerates the offenses with which a person may be charged for failing to comply with certain sections of the sex offender registration statute. N.C. Gen. Stat. § 14-208.11 states, in pertinent part, that

> [a] person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.
>
> . . . .

> (7) Fails to report in person to the sheriff's office as required by G.S. 14-208.8, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11 (2013).

Defendant was charged with two counts of violating N.C. Gen. Stat. § 14-208.11. Both indictments alleged that during the dates listed in each indictment Defendant

> fail[ed] to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Defendant argues that the State only offered evidence of statutory violations not charged in the indictment. Specifically, Defendant contends that although the State presented evidence that he failed to register upon release from a penal institution, in violation of N.C. Gen. Stat. § 14.208.7, and that he failed to report to the sheriff of the county of his current residence at least three days prior to the date he intended to leave the state, in violation of N.C. Gen. Stat. § 14-208.9(b), the State did not offer evidence proving Defendant had violated N.C. Gen. Stat. § 14-208.11, as alleged in the indictments. This argument is without merit.

This Court has previously determined that because N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 "deal with the same subject matter, they must be construed in *pari materia* to give effect to each." *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (citation omitted).

[3] Having established that N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 are properly read together when charging a defendant with a violation of the sex offender registration statute, we turn to Defendant's argument that the State failed to prove that he changed his address and did not provide proper written notice to the sheriff.

Our Supreme Court has held that a conviction for failing to notify the appropriate sheriff of a change of address pursuant to N.C. Gen. Stat. § 14-208.11(a) requires proof of three essential elements: "(1) the defendant is a person required . . . to register; (2) the defendant change[d] his address; and (3) the defendant [willfully[3]] [f]ail[ed] to notify the last

3. We recognize that in *Abshire*, our Supreme Court held that "[t]he crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a) is a strict liability offense" because the case was analyzed under the 2005

registering sheriff of [the] change of address, not later than the tenth day after the change." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (omission, third, and fifth alteration in original)(citations and internal quotation marks omitted).

In the case at hand, the parties stipulated at trial that upon his 8 October 1997 conviction of a reportable offense, Defendant became a person required to register as a sex offender and comply with the requirements of the North Carolina Sex Offender Registration Program. Pursuant to N.C. Gen. Stat. § 14-208.7(a), on 9 April 1999, Defendant signed sex offender registration paperwork and registered his address for the first time.

Defendant was incarcerated from 15 April 2009 until 20 January 2011. On 20 January 2011, Defendant was released from incarceration. He did not register his new address with the Mecklenburg County Sheriff's Office in writing within three days of his change of address when he left the Mecklenburg County jail, as required under N.C. Gen. Stat. § 14-208.9.[4] Defendant was arrested again on 7 November 2011 and released ten days later, on 17 November 2011. Upon his release, Defendant registered Urban Ministry as his address.

Defendant argues that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address on 20 January 2011 because Ms. Stutts testified that she "received an e-mail from release stating that [Defendant] was going to live at 945 North College Street," the street address for Urban Ministry, although "he didn't list it on the paper." However, we believe that this email, in lieu of Defendant completing and signing paperwork with his address, is insufficient to constitute "registration" as statutorily prescribed in Article 27A.

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version of the statutes. However, in 2006, the General Assembly amended § 14-208.11, adding the requirement that the State must show that the defendant "willfully" failed to comply with the requirements of the sex offender registration statute. The change to the quoted language from *Abshire* in this opinion reflects the addition of the *mens rea* requirement in the amended version of the statute. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009).

4. **[4]** We view Defendant's January 2011 release from jail as a change of address falling within the purview of N.C. Gen. Stat. § 14-208.9 rather than § 14-208.7 because Defendant had been a registered sex offender since April 1999. Based on the language of N.C. Gen. Stat. § 14-208.7, we believe this section pertains to a defendant's *initial* registration upon release from a penal institution.

Even assuming *arguendo* that the email was sufficient to constitute "registration," Urban Ministry is not a valid address at which Defendant could register in compliance with the sex offender registration statute because Defendant could not *live* there. Although "address" is not a term defined in the statute itself, our Supreme Court has held that "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary." *Abshire*, 363 N.C. at 331, 677 S.E.2d at 451.

> [M]ere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

Id. at 332, 677 S.E.2d at 451.

Yet in *Abshire*, our Supreme Court declined to "add[] any further nuance" to what it means to "live" in a place. *Id.* In the context of the case law, the place where a person lives is where a person "resides" and performs his activities of daily living, such as sleeping and eating. These activities also require that a person keep his personal belongings at his residence. Although Defendant could perform at Urban Ministry some activities which a person normally does at his residence, such as bathing or eating, these activities can also be done at many public locations at which one cannot "live." For example, individuals may shower at the gym or eat in a restaurant. Critical to our holding in the present case that Defendant did not "live" at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to "reside" at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his "residence" because he cannot "live" there.

Urban Ministry's operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is "to assist law

enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." *Id.* Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute. *See* N.C. Gen. Stat. § 14-208.5 (2013).

[5] The State also presented evidence that Defendant was living in South Carolina during the second indictment period of 1 December 2011 through 23 February 2012. In a letter addressed to Mecklenburg County Superior Court Judge Yvonne Evans, Defendant wrote that his cousin had permitted him to live in one of his houses in Rock Hill, South Carolina. The envelope of the letter was postmarked 15 February 2011 and the return address was listed as York County Detention Center in South Carolina.

The record also contained sufficient evidence that a jury could find Defendant *willfully* failed to report his changes of address. " 'Wilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (citation omitted). Because willfulness is a mental state, it often must be inferred from the surrounding circumstances rather than proven through direct evidence. *Id.* Here, there was ample evidence to show that Defendant had complied with the registration requirements between 1999 and 2006. Additionally, Defendant had signed forms acknowledging the requirements for sex offenders under the statute and his understanding of these requirements.

The State presented sufficient evidence that Defendant (1) was required to comply with the sex offender registration act; (2) changed his address; and (3) willfully failed to notify the sheriff within three days' time. Thus, we conclude that, taken in the light most favorable to the State, the record contained sufficient evidence that a jury could find Defendant changed his address and failed to notify the sheriff's office, in violation of N.C. Gen. Stat. § 14-208.11, during both indictment periods. Thus, the trial court properly denied his motion to dismiss. This argument is overruled.

II. Evidence Regarding the Mecklenburg County Sheriff's Office Policy

[6] Defendant next argues that the trial court erred by admitting evidence that the Mecklenburg County Sheriff's Office had a policy that Urban Ministry was not considered a valid address for the purposes of compliance with the sex offender registration statute. Defendant contends that the admission of this policy was not only irrelevant, but

"created the real risk that the jury would convict [Defendant] based solely on a 'violation' of the Mecklenburg County Sheriff's Office policy."

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. R. Evid. 401. This Court gives a trial court's relevancy determinations great deference on appeal. *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C. R. Evid. 403. It is within the trial court's sound discretion to decide whether to exclude evidence under Rule 403, and its ruling will not be reversed absent a showing of abuse of that discretion. *State v. Lloyd*, 354 N.C. 76, 108, 552 S.E.2d 596, 619 (2001) (citations omitted).

The policy of the Mecklenburg County Sheriff's Office that prohibits sex offenders from registering Urban Ministry as their address was relevant in that it tended to show that no one could "live" at Urban Ministry. Evidence that Defendant registered an address at which he could not live suggests that his actual address, for purposes of complying with the sex offender registration statute, was not the one he had registered. "The State can show that defendant changed his address simply by showing that he was no longer residing at the last registered address . . . ." *State v. McFarland*, __ N.C. App. __, __, 758 S.E.2d 457, 463 (2014) (citation omitted).

Even assuming, without deciding, that this policy lacked relevance, Defendant has failed to show that any such error was prejudicial. *State v. Oliver*, 210 N.C. App. 609, 615, 709 S.E.2d 503, 508 ("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. Further, it is the defendant's burden to show prejudice from the admission of evidence." (citations and quotation marks omitted)), *disc. review denied*, 365 N.C. 206, 710 S.E.2d 37 (2011). The State presented additional evidence at trial that showed Defendant did not live at 945 North College Street, indicating that he had changed his address and failed to notify the Mecklenburg County Sheriff's Office.

Additionally, we are not persuaded by Defendant's assertion that "the jury could have convicted [him] because it believed [he] violated the Mecklenburg County Sheriff's Office policy." The trial court carefully

instructed the jury on each element the State must prove beyond a reasonable doubt in order for the jury to find Defendant guilty of the offenses charged. Defendant has failed to show prejudicial error by the trial court in allowing the policy of the Mecklenburg County Sheriff's Office into evidence.

III. Unanimous Jury Verdict

[7] Defendant's final argument on appeal is that the trial court violated his right to a unanimous jury verdict under Article I, § 24 of the North Carolina Constitution. Specifically, Defendant argues that it was not possible to determine the theory upon which the jury convicted him when it found him guilty of failing to comply with the sex offender registration requirements for each indictment period.

"Article I, Section 24 of the North Carolina Constitution states that '[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.' " *State v. Wilson*, 363 N.C. 478, 482-83, 681 S.E.2d 325, 329 (2009) (alteration in original)(citing N.C. Const. art. I, § 24). However, "[i]t is well established . . . that if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *State v. Taylor*, 362 N.C. 514, 541, 669 S.E.2d 239, 262 (2008) (citations and internal quotation marks omitted) (holding trial court's jury instructions that did not specifically instruct jury as to which robbery it should consider as basis for felony murder charge did not violate defendant's right to unanimous jury verdict), *cert. denied*, 558 U.S. 851, 175 L.Ed.2d 84 (2009). *See State v. Hartness*, 326 N.C. 561, 563, 567, 391 S.E.2d 177, 178, 180-81 (1990) (holding that when defendant is charged with "a single offense which may be proved by evidence of the commission of any one of a number of acts," jury instruction not specifying which of those acts the jury should consider does not risk a non-unanimous verdict).

Here, with respect to the first indictment, the trial court instructed the jury as follows:

> The defendant . . . has been charged with willfully failing to comply with the sex offender registration law. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that on or about the period January 24th, 2011, and November 6th, 2011, the defendant was a resident of this state.

> Second, that the defendant had been previously convicted of a reportable [offense] for which he was required to register. The parties . . . have previously stipulated and agreed that the defendant had been previously convicted of a reportable offense and that he was required to register as a sex offender in North Carolina.
>
> Third, the State must prove to you that the defendant willfully changed his address and failed to provide written notice of his new address in person at the sheriff's office not later than three days after the change of address to the sheriff's office in the county with which he had last registered.

The trial court gave an identical instruction for the second indictment, but with the applicable time period of 1 December 2011 through 23 February 2012.

Defendant argues that, based on the trial court's instructions, it was impossible to determine whether the jury based his conviction of failing to register as a sex offender because it found he had (1) failed to register upon leaving the Mecklenburg County jail; (2) failed to register upon changing his address; (3) registered at an invalid address; or (4) did not actually live at the address he had registered. However, because any of these alternative acts satisfies the third element of the jury instruction — that Defendant changed his address and failed to notify the sheriff within the requisite time period — the requirement of jury unanimity was satisfied. As such, Defendant's argument on this issue lacks merit.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges GEER and STROUD concur.

STATE v. FLOYD

[238 N.C. App. 110 (2014)]

STATE OF NORTH CAROLINA
v.
COREY DEON FLOYD

No. COA14-533

Filed 16 December 2014

1. Firearms and Other Weapons—possession of firearm by convicted felon—motion to dismiss—attempted assault not recognized in North Carolina

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon charge for insufficiency of the evidence. The prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon, and that attempted assault is not a recognized offense in North Carolina. Defendant's conviction for possession of a firearm by a convicted felon was vacated.

2. Sentencing—habitual felon status—underlying offense—attempted assault not recognized in North Carolina

The trial court by allowing the use of defendant's attempted assault conviction to support the determination that he had attained habitual felon status. Attempted assault is not a recognized criminal offense in North Carolina. Defendant's conviction for having attained the status of an habitual felon was vacated.

3. Constitutional Law—right to control nature of defense—court's failure to conduct inquiry into nature of impasse

The trial court erred by failing to adequately address an impasse between defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. As a result of the fact that no inquiry was conducted into the nature of the impasse, there was no basis for finding that the State had established that the error was harmless beyond a reasonable doubt. Thus, defendant was entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction.

4. Constitutional Law—right to speedy trial—pre-indictment delay—failure to show prejudice

The trial court did not err by denying defendant's motion to dismiss the charges of possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status on the basis of an excessive period

of pre-indictment delay. Defendant failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense.

Appeal by defendant from judgment entered 30 October 2013 by Judge Jack W. Jenkins in Lenoir County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney Roy Cooper, by Assistant Attorney General Stuart M. Saunders, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

ERVIN, Judge.

Defendant Corey Deon Floyd appeals from judgments entered based upon his convictions for possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. On appeal, Defendant argues that the trial court erred by denying his motions to dismiss the possession of a weapon by a convicted felon and habitual felon charges on the grounds that these charges were supported by Defendant's previous conviction for an offense that did not exist, effectively determining that Defendant had no right to insist that his trial counsel pose certain questions to a prosecution witness, and denying his request for dismissal based on the length of the delay between the commission of the offense and the date upon which he was formally charged with committing that offense. 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 Defendant's convictions for possession of a firearm by a convicted felon and having attained the status of an habitual felon should be vacated and that Defendant is entitled to a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

I. Factual Background

A. Substantive Facts

On 16 October 2008, the Kinston Police Department received a call from a confidential source indicating that Defendant was "hanging" in the area of Adkin and Macon streets in Kinston while carrying a sawed-off shotgun in his pants. Detective Robbie Braswell and his shift commander,

Carey Barnes, set out in a patrol car to locate Defendant. Commander Barnes had had frequent face-to-face contact with Defendant in the past and knew what he looked like.

As Detective Braswell and Commander Barnes approached Adkin Street from the south, Commander Barnes spotted an individual wearing a black hoodie and jeans who fit Defendant's description. When the individual turned around, Commander Barnes recognized him as Defendant. As the officers drove past the point at which Defendant was located, parked, and started walking toward him, Defendant began "inching his way off." At that point, Commander Barnes yelled out, "Corey Floyd, you'd better stop." Although Defendant initially turned toward Commander Barnes, he then took off running.

As the officers pursued Defendant on foot, Defendant jumped a brick wall. At that point, Detective Braswell, who was right behind Defendant, saw Defendant pull a shotgun out of the waistband of his pants and toss it over a high fence into a nearby yard. Upon making this observation, Detective Braswell stopped running and stood by the weapon. Upon his arrival, Commander Barnes secured the shotgun and removed a shotgun shell from the weapon.

B. Procedural History

On 8 November 2010, an arrest warrant was issued charging Defendant with possession of a weapon of mass destruction, resisting a public officer, and possession of a firearm by a convicted felon. On 31 January 2011, the Lenoir County grand jury returned bills of indictment purporting to charge Defendant with possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status. The charges against Defendant came on for trial before the trial court and a jury at the 28 October 2013 Session of the Lenoir County Superior Court. On 30 October 2013, the jury returned verdicts convicting Defendant of possession of a weapon of mass destruction and possession of a weapon by a convicted felon. On 31 October 2013, the jury returned a verdict convicting Defendant of having attained habitual felon status. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 151 to 191 months imprisonment based upon his convictions for possession of a weapon of mass destruction and having attained habitual felon status and to a concurrent term of 151 to 191 months imprisonment based upon his convictions for possession of a firearm by a convicted felon and having attained habitual felon status. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Attempted Assault as Predicate Felony

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his motion to dismiss the possession of a firearm by a convicted felon charge for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the possession of a firearm by a convicted felon charge on the grounds that the prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon and that attempted assault is not a recognized offense in North Carolina. Defendant's contention has merit.

1. Standard of Review

"In order to survive a motion to dismiss criminal charges, the State must present 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. Dawkins*, 196 N.C. App. 719, 723, 675 S.E.2d 402, 405 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *disc. review denied*, 363 N.C. 585, 682 S.E.2d 707 (2009). In deciding whether the dismissal motion should be allowed or denied, the evidence should be considered "in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence." *State v. Allah*, __ N.C. App. __, __, 750 S.E.2d 903, 907 (2013) (citing *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985)). This Court reviews a trial court's decision to deny a motion to dismiss using a *de novo* standard of review. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).[1]

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1. The standard of review set forth in the text is that applicable to the motion that Defendant actually made before the trial court. The ultimate issue addressed by Defendant's dismissal motion could also have been raised through the making of a motion to dismiss the underlying indictment for failing to charge an offense pursuant to N.C. Gen. Stat. §§ 15A-954(a)(10) and 15A-924(a)(5). However, since the standard of review utilized in connection with challenges to the validity of an indictment is also *de novo*, *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012), we do not believe that it makes any significant difference whether we treat Defendant's argument as a challenge to the denial of his motion to dismiss for insufficiency of the evidence or a challenge to the denial of a motion to dismiss the indictment for failing to charge an offense.

2. Assault as a Predicate Felony

The essential elements of the offense of possession of a firearm by a convicted felon are that (1) the defendant was previously convicted of a felony and (2) subsequently possessed a firearm. N.C. Gen. Stat. § 14-415.1(a); *Dawkins*, 196 N.C. App. at 725, 675 S.E.2d at 406. According to N.C. Gen. Stat. § 14-415.1(b), "[p]rior convictions which cause disentitlement . . . include: (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995." Although the predicate felony alleged in the indictment by means of which Defendant was purportedly charged with the offense of possession of a firearm by a convicted felon and established during the course of the State's evidence was "Attempted Assault With a Deadly Weapon Inflicting Serious Injury" in violation of N.C. Gen. Stat. § 14-32(a), with the offense in question having been "committed on February 16, 2005" and with Defendant having "pled guilty on December 5, 2005," and "sentenced to 25-30 months in the North Carolina Department of Corrections," this Court has previously held that attempted assault with a deadly weapon inflicting serious injury is not a recognized criminal offense in North Carolina. In *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99 (1972), we explained the logic underlying this principle by noting that an assault consists of "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another." *Id.* at 265, 188 S.E.2d at 12 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). As a result, since the effect of an attempted assault verdict was to find the defendant guilty of an "attempt to attempt" and since "[o]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.*, we held that an attempted assault is simply not a recognized criminal offense in this jurisdiction.

This Court reaffirmed *Currence* in *State v. Barksdale*, 181 N.C. App. 302, 638 S.E.2d 579 (2007). In *Barksdale*, the trial court instructed the jury concerning the issue of the defendant's guilt of "attempted assault" and the jury convicted the defendant of two counts of attempted assault on a governmental official with a deadly weapon. *Id.* at 305, 638 S.E.2d at 581. Although the defendant's trial counsel did not object to the delivery of the attempted assault instruction, this Court held that the delivery of the attempted assault instruction constituted plain error, stating that "instructing a jury in such a way that the jury convicts the defendant of a nonexistent offense is an unmistakable example of a miscarriage of justice." *Id.* at 309, 638 S.E.2d at 583-84.

The decisions reflected in *Currence* and *Barksdale* to the effect that attempted assault is not a recognized criminal offense in North Carolina have not been overturned and are, for that reason, binding upon us in this case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, "[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"). Although the State does not appear to dispute the validity of either *Currence* or *Barksdale*, it does contend that the offense of attempted assault has been recognized in other decisions and that we should treat these decisions as controlling. In support of this assertion, the State cites several decisions from this Court in which an attempted assault conviction was not overturned on appellate review. *See State v. Edwards*, 150 N.C. App. 544, 548-49, 563 S.E.2d 288, 290-91 (2002); *State v. Parks*, 2010 N.C. App. LEXIS 549 (N.C. Ct. App. Apr. 6, 2010) (unpublished); *State v. Carpenter*, 2007 N.C. App. LEXIS 1890 (N.C. Ct. App. Sept. 4, 2007) (unpublished); *State v. Franklin*, 2009 N.C. App. LEXIS 133 (N.C. Ct. App. Feb. 17, 2009) (unpublished). We do not believe that our opinions in these cases support a decision to reach the result that the State deems to be appropriate.

As an initial matter, we note that none of the cases upon which the State relies directly addressed the validity of a conviction for attempted assault, given that the defendant did not raise the issue of the existence of such a crime for the Court's consideration. Secondly, all but one of the decisions upon which the State relies were unpublished and do not, for that reason, have any precedential value for purposes of our consideration of this issue. Although this Court does allow the citation of unpublished opinions when they have "precedential value to a material issue in the case and . . . there is no published opinion that would serve as well," N.C. R. App. P. 30(e)(3), our decision in this case must be based on published decisions like *Currence* and *Barksdale*, in which this Court has clearly held that attempted assault is not a recognized criminal offense in North Carolina, rather than on other decisions, all but one of which were unpublished, in which the validity of an attempted assault conviction was never directly decided by the reviewing court. As a result, the decisions upon which the State relies do not provide a legitimate basis for a determination that attempted assault is, in fact, a recognized offense in North Carolina.

Having concluded that, in light of *Currence* and *Barksdale*, attempted assault is not a recognized criminal offense in North Carolina, we must determine what, if any, is the legal effect of a judgment purporting to rest on an attempted assault conviction. According to well-established

North Carolina law, "[j]udgments may be void, irregular or erroneous." *Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891) (defining void, irregular, or erroneous judgments and describing the legal effect of the entry of each type of defective judgment). A judgment is void if the court in which that judgment was imposed lacked jurisdiction over the parties or the subject matter of the case or had no authority to render the judgment in question. *Windham Distributing Co. v. Davis*, 72 N.C. App. 179, 181-82, 323 S.E.2d 506, 508 (1984) (citing *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974)), *discr. review denied*, 313 N.C. 613, 330 S.E.2d 617 (1985)). "[A void judgment] is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986); *see also Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981) (stating that "[a] void judgment is not a judgment at all, and it may always be treated as a nullity because it lacks an essential element of its formulation").

As this survey of the applicable law indicates, a judgment entered in a case in which the trial court lacked jurisdiction over the subject matter is void and may safely be ignored. "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). N.C. Gen. Stat. § 14-1 describes a "felony" as a crime which "(1) [w]as a felony at common law; (2) [i]s or may be punishable by death; (3) [i]s or may be punishable by imprisonment in the State's prison; or (4) [i]s denominated as a felony by statute." As a result of the fact that, as *Currence* and *Barksdale* clearly establish, attempted assault with a deadly weapon inflicting serious injury does not fall into any of these categories, a trial court lacks jurisdiction to enter a judgment that is based in any way on the understanding that the defendant has been convicted of that alleged offense.

In its brief, the State points to the fact that Defendant pled guilty to attempted assault as part of a negotiated plea agreement.[2] The fact that

2. In its brief, the State argues that a decision in Defendant's favor would undercut the plea negotiation process, which is an integral part of the criminal justice system, and argues that Defendant may, in fact, be worse off than he otherwise would be if he succeeds in overturning the trial court's judgment in the case in which he was convicted of possession of a firearm by a convicted felon and having attained habitual felon status. Although the plea negotiation process is a recognized part of the criminal justice system and although we are unable to say that there is no risk that Defendant would not be better off in the long-term if he had refrained from advancing the argument that is discussed in the text, neither of these arguments provides any legal justification for a decision to find that Defendant should not be afforded relief based upon his attack on the use of an attempted assault conviction to support his convictions for possession of a firearm by a convicted felon and attaining habitual felon status.

Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not, however, affect the required jurisdictional analysis. *See State v. Oliver*, 186 N.C. 329, 331, 119 S.E. 370, 371 (1923) (stating that "[j]urisdiction of the offense [can] neither be waived nor conferred by consent"); *see also Harkness v. State*, 771 So.2d 588, 589 (Fla. Dist. Ct. App. 1st Dist. 2000) (stating that "[c]onviction of a nonexistent crime is fundamental error which requires reversal, regardless of whether the error was invited by the defendant"); *Upshaw v. State*, 665 So.2d 303, 303-04 (Fla. Dist. Ct. App. 2d Dist. 1995) (holding that defendant's conviction, which stemmed from a *nolo contendere* plea, for committing a nonexistent offense constituted reversible fundamental error); *State v. Tarrer*, 140 Wash. App. 166, 169-70, 165 P.3d 35, 37 (Wash. Ct. App. 2007) (holding that defendant's plea to a nonexistent offense was invalid when entered and must be set aside); *State v. Briggs*, 218 Wis. 2d 61, 65, 68, 74, 579 N.W.2d 783, 786-87, 789 (Wis. Ct. App. 1998) (rejecting the State's argument that, even if, as the defendant contended, the crime of attempted felony murder was not a recognized offense, the defendant had waived his right to challenge the validity of the conviction by entering a guilty plea to that offense on the grounds that "[s]ubject matter jurisdiction cannot be conferred on the court by consent," so that "an objection to it cannot be waived," and concluding that, "[b]ecause the circuit court had no subject matter jurisdiction over a non-existent crime, even though the charge was filed as part of an amended information pursuant to a plea agreement, Briggs's conviction for attempted felony murder must be vacated and the order denying him postconviction relief must be reversed"). As a result, given that Defendant's attempted assault conviction is a nullity and cannot serve to support Defendant's conviction for possession of a firearm by a felon, the trial court's judgment stemming from Defendant's conviction for possession of a firearm by a felon must be vacated.[3]

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3. The State also argues that Defendant is not entitled to collaterally attack the validity of his attempted assault conviction in this case and appears to suggest that Defendant is relegated to the filing of a motion for appropriate relief instead. However, the State has not presented any authority tending to show that the argument that Defendant has advanced in this case is not cognizable on appeal and we know of none. Admittedly, the Supreme Court has held that a defendant is not entitled to argue that the trial court lacked jurisdiction to impose the underlying judgment in a revocation proceeding. *State v. Pennell*, __ N.C. __, __, 758 S.E.2d 383, 387 (2014) (stating that "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence"). As a result of the fact that we have found no decisions indicating that the principle enunciated in *Pennell* and similar cases has been extended beyond the probation revocation context and the fact that, as we have already noted, the parties are generally entitled to treat a void judgment as a nullity, we do not believe that a defendant is precluded from challenging the trial court's jurisdiction to enter an earlier

B. Attempted Assault as Basis for Habitual Felon Finding

[2] In his second challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing the use of his attempted assault conviction to support the determination that he had attained habitual felon status. In view of the fact that, for the reasons set forth above, attempted assault is not a recognized criminal offense in North Carolina, it cannot serve as support for an habitual felon allegation or conviction in this case. As a result, the trial court's judgment in the case in which Defendant was convicted of possession of a firearm by a convicted felon and sentenced as an habitual felon must be vacated and this case must be, for the reasons discussed in more detail below, remanded to the Lenoir County Superior Court for further proceedings not inconsistent with this opinion.

C. Defendant's Right to Input on Cross-Examination

[3] In his third challenge to the trial court's judgments, Defendant contends that the trial court violated his constitutional right to control the nature of the defense that was presented on his behalf. More specifically, Defendant contends that the trial court erred by failing to adequately address an impasse between Defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. Once again, we conclude that Defendant's contention has merit.

1. Standard of Review

An alleged violation of a constitutional right involves a question of law and is reviewed *de novo* by this Court. *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). "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) (quotation marks and citation omitted). A federal or state constitutional violation requires an award of appellate relief in the absence of a demonstration by the State that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

As the Supreme Court stated in *State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954), the attorney-client relationship

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judgment based upon a conviction for a nonexistent offense in a proceeding in which a conviction for that nonexistent offense was used to establish the existence of an element of an offense or charge that has been lodged against the defendant on direct appeal in that case and is not limited to asserting such a claim by means of a motion for appropriate relief or petition for the issuance of a writ of habeas corpus.

> rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld.

"[T]actical decisions – such as which witnesses to call, which motions to make, and how to conduct cross-examination – normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 116 S. Ct. 90, 133 L. Ed. 2d 46 (1995). "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Id.* (quotation marks and citation omitted). In the event that such an impasse occurs, "[t]he attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred." *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) (quotation marks and citation omitted). As a result, when an impasse occurs and the attorney's client insists upon proceeding in a certain manner contrary to the attorney's advice, "the client's wishes must control" and "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.* at 404, 407 S.E.2d at 189.

<u>2. Relevant Facts</u>

At the conclusion of the testimony of Detective Braswell on recross examination, Defendant stated "I need to say something to the witness." After denying Defendant's request, the trial court asked the jury to step out of the courtroom,[4] at which point the following proceedings occurred:

> [Defendant]: You won't ask him what I need to ask him.
>
> The Court: Thank you. All right, let the record reflect that the twelve members of the jury and the alternate juror have

4. As the State notes, the record clearly reflects that Defendant had exhibited less than exemplary behavior throughout earlier portions of the trial proceedings, including having rejected the trial court's suggestion that he refrain from wearing jail clothes in the courtroom, rejecting what may well have been a favorable plea agreement against his trial counsel's advice, and repeatedly contending that the charges that had been lodged against him should be dismissed because of the fact that the State had delayed initiating charges against him, among other things.

> left the courtroom. Let the record reflect that while the jurors were in here, [Defendant] started asking questions. I called [Defendant's trial] counsel to the bench, asked counsel . . . to go back and talk to [Defendant], privately, to determine what [Defendant's] questions were or what [Defendant] wanted to present to the jury. [Defendant's trial counsel] attempted to do so. In the meantime, [Defendant] began speaking out on his own volition in the presence of the jury, and so the Court immediately sent the jury out of the courtroom. And, [Defendant], I can't let you disrupt this trial, and I've already warned you --
>
> [Defendant]: I mean, I can – I can question the witness.
>
> The Court: Your lawyer questions the witness. You don't --
>
> [Defendant]: Then I'll represent myself. I'm firing my lawyer.
>
> The Court: No. No, you can't do that, I'm sorry.
>
> [Defendant]: See, I can represent myself.
>
> The Court: No, I'm sorry. In my discretion, I'm not allowing you to do that.
>
> [Defendant]: I can represent myself. I can represent myself. It ain't – ain't no kind of mess like that, because he ain't questioned him what I'm going to question him.
>
> The Court: Well, you ask [Defendant's trial counsel] what you want to ask the --
>
> [Defendant]: I done told him, and ain't none of that stuff been done, and I'm going for the --
>
> The Court: You ask [Defendant's trial counsel] what questions you want to present to the witnesses in front of the jury.

At this point in the exchange, the prosecutor requested the trial court to determine if Defendant should be held in contempt of court and asked that Defendant be removed from the courtroom. In view of the fact that Defendant interrupted the prosecutor on a number of occasions, the trial court instructed Defendant to stop engaging in that sort of behavior and to wait his turn before speaking. At that point, Defendant made additional comments concerning the questions that he wanted his trial counsel to pose to Detective Braswell:

> [Defendant:] I waited till it was our turn to question this witness, and now I ain't even questioned him.
>
> The Court: Well, but the way the process works, you don't ask the questions, your attorney asks the questions.
>
> [Defendant]: He didn't ask -- I told him to ask him. Things wasn't stated. It was things I needed -- I needed to them to hear.
>
> The Court: He is a professional. He is–
>
> [Defendant]: The truth be told about –
>
> The Court: -- very experienced. He knows what he's doing. The manner in which he asks questions is part of the expertise provided by counsel. It's part of the assistance of counsel that's provided. And you are not an attorney, and you are relying on his [assistance].
>
> [Defendant]: I know the law. I know the law.
>
> The Court: -- and you can talk to him and confer with him and let him know what questions you think should be asked, but he asks the questions, not you.
>
> [Defendant]: He got – he got to ask them, then, and put things out. That's the thing, I'll represent myself. I don't even need a counsel.

At that point, the trial court reiterated its denial of Defendant's request to represent himself and, after admonishing Defendant for the disruptive behavior in which he had engaged throughout the trial, ordered that Defendant be removed from the courtroom. In response, Defendant again expressed his concerns about the manner in which Detective Braswell had been questioned:

> [Defendant]: Well, see, I'll tell him the question, to ask him something, and he don't do it. Come on, man.
>
> The Court: Sir, you're doing it now, and I have not held you in contempt. In my discretion, I have not done that. The State has not brought any obstruction charges --
>
> [Defendant]: Well, I'm -- I'm gonna give him -- I'm gonna have -- I'm gonna talk to him so he can say what I would say?

> The Court: That's how it works, sir.
>
> [Defendant]: Exactly. And he didn't do it. That's what I'm talking about.
>
> The Court: Well, that's between you and [Defendant's trial counsel] --
>
> [Defendant]: I'm gonna get another attorney.
>
> The Court: -- that's not for me to interject.

At that point, the trial court had Defendant removed from the courtroom and instructed the jury that it should not hold Defendant's conduct or his absence from the courtroom against him.

3. Trial Court's Response to the Impasse

Although the record does not disclose the nature of the questions that Defendant wanted his trial counsel to pose to Detective Braswell,[5] the transcript clearly demonstrates that Defendant wanted his trial counsel to pose certain questions to Detective Braswell that were never asked. In addition, an examination of the record reveals that, in the aftermath of Defendant's continued insistence that certain questions be posed to Detective Braswell, Defendant's trial counsel failed to "make a record of the circumstances, [his] advice to the [D]efendant, the reasons for the advice, the [D]efendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Finally, the record clearly establishes that the trial court failed to make inquiry of Defendant and his defense counsel concerning the nature of the questions that Defendant wanted to have posed to Detective Braswell on cross-examination. As a result, given that the questions upon which his request was based were never posed despite his insistence that that be done, Defendant was denied his right to decide "how to conduct cross examination[]." *Id.*

In attempting to persuade us that Defendant has failed to establish that a violation of his right to control his defense occurred, the State points to our decision in *State v. Williams*, 191 N.C. App. 96, 662 S.E.2d 397 (2008), *disc. review denied*, __ N.C. __. 684 S.E.2d 158 (2009) in which we determined that the defendant and his trial counsel had not reached an absolute impasse with respect to the manner in which the

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5. In his brief, Defendant asserts that the questions that Defendant wanted his trial counsel to ask Detective Braswell related to the two-year delay between the date upon which Defendant allegedly possessed the shotgun and the date upon which he was initially charged with unlawfully possessing that weapon.

defendant's peremptory challenges should be exercised and that the disagreement between the defendant and his trial counsel "centered on Defendant's dissatisfaction with the fact that Defendant was required stand trial at all" rather than upon a disagreement over a specific tactical issue. *Id.* at 99, 662 S.E.2d at 399. In concluding that "Defendant's aggressive, violent and abrasive behavior did not rise to the level of an absolute impasse regarding the specific decision as to peremptory challenges," we noted that:

> First, Defendant did not advise defense counsel which six jurors he desired to excuse; in fact, Defendant did not advise defense counsel as to any particular juror he desired to excuse; Defendant tended to show displeasure with the process itself, rather instead of any particular juror in the *voir dire* proceedings; when asked to elaborate in the jury selection process as to which jurors to excuse, Defendant had nothing to add, but deferred to defense counsel. After Defendant was escorted from the courtroom, due to his disruptive behavior, defense counsel excused only four jurors. The court again stated, "now, again, the counsel will have an occasion to talk to the defendant [regarding which jurors to excuse,]" but given the opportunity to speak, Defendant did not dispute defense counsel's use of four peremptory challenges instead of six, and "didn't want to say anything to [his attorney] about this last four[,]" again deferring decisions in the selection process to defense counsel. After Defendant was escorted back into the courtroom, the court directly stated, "your lawyer has questioned the four new jurors, but he hasn't made any decision yet as to who he wants to exclude because . . . he wanted to have a chance to talk with you[.]" When asked whether he "want[ed] to talk to [his] lawyer about the exclusion of these four new jurors[,]" Defendant replied, "No, sir[,]" deferring the decision to defense counsel. In fact, Defendant repeatedly deferred to defense counsel's decision with regard to peremptory challenges, beginning with his initial statement: "[w]hatever six he [sic] talking about, I don't want them[.]" When either defense counsel or the court asked for Defendant's further input in the selection process, Defendant stated multiple times, in his usual combative and contentious manner, that he did not wish to further discuss the selection process at all, thus, deferring the decision to defense counsel.

Id. at 103-04, 662 S.E.2d at 402. Based upon this analysis, we concluded that the only arguably specific impasse relating to a tactical decision revealed by the *Williams* record stemmed from Defendant's desire to impermissibly exercise his peremptory challenges based on racial grounds and held that the defendant's trial counsel was not bound to comply with Defendant's instructions to engage in such constitutionally prohibited conduct. *Id.* at 104-05, 662 S.E.2d at 402-03.

In contrast to the situation addressed in *Williams*, the record developed in this case clearly reveals that Defendant reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination. Although Defendant repeatedly informed the trial court that he wanted his trial counsel to ask certain questions of Detective Braswell and that his trial counsel had not asked these questions, the trial court simply told Defendant that he should discuss this subject with his trial counsel without taking any further action despite Defendant's insistence that he had already done what the trial court had told him to do. Although the trial court in *Williams* provided multiple opportunities for the defendant to discuss the extent to which certain prospective jurors should be peremptorily challenged and clearly indicated that the defendant's lawful wishes with respect to this subject would be honored, Defendant's trial counsel never described the nature of the questions that Defendant wanted posed to Detective Braswell and the trial court never inquired what those questions might be nor instructed Defendant's trial counsel to ask the questions that Defendant wanted put to Detective Braswell. Thus, we do not believe that *Williams* sheds significant light on the proper resolution of this case.

In addition, the State argues that the disagreement between Defendant and his trial counsel, instead of representing an impasse over a specific tactical issue, involved nothing more than a generalized complaint by Defendant about the manner in which his trial counsel represented him during the trial. As the State correctly notes, Defendant made numerous complaints about the quality of the representation that he received from his trial counsel during the course of the trial, with these complaints including the expression of Defendant's belief that his attorney had not adequately addressed his disability and the manner in which he had been treated in jail and that his trial counsel was "going with the DA." The fact that Defendant made such generalized complaints about the representation that he received from his trial counsel during the trial does not in any way establish that Defendant had not reached an absolute impasse with his trial counsel concerning the manner

in which the cross-examination of Detective Braswell should be conducted. Instead, as we have already noted, the transcript of Defendant's trial demonstrates beyond reasonable contradiction that Defendant and his trial counsel reached an impasse with respect to the issue of whether certain specific questions should be posed to Detective Braswell. In light of Defendant's repeated statements that his trial counsel had refused to ask the questions that Defendant wanted posed to Detective Braswell; the trial court's erroneous statement that "that's between you and Mr. Herring" and that it's not its place "to interject"; and that the trial court failed, when the existence of the impasse between Defendant and his trial counsel was brought to its attention, to inquire into the nature of the impasse and order defense counsel "to comply with [his] client's lawful instructions," *Ali*, 329 N.C. at 403, 407 S.E.2d 189, we find the State's second response to this aspect of Defendant's challenge to the trial court's judgment unpersuasive as well.

Finally, the State has not argued that the trial court's error was harmless beyond a reasonable doubt and we would be unable to make such a determination even if the State had advanced a harmless error argument. *See* N.C. Gen. Stat. § 15A-1443(b) (stating that "[t]he burden is on the State to demonstrate, beyond a reasonable doubt, that the error [violating Defendant's constitutional rights] was harmless"). As a result of the fact that no inquiry was conducted into the nature of the impasse that Defendant and his trial counsel had reached concerning the manner in which the cross-examination of Detective Braswell should be conducted, including the nature of the exact questions that Defendant wanted his trial counsel to pose to Detective Braswell, we have no basis, apart from mere speculation, for finding that the State has established that the error at issue here was harmless beyond a reasonable doubt.[6]

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6. Even if we were to assume, in accordance with the unsupported contention advanced in Defendant's brief, that the impasse between Defendant and his trial counsel concerned questioning related to the delay between the date of the incident and the arrest warrant, we could not properly conclude that the error was harmless beyond a reasonable doubt. As a result of the fact that the suspect was not apprehended at the time of the commission of the alleged offense and the fact that the shotgun was not linked to Defendant on the basis of any sort of physical evidence, such as fingerprints, the only evidence identifying Defendant as the individual in possession of the shotgun on the occasion in question was the testimony of Detective Braswell and Commander Barnes. Admittedly, Commander Barnes positively identified Defendant based on his long-standing acquaintance with him. However, the officers' descriptions of the incident in question varied substantially, with Commander Barnes having testified that it occurred between "7:30 and eight o'clock" and that it was "more dark than it was light," while Detective Braswell asserted that "I know it was daylight," "maybe mid-afternoon, three, four o'clock." As a result of the length of time that elapsed between the date upon which Defendant allegedly possessed the shotgun and the date upon which Defendant's case was called for trial, coupled with the inconsistencies

As a result, we have no choice except to conclude that Defendant is entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction.[7]

D. Pre-Indictment Delay

[4] Finally, Defendant contends that the trial court erred by denying his motion that the charges that had been lodged against him be dismissed on the basis of an excessive period of pre-indictment delay. More specifically, Defendant contends that the two year period that elapsed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case violated his constitutional rights. We do not find Defendant's argument persuasive.

1. Standard of Review

As we have already noted, an alleged violation of a constitutional right raises a question of law that is subject to *de novo* review on appeal. *Gardner*, 322 N.C. at 594, 369 S.E.2d at 596. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (quotation marks and citation omitted).

2. Applicable Legal Principles

As an initial matter, we note that "the Speedy Trial Clause of the Sixth Amendment . . . applie[s] only to delay following indictment, information or arrest." *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22, *disc. review denied*, 301 N.C. 97, __ S.E.2d __ (1980). A challenge to a pre-indictment delay is, instead, predicated on an alleged violation of the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* "To prevail, a defendant 'must show both actual and substantial prejudice from the pre-indictment delay and that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the

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between the testimony of Detective Braswell and Commander Barnes, we are unable to conclude beyond a reasonable doubt that the outcome at Defendant's trial would have been the same had the trial court addressed the impasse between Defendant and his trial counsel in a different way.

7. As a result of our decision to grant Defendant a new trial based upon the trial court's failure to resolve the impasse between Defendant and his trial counsel in the manner required by North Carolina law, we need not address Defendant's alternative argument that the trial court erred by rejecting Defendant's request to be allowed to proceed *pro se*.

defendant.' " *State v. Graham*, 200 N.C. App. 204, 215, 683 S.E.2d 437, 444 (2009) (quoting *Davis*, 46 N.C. App. at 782, 266 S.E.2d at 23), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "The test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)).

A careful review of the record demonstrates that Defendant has failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense. Although Defendant had sustained a gunshot wound to the head a few months prior to the October 2008 incident and contends, in reliance upon that fact, that he was suffering from a significant visual impairment at the time of the incident underlying this case and that the existence of this condition undermined the validity of the State's claim that he successfully fled from Detective Braswell and Commander Barnes on 16 October 2008, we do not find this contention persuasive. Assuming, without deciding, that Defendant does, in fact, suffer from the visual impairment upon which he relies in an attempt to make the necessary showing of prejudice, Defendant has not shown that the nature and extent of his visual limitations had changed between the date upon which he allegedly possessed the shotgun and the date upon which he was formally charged with committing the offenses at issue in this case or that any other development would have rendered a visual assessment conducted after the date upon which he was formally charged insufficient to effectively advance the argument upon which he now seeks to rely. As a result, since Defendant has not shown that "significant evidence or testimony that would have been helpful to the defense was lost due to delay," *id.*, we have no hesitation in concluding that Defendant is not entitled to relief from the trial court's judgments on the basis of his pre-indictment delay claim.

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court erred by denying Defendant's motions to dismiss the possession of a firearm by a convicted felon and habitual felon charges and that the trial court failed to address the impasse that arose between Defendant and his trial counsel during the testimony of Detective Braswell in the manner required by North Carolina law. However, we further conclude that the trial court correctly denied Defendant's motion to dismiss the charges that had been lodged against him on the basis of excessive

pre-indictment delay. As a result, the trial court's judgment based upon Defendant's convictions for possession of a firearm by a felon and attaining habitual felon status should be, and hereby are, vacated and Defendant should be, and hereby is, awarded a new trial in the case in which he was convicted of possession of a weapon of mass destruction.

VACATED IN PART; NEW TRIAL IN PART.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA
v.
FREDERICK DARNELL JARMAN

No. COA14-572

Filed 16 December 2014

1. Sentencing—habitual felon status—runs consecutively with other sentences

At defendant's resentencing hearing, the trial court did not err by ordering that defendant's term of imprisonment for his conviction as a habitual felon begin at the expiration of his two consecutive sentences for prior convictions. N.C.G.S. § 14-7.6 requires that sentences imposed for habitual felon status "shall run consecutively with and shall commence at the expiration of any sentence being served" by the habitual felon.

2. Sentencing—resentencing—de novo hearing—no error

The trial court properly conducted at de novo hearing for defendant's resentencing. The trial court's comment that "those judges had the benefits of things I do not have in front of me" was a response to defense counsel's request that he consider evidence of mitigation presented at a previous sentencing hearing. Further, the trial court sentenced defendant at the bottom of the presumptive range and therefore was not required to formally find or act on defendant's proposed mitigating factors.

Appeal by Defendant from judgment entered 4 November 2013 by Judge John E. Nobles, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 17 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Erin O. Scott, for the State.

North Carolina Prisoner Legal Services, by Mary E. McNeill, for Defendant—Appellant.

McGEE, Chief Judge.

Frederick Darnell Jarman ("Defendant") appeals from a judgment entered pursuant to a resentencing hearing that corrected his prior record level determination from a level IV to a level III offender, and sentenced him to a term of 93 months to 121 months' imprisonment, to begin at the expiration of two consecutive sentences imposed for prior convictions. We affirm.

Defendant was found guilty by a jury of possession with intent to sell and deliver cocaine and entered a plea of no contest to having attained the status of an habitual felon on 15 April 1998. *See State v. Jarman (Jarman II)*, 132 N.C. App. 398, 518 S.E.2d 579, slip op. at 1 (1999) (unpublished), *cert. denied*, 351 N.C. 644, 543 S.E.2d 879 (2000). After finding that the factors in aggravation outweighed the factors in mitigation, and based on the trial court's determination that Defendant was a prior record level IV offender, he was sentenced to a term of 133 to 169 months' imprisonment. *See id.* The trial court further ordered that Defendant's sentence begin at the expiration of two consecutive terms of 125 to 159 months' imprisonment that Defendant was then obligated to serve from December 1997 convictions for forgery, uttering a forged check, and being an habitual felon. *See State v. Jarman* (*Jarman I)*, 131 N.C. App. 702, 515 S.E.2d 758, slip op. at 1, 3 (1998) (unpublished).

Defendant is said to have filed a motion for appropriate relief requesting a resentencing hearing to correct his prior record level determination from a designation as a level IV offender to a designation as a level III offender, and to reconsider his sentence for his 15 April 1998 convictions in light of the correction to his prior record level determination. Defendant's resentencing hearing ("the hearing") was held on 4 November 2013.

At the hearing, the State conceded an error in calculating Defendant's prior record level, and submitted to the trial court a corrected worksheet with Defendant's level III offender designation, along with the sentencing grid that was in effect at the time the offenses were committed. Defense counsel then asked the court to make findings as to mitigating

factors because counsel opined, among other things, that: Defendant "only ha[d] 13 infractions since he'[d] been in prison;" Defendant's mother was present at the hearing; Defendant had a "handicapped brother at home;" and Defendant had a job as a janitor and had taken classes in prison. Counsel did not seek to present any testimonial or documentary evidence for the court to consider in support of counsel's declarations, and the trial court did not make any findings as to aggravating or mitigating factors. Defense counsel then requested that the trial court allow Defendant's sentence for the 15 April 1998 convictions to run consecutively with the first of Defendant's two consecutive terms of 125 to 159 months' imprisonment for his December 1997 convictions, so that Defendant's sentence for the present case would run concurrently with the second term of imprisonment for his 1997 convictions. The trial court declined counsel's request, and sentenced Defendant at the bottom of the presumptive range to a term of 93 to 121 months' imprisonment for his 1998 convictions, to begin at the expiration of the two consecutive terms of imprisonment Defendant was serving for his 1997 convictions. Defendant appeals.

[1] Defendant first contends the trial court erred when it ordered that Defendant serve the sentence imposed for his 1998 habitual felon conviction upon the expiration of both terms of imprisonment for his 1997 convictions, rather than concurrently with the second term of imprisonment arising from his 1997 convictions. Defendant asserts the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run Defendant's 1998 sentence concurrently with the second term of imprisonment arising from his 1997 convictions. We disagree.

N.C. Gen. Stat. § 14-7.6 has long provided that "[s]entences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2013); N.C. Gen. Stat. § 14-7.6 (1997). Our Courts have also long recognized that, when this language has been examined in other criminal statutory provisions, such language is "clear" and "unambiguous," *e.g.*, *State v. Wall*, 348 N.C. 671, 675, 502 S.E.2d 585, 588 (1998) (N.C. Gen. Stat. § 14-52); *State v. Warren*, 313 N.C. 254, 265, 328 S.E.2d 256, 264 (1985) (N.C. Gen. Stat. § 14-52); *State v. Woods*, 77 N.C. App. 622, 625-26, 336 S.E.2d 1, 2-3 (1985) (N.C. Gen. Stat. § 14-87(d)), *aff'd per curiam*, 317 N.C. 143, 343 S.E.2d 538 (1986); *see*, *e.g.*, *State v. Ellis*, 361 N.C. 200, 206, 639 S.E.2d 425, 429 (2007) (N.C. Gen. Stat. § 14-87(d)); *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010) (N.C. Gen. Stat. § 90-95(h)(6)), and

its plain meaning is "that a term imposed for [such offenses] under the [respective] statute[s] is to run consecutively with *any other sentence* being served by the defendant." *See Warren*, 313 N.C. at 265, 328 S.E.2d at 264. We find no authority, and have been directed to none, that would require us to construe the substantively-similar language of N.C. Gen. Stat. § 14-7.6 any differently than our Courts have previously construed it for other statutory provisions in Chapter 14 of the North Carolina General Statutes. Thus, we conclude that the plain meaning of the last sentence of N.C. Gen. Stat. § 14-7.6 requires that a term of imprisonment imposed pursuant to a conviction as an habitual felon must "run consecutively with *any other sentence* [or sentences] being served by [a] defendant." *See id.*

Nevertheless, in the present case, Defendant directs our attention to an excerpt from N.C. Gen. Stat. § 15A-1354(a), which provides as follows: "When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354(a) (2013); N.C. Gen. Stat. § 15A-1354(a) (1997). Defendant relies on this language to insist that the trial court "ha[d] the discretion to determine which prior sentence to run the habitual felon sentence consecutive to." However, Defendant seems to have overlooked the last sentence of this statutory subsection, which further provides: "*If* not specified or *not required by statute to run consecutively*, sentences shall run concurrently." N.C. Gen. Stat. § 15A-1354(a) (emphases added). Since we have determined N.C. Gen. Stat. § 14-7.6 requires that sentences imposed pursuant to this provision must "run consecutively with *any other sentence*," *see Warren*, 313 N.C. at 265, 328 S.E.2d at 264, the discretion that would otherwise be afforded to the trial court with respect to sentencing pursuant to N.C. Gen. Stat. § 15A-1354(a) is inapposite to N.C. Gen. Stat. § 14-7.6. Accordingly, we conclude the trial court did not misapprehend the law or abuse its discretion when it ordered that Defendant's term of imprisonment for the sentence at issue in the present case begin at the expiration of the two consecutive sentences imposed for Defendant's prior 1997 convictions.

[2] Defendant next contends the trial court failed to conduct a *de novo* resentencing hearing. Specifically, Defendant asserts the trial court made statements "indicating that it was not conducting a *de novo* resentencing and did not understand that it should." We disagree.

"It has been established that each sentencing hearing in a particular case is a *de novo* proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370

S.E.2d 68, 69 (1988). "The judge hears the evidence without a jury," *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 388 (1985), "and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *State v. Brooks*, 136 N.C. App. 124, 133, 523 S.E.2d 704, 710 (1999) (internal quotation marks omitted), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). "Although [the judge] must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist." *Jones*, 314 N.C. at 648, 336 S.E.2d at 388. At each sentencing hearing, "the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation," *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986), and must find aggravating and mitigating factors "without regard to the findings in the prior sentencing hearings." *Jones*, 314 N.C. at 649, 336 S.E.2d at 388.

"[H]owever, the trial court need 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." *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363 (internal quotation marks omitted), *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007). When a trial court "enter[s] a sentence within the presumptive range, the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible." *Id.* (citing *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006) ("[The] notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected."), *appeal after remand*, 188 N.C. App. 799, 656 S.E.2d 704 (2008)).

In the present case, Defendant directs our attention to the following comment from the trial court as support for its assertion that the court misapprehended its obligation to conduct *de novo* review: "I agree with you that two Class Is and Class H, you don't normally think in terms of 30 years, but those judges had the benefits of things I do not have in front of me." Defendant asserts that "[t]his statement indicates that the trial court felt that its discretion on how to sentence [him] was limited by the decision of the original sentencing court," and "indicates that the trial court did not understand that it could consider mitigating factors and had the discretion to sentence [Defendant] in the mitigated range." However, our review of the context of this remark

shows that the trial court was responding to defense counsel's earlier entreaty that it consider evidence of mitigation presented during the sentencing phase for Defendant's two 1997 Class I convictions, which convictions were not subject to review by the trial court. Thus, the court properly recognized that it could not consider evidence of mitigation from, or consider modifying the sentences of, Defendant's prior convictions that were not before it for review. Therefore, after reviewing the transcript of the resentencing proceedings in its entirety, we are not persuaded that the trial court's arguably imprecisely worded remarks demonstrate that it "did not understand" its obligation to conduct a *de novo* review of the evidence that was properly before it for consideration. Since the trial court sentenced Defendant at the bottom of the presumptive range based on Defendant's corrected prior record level determination, and since "the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible" when it sentences a defendant within the presumptive range, *see Dorton*, 182 N.C. App. at 43, 641 S.E.2d at 363, we conclude that this issue on appeal is without merit.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.

STATE OF NORTH CAROLINA
v.
MAJOR WOODY MYERS, JR.

No. COA14-504

Filed 16 December 2014

1. Sentencing—second-degree murder—aggravating factors—especially heinous atrocious or cruel

The trial court's finding that a second-degree murder was especially heinous, atrocious, or cruel was not supported by the evidence. Additional injuries found on the victim's hands and face before she was shot did not alone rise to the necessary level of extreme physical and psychological suffering; defendant was in the home that he lawfully shared with the victim and his mere presence in his own home did not make his actions especially atrocious, heinous, or

cruel; and the fact that the victim did not die instantaneously did not support the factor because the medical examiner testified that the victim likely lost consciousness shortly after being shot and there was no indication she suffered.

2. Sentencing—second-degree murder—aggravating factors—position of trust or confidence—spouse

The trial court's finding that defendant took advantage of a position of trust or confidence in order to kill his wife was not supported by the evidence. In essence, the State argued that the marital nature of the relationship made his killing a *per se* taking advantage of a position of trust or confidence. However, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence to effectuate the offence.

3. Sentencing—second-degree murder—aggravating factors—not supported by evidence—disposition

Where neither of the aggravating factors supporting a sentence for second-degree murder had a sufficient factual basis in the record, the Court of Appeals determined that the proper disposition for defendant's appeal was to set aside his plea agreement and remand for disposition on the original charge of first-degree murder.

Appeal by Defendant from judgment entered 19 February 2009 by Judge Donald Stephens in Superior Court, Caswell County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Linda B. Weisel for Defendant.

McGEE, Chief Judge.

Major Woody Myers, Jr. ("Defendant") was charged with the first-degree murder of his wife, Darlene Myers ("Ms. Myers"). During Defendant's trial, Defendant entered an Alford plea to second-degree murder, pursuant to a plea agreement. The plea agreement required that Defendant concede the existence of two aggravating factors in connection with Ms. Myers' homicide. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced Defendant for second-degree murder in the aggravated range. On appeal, Defendant contends there was an insufficient factual basis

to support the aggravating factors. We agree with Defendant. Thus, the plea agreement must be set aside, and we remand for disposition on Defendant's original charge of first-degree murder.

I. Background

Defendant and Ms. Myers lived together in rural Caswell County. Defendant regularly shot targets with firearms on their property. Defendant's neighbor, Danny Gregory ("Mr. Gregory"), disliked Defendant's target shooting and at times argued with Defendant over his practice of target shooting. Mr. Gregory's cousin, Tony Cook ("Mr. Cook"), was working on Mr. Gregory's property with other workers around 11:00 a.m. on 14 January 2008, when Mr. Cook heard gun shots coming from Defendant's property. Defendant was conducting target practice with his Taurus 9mm pistol ("the pistol"). Fearing that he or one of the other workers might be struck by a stray bullet, Mr. Cook confronted Defendant, and the two argued. Defendant eventually calmed down, apologized, went into his house, and Mr. Cook returned to his work.

Within the hour, at 11:37 a.m., Defendant called 911 and reported a shooting inside his home. Law enforcement and emergency medical personnel arrived at Defendant's home around 11:50 a.m. and found Ms. Myers lying unresponsive and face down on the kitchen floor with a fatal gunshot wound in the back of her head. Other than an overturned space heater, the kitchen appeared undisturbed. In spite of multiple attempts at resuscitation, Ms. Myers was pronounced dead at 1:07 p.m., ninety minutes after the 911 call.

Defendant was not at home when law enforcement arrived. After calling 911, Defendant left his house and went to his stepdaughter's house to tell her what had happened. However, Defendant eventually returned and peacefully surrendered to law enforcement. Defendant subsequently was indicted for first-degree murder.

At trial, Defendant testified that he had consumed two 22-ounce beers and had smoked some marijuana on the morning of 14 January 2008, before engaging in target practice. Defendant further testified that, after his confrontation with Mr. Cook, he went inside his house and had a heated conversation with Ms. Myers over his ongoing disputes with Mr. Gregory. Defendant stated that he was frustrated, was talking with his hands, and that he continued to hold the pistol while he spoke. However, the pistol reportedly had a "hair-pin trigger," and Defendant testified that it accidently discharged and shot Ms. Myers in the head. The State contends the shooting was intentional.

Medical Examiner Deborah Radisch ("Dr. Radisch") testified that the cause of Ms. Myers' death was one "very tangential . . . almost a glancing" gunshot wound across the back of Ms. Myers' head. She testified that the gunshot was not made point-blank or in close range because there was no stippling about the wound. Dr. Radisch further testified that Ms. Myers likely lost consciousness shortly after being shot. She said that Ms. Myers had several bruises and abrasions on her face and hands, which "could be consistent with defens[ive] wounds." These injuries were visibly "faint" and not very large; although Dr. Radish testified that, if Ms. Myers sustained the injuries right before being shot, her subsequent, and significant, blood loss would have minimized the amount of bruising that otherwise might have developed. Dr. Radisch further testified that these injuries were also consistent with injuries "inflicted by being struck by a blunt force object or perhaps a fall onto a hard surface," and "more likely than not" were incurred before the gunshot wound.

At the close of all the evidence, and pursuant to a plea agreement ("the plea agreement"), Defendant entered an *Alford* plea to second-degree murder. The plea agreement provided that

> [u]pon Defendant's plea to second-degree murder with the existence of aggravating factors ([taking] advantage of [a] position of trust and confidence, and [especially heinous], cruel, and atrocious); Defendant waives notice of aggravating factors; and sentencing will be in the aggravated range.

The trial court conducted a plea colloquy with Defendant, found factual bases for the above-listed aggravating factors, and accepted Defendant's plea. The trial court sentenced Defendant in the aggravated range for second-degree murder. Defendant did not enter a notice of appeal. However, Defendant filed a petition for a writ of certiorari with this Court on 7 October 2013 to review his sentence, which this Court granted.

II. Standard of review

The standard of review for a sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and at the sentencing hearing. *See State v. Choppy*, 141 N.C. App. 32, 43, 539 S.E.2d 44, 51 (2000).

III. Analysis

On appeal, Defendant contends there was not a sufficient factual basis for the trial court to find the aggravating factors listed in Defendant's plea agreement. Defendant is correct.

A. Especially Atrocious, Heinous, or Cruel

[1] During Defendant's sentencing hearing, the trial court found that

> [Ms. Myers] suffered blunt force trauma to her face in the nature of an assault separate and apart from the final assault that caused her death, and the totality of the assault that she suffered . . . in combination [was] especially atrocious, heinous, and cruel and therefore, the Court makes that finding in aggravation.

There is not a sufficient factual basis in the record to support this finding.

All homicides are gruesome. However, to support a finding that a homicide was especially heinous, atrocious, or cruel, the defendant's acts must have been characterized by "*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*" in the homicide charged. *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983).

In *State v. Martin*, 303 N.C. 246, 250-53, 278 S.E.2d 214, 217-19 (1981), the trial court properly found a homicide was especially heinous, atrocious, or cruel where the victim was paralyzed from the waist down after being shot by the defendant. The defendant then, over a twenty-five minute period, dragged the victim into another room, beat her with a pistol, threw her repeatedly against a wall, beat her on the head with his fists, and beat her again with the pistol before finally firing the fatal shots. *Id.* at 252, 278 S.E.2d at 218. Similarly, in *State v. Shadrick*, 99 N.C. App. 354, 355, 393 S.E.2d 133, 133 (1990), the trial court properly found this aggravating factor where,

> on the day of the offense and prior to the victim's death, [the] defendant assaulted the victim, his wife, by pushing her and pulling her by the hair of her head, [the] defendant placed a gun to the victim's head and clicked the trigger, and [the] defendant burned the victim's clothes in her presence and burned her pubic hair.

Assuming *arguendo* that Defendant did cause the additional injuries found on Ms. Myers' hands and face before she was shot, although deplorable, those injuries alone do not rise to the level of extreme physical and psychological suffering that would support a finding that the circumstances surrounding Ms. Myers' death were especially atrocious, heinous, or cruel.

The State also argues that a finding of this aggravating factor is supported by the fact that Ms. Myers was killed within the "sanctuary" of her home. In support of this contention, the State cites several sources of authority, specifically *State v. Garcell*, 363 N.C. 10, 66, 678 S.E.2d 618, 653 (2009); *State v. Cummings*, 361 N.C. 438, 477, 648 S.E.2d 788, 811-12 (2007); and *State v. Smith*, 359 N.C. 199, 220, 607 S.E.2d 607, 622 (2005). While it is true that killing someone in his or her home can help support a finding that a homicide was especially heinous, atrocious, or cruel, the present case is distinguishable from the authority presented by the State. The defendants in *Garcell*, *Cummings*, and *Smith* did not live with their victims, and they either had no lawful right to be in the victims' homes when the homicides occurred or had tricked their way inside. *See Garcell*, 363 N.C. at 21, 678 S.E.2d at 626; *Cummings*, 361 N.C. at 443, 648 S.E.2d at 792; *Smith*, 359 N.C. at 203, 607 S.E.2d at 612. In the present case, Defendant was in the home that he lawfully shared with Ms. Myers when she was shot. As such, Defendant's mere presence in his own home did not make his actions especially atrocious, heinous, or cruel.

Finally, the State contends that a finding of this aggravating factor is supported by the fact that Ms. Myers did not die instantaneously; indeed, from the time Defendant called 911, it took Ms. Myers ninety minutes to die. In support of its contention, the State points only to *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). However, in *Stanley*, this aggravating factor was found unsupported by the evidence where the victim was shot, "rendered . . . unconscious within minutes," and died some time later. *Id.* at 340, 312 S.E.2d at 398. The *Stanley* Court expressly stated that even where "death is not instantaneous, . . . [this] does not alone make a murder especially heinous, atrocious or cruel." *Id.* at 337, 312 S.E.2d at 396.

In the present case, Dr. Radisch's testimony indicated that Ms. Myers likely lost consciousness shortly after being shot and, although she was not pronounced dead for at least another ninety minutes, there was no indication she suffered during that time period. As such, the present case is not distinguishable from *Stanley*, and the State's argument here is without merit. Therefore, for all the above reasons, the trial court's finding that the circumstances surrounding Ms. Myers' death were especially heinous, atrocious, or cruel was not supported by the evidence.

B. Position of Trust or Confidence

[2] During Defendant's sentencing hearing, the trial court also found that

> given the relationship between the Defendant and the victim, his wife, that the Defendant did take advantage of a position of trust, including a domestic relationship[,] to commit this offense, and therefore finds aggravating factor number 15 based upon the evidence presented to the jury and to this Court with regard to what occurred on January the 14th of 2008, at the time, prior to the victim's death.

This, too, is not supported by the evidence.

In essence, the State presents this Court with the argument that the marital nature of Defendant's and Ms. Myers' relationship made his killing her a *per se* taking advantage of a position of trust or confidence. Indeed, the State's argument that the trial court's finding was supported by the evidence rests on a contention that Defendant and Ms. Myers had been married for eighteen years, they shared a home together, and that Ms. Myers was shot while not directly facing Defendant because "she had no reason to distrust [Defendant] immediately before he fired the gun." However, "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where '[t]here was no evidence showing that defendant *exploited* his wife's trust in order to kill her.' " *State v. Wiggins*, 159 N.C. App. 252, 269, 584 S.E.2d 303, 316 (2003) (quoting *State v. Marecek*, 152 N.C. App. 479, 514, 568 S.E.2d 237, 259 (2002)) (emphasis added). In other words, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence with his or her spouse in some way to effectuate the offense. *See e.g.*, *State v. Arnold*, 329 N.C. 128, 135, 144, 404 S.E.2d 822, 826, 832 (1991) (aggravating factor supported by the evidence where the defendant asked her husband to retrieve her purse from their church late at night, and where, upon arrival, the husband was ambushed by the wife's lover and killed). In the present case, there is no evidence that Defendant asked Ms. Myers to face away from him before firing the pistol, or that he otherwise utilized his position of trust or confidence with Ms. Myers in order to effectuate her death. As such, the trial court's finding that Defendant took advantage of a position of trust or confidence in order to kill Ms. Myers also was not supported by the evidence.

C. Rescinding the Plea Agreement

[3] Because neither of these aggravating factors has a sufficient factual basis in the record, this Court now must determine the proper disposition for Defendant's appeal. In *State v. Rico*, 218 N.C. App. 109, 110, 720 S.E.2d 801, 802 (2012), *rev'd in part per curiam for the reasons*

stated in the dissent, 366 N.C. 327, 734 S.E.2d 571 (2012), the defendant was charged with first-degree murder. The defendant entered into a plea agreement, through which he pleaded guilty to voluntary manslaughter and admitted to the existence of an aggravating factor in connection with the homicide. *Id.* at 110–11, 720 S.E.2d at 802. The trial court accepted the plea agreement and found the existence of the aggravating factor that was included in the plea agreement. *Id.* at 111, 720 S.E.2d at 802. After being sentenced in the aggravated range for voluntary manslaughter, the defendant appealed and successfully challenged the factual sufficiency of that aggravating factor. *Id.* at 118, 720 S.E.2d at 806. However, because the defendant "elected to repudiate a portion of his [plea] agreement," the "essential and fundamental terms of the plea agreement were unfulfillable." *Id.* at 122, 720 S.E.2d at 809 (Steelman, J, dissenting in part). As a result, the plea agreement had to be set aside, and the case was remanded to superior court for disposition on the original charge of first-degree murder. *Rico*, 366 N.C. at 327, 734 S.E.2d at 571; *accord State v. Smith*, __ N.C. App. __, __ S.E.2d __, COA13-742-2, slip op. at 9–10 (Aug. 5, 2014) (unpublished) (setting aside the defendant's plea agreement, which defendant repudiated, and remanding for disposition on the original charges against the defendant).

Defendant's case is indistinguishable from *Rico*. Defendant entered into a plea agreement, through which he pleaded guilty to a lesser included offense of first-degree murder and admitted to two aggravating factors in connection with Ms. Myers' homicide. On appeal, Defendant successfully challenges the factual bases for the aggravating factors set out in his plea agreement. Therefore, as required by *Rico*, Defendant's plea agreement must be set aside and this case is remanded for disposition on the original charge of first-degree murder.

Reversed and remanded; new trial.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA
v.
KELLY WINTON PIERCE

No. COA14-574

Filed 16 December 2014

1. Sexual Offenders—registration—failure to notify new sheriff's office of change of address—sufficiency of indictment

Although the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender improperly alleged that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office, the "new county sheriff."

2. Sexual Offenders—registration—new address—amendment of indictment—expansion of dates of offense

The trial court did not err by allowing the State to amend the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender to expand the dates of the offense from 7 November 2012 to June to November 2012. The amendment did not substantially alter the charge because the specific date that defendant moved was not an essential element of the crime. Further, defendant's argument that timing was of the essence in charges involving failure to report a change of address as a sex offender was without merit. Finally, defendant failed to show that he detrimentally relied on the original date of the offense and that he was substantially prejudiced by the amendment.

3. Sexual Offenders—registration—failure to notify sheriff's office of change of address—motion to dismiss—temporary home address

The trial court did not err by denying defendant's motion to dismiss the charge of failing to notify the sheriff's office of a change of address as a registered sex offender based on the State's alleged failure to provide substantial evidence that defendant changed his address. The State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address, in Wilkes County.

Appeal by defendant from judgment entered 7 November 2013 by Judge Ronald E. Spivey in Wilkes County Superior Court. Heard in the Court of Appeals 21 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Brock & Meece, P.A., by C. Scott Holmes, for defendant.

HUNTER, Robert C., Judge.

Defendant appeals the judgment entered after he was convicted of failing to notify the sheriff's office of a change of address as a registered sex offender ("failure to notify") and pled guilty to attaining habitual felon status. On appeal, defendant only challenges the failure to notify conviction and argues that: (1) the indictment was fatally defective because it named the wrong sheriff's department where notification was required and failed to allege a "failure to report in person"; (2) the trial court erred in allowing the indictment be amended with regard to the dates of offense; and (3) the trial court erred in denying defendant's motion to dismiss because the State failed to provide substantial evidence that he resided in Wilkes County.

After careful review, we find no prejudicial error.

Background

In 2009, defendant was convicted of four counts of indecent liberties with a child, an offense that required him to register as a sex offender. In November 2010, defendant registered as a sex offender in Burke County. Deputy Robin Jennings at the Burke County Sheriff's Office reviewed all the sex offender registration requirements with defendant, including the requirement that, if he moved to a different county, he would be required to appear in-person and provide written notice of the address change to both the sheriff in the county where he was most currently registered and the new sheriff. However, the State contends that defendant moved to Wilkes County during the summer of 2012 but failed to notify the Wilkes County Sheriff's Office that he had moved. Defendant denies it and claims that he still resided in Burke County throughout 2012 where he was properly registered. Both sides presented evidence at trial in support of their contentions.

I. The State's Evidence

Defendant's ex-wife, Marilyn Joann Long ("Joann"), lived in Wilkes County. At trial, Melissa Anderson ("Melissa"), who lived next door to Joann, testified on behalf of the State. Melissa claimed that, beginning in June 2012, she saw defendant at Joann's house "all week," "at least five days a week," and "every evening." Although she acknowledged that defendant would usually be gone on the weekends, he was "always there" during the week. Furthermore, she alleged that defendant did things around Joann's home "like a normal person living in a house" such as mowing the yard.

Joy Griffin ("Joy"), who lived in the trailer in front of Joann's, also testified at trial. She claimed that, in June, she saw defendant in her backyard with a headlight on his head. Joy alleged that defendant would be at Joann's two or three days, leave for a day, and then come back. He would be there all day and all night. Ultimately, in November 2012 after she found out that defendant was a registered sex offender, Joy called the Wilkes County Sheriff's Office and reported that defendant was living with Joann.

II. Defendant's Evidence

Defendant testified on his own behalf at trial and claimed that he never moved in with Joann. Although he conceded that he may have stayed with Joann two or three days in a row to help her with home improvement projects, he usually just drove back and forth between Morganton and Wilkesboro. Joann's testimony was similar to defendant's. She claimed that defendant travelled back and forth between Morganton and Wilkesboro to help her. According to Joann, although he may have spent one or two nights with her a week, "that was about the limit."

At trial, defendant produced several documents showing an address in Burke County, including his driver's license, an electricity bill from November 2012, his bank account statements, a wireless phone bill, car registration and tax bill, and his disability check. According to defendant, these documents showed that he still resided in Burke County.

Defendant also relied on the testimony of Earl Miller ("Earl"), his neighbor in Burke County, to support his claim that he never moved to Wilkes County. According to Earl, he helped defendant complete several projects around his mobile home, including installing a water pump and water heater. Earl claimed that he and his wife saw defendant every other day during 2012 and that defendant often ate dinner with him, sometimes five times a week.

On 7 November 2012, Lieutenant Whitley from the Wilkes County Sheriff's Office took the report from Joy that defendant was living with Joann. He and Sergeant Coles went to Joann's home to investigate. Defendant denied that he was living with Joann, claiming that he stays with her "from time to time." Based on their investigation and defendant's failure to register in Wilkes County, they arrested defendant for failure to notify the Wilkes County Sheriff's Office.

On 22 July 2013, defendant was indicted for failure to notify pursuant to N.C. Gen. Stat. §§ 14-208.11(a)(7) and 14-208.9(a). The date of offense was 7 November 2012. The indictment read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did as a person required by-Article 27A of Chapter 14 of the General Statues to register as a sexual offender, moved from Morganton, North Carolina, which is Burke County, North Carolina to Wilkes County, North Carolina, thereby the defendant changed his address to Wilkes County, North Carolina, and the defendant failed to provide written notice within 10 days after his change of address to the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office as required by statute.

At trial, the court allowed the State to amend the date of offense from 7 November 2012 to June to November 2012. The jury found defendant guilty on 6 November 2013 of failing to notify the Wilkes County Sheriff's Office of his address change, and defendant pled guilty to attaining the status of being a habitual felon. The trial court sentenced defendant to a minimum term of 87 months to a maximum term of 117 months imprisonment. Defendant appeals.

Arguments

[1] Defendant first argues that the indictment was fatally defective because it failed to include all the essential elements of the offense. Specifically, defendant contends that the indictment was fatal in two respects. First, it failed to include the essential element that defendant "report in person" as required by sections 14-208.11(a)(7) and 14-208.9(a). Second, defendant argues that it improperly alleges a failure to notify "the last registering sheriff"; in contrast, defendant contends that it should allege that defendant failed to notify "the sheriff of

the new county." We disagree; although the indictment improperly alleges that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office—the "new county sheriff."

This Court reviews the sufficiency of an indictment de novo. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). Regarding its sufficiency, it is well-established that:

> The indictment is sufficient if it charges the offense in a plain, intelligible and explicit manner. Indictments need only allege the ultimate facts constituting each element of the criminal offense, and an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.

State v. Barnett, __ N.C. App. __, __, 733 S.E.2d 95, 98 (2012).

A person who is required to register as a sex offender commits a felony if he "[f]ails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(7) (2013). In turn, section 14-208.9(a), the statute defendant was indicted for violating, sets out two basic sets of notification requirements for registered sex offenders. First, to the sheriff of the county with whom the person had last registered, i.e., the "last registering sheriff," the person must provide in-person and written notice of the new address "not later than the third business day after the change." *Id.* Second, if the person moves to a new county, he must also report in-person and provide written notice of his address within 10 days after the change in address to the sheriff of the new county, i.e., the "new county sheriff." *Id.*

Here, the indictment alleges that defendant violated section 14-208.9(a) by failing to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office as required by statute." As to defendant's first contention that the indictment was fatally defective for not alleging that defendant failed to give in-person notification to the Wilkes County Sheriff's Office, defendant has failed

to show any defect in the indictment. Defendant is correct that a registered sex offender must provide both in-person notification and written notice of the new address. However, defendant was only prosecuted and convicted based on his failure to give 10 days of written notice, which, by itself, constitutes a violation of section 14-208.9(a). Thus, the indictment properly charged a violation of section 14-208.9(a) based on his failure to provide written notice of his new address to the "new county sheriff." Consequently, defendant has failed to establish any defect in the indictment based on the type of notification defendant was charged with failing to provide.

Next, as to the indictment's reference to the wrong sheriff's department, clearly, there is a conflict in the language of the indictment. Specifically, while the indictment alleges that defendant failed to give written notification of the address change to "the last registering sheriff," it references the Wilkes County Sheriff's Office which is the new county's sheriff's office. Thus, the issue is whether the conflict constituted a fatal variance.

Here, read in totality, the language of the indictment would put defendant on notice that he was being prosecuted for failing to give notice to the "new county sheriff," not the "last registering sheriff," for two primary reasons. First, the indictment actually named the sheriff's department properly—the Wilkes County Sheriff's Office. Second, the 10-day notice requirement only applies to the "new county sheriff," not the "last registering sheriff." Thus, although the indictment improperly references the "last registering sheriff," this language is not fatal to the indictment because the other language was sufficient to charge a violation of section 14-208.9(a) for failing to provide in-person notification to the "new county sheriff."

[2] Next, defendant argues that the trial court erred in allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. We disagree.

This Court reviews a trial court's granting of the State's motion to amend an indictment *de novo*. *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596 (2010). "A change of the date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment." *State v. Wallace*, 179 N.C. App. 710, 716, 635 S.E.2d 455, 460 (2006). "Where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment." *State v. Taylor*, 203 N.C. App. 448, 457, 691 S.E.2d 755, 763 (2010).

Here, the amendment of the dates of offense did not substantially alter the charge against defendant because the specific date that defendant moved to Wilkes County was not an essential element of the crime. In *State v. Harrison*, 165 N.C. App. 332, 336, 598 S.E.2d 261, 263 (2004), this Court rejected the defendant's argument that the specific date that the sex offender moved was an essential element of the crime of failing to register as a sexual offender pursuant to N.C. Gen. Stat. § 14-208.11(a)(2). Accordingly, time is not be an essential element of a violation under section 14-208.11(a)(7), and the trial court was permitted to amend the dates of offense in the indictment.

Furthermore, defendant's argument that "timing is of the essence in charges involving failure to report a change of address as a sex offender" is without merit. The only time element that must be alleged in the indictment charging a violation of section 14-208.11 is the time period in which the registered sex offender has to notify the sheriff of a change of address, not the date he moves. Here, since the indictment properly alleged that defendant failed to provide written notice to the Wilkes County Sheriff's Office within 10 days after his change of address, the indictment sufficiently alleged the relevant time element, and the amendment of the dates of the offense did not substantially alter the charges against defendant.

Finally, defendant has failed to show that he detrimentally relied on the original date of offense and was substantially prejudiced by the amendment. *See State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001). Defendant contends he was deprived of the ability to present a meritorious defense because he only focused on the original date in the indictment in preparing for trial. Specifically, he claims that he only brought bills and proof of his address from November and December 2012. However, at trial, both Joann and Earl testified that defendant was still living in Burke County throughout the time period set out in the amended indictment. Therefore, defendant has not demonstrated that he was prejudiced by relying on the original timeframe set forth in the indictment. Accordingly, the trial court did not err in allowing the amendment of the indictment.

[3] Next, defendant argues that the trial court erred in denying his motion to dismiss because the State failed to provide substantial evidence that defendant changed his address. Taking the evidence in a light most favorable to the State, we disagree.

" '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 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007). However, the trial court must consider all the evidence in a light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

With regard to what constitutes a sex offender's "home address," our Supreme Court has rejected the notion that it is only "a place where a registrant resides and where that registrant receives mail or other communication." *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009). Instead, the Court held that

> a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. Domicile is a legal term of art that denotes one's permanent, established home, whereas a person's residence may be only a temporary, although actual, place of abode.

Id. at 331, 677 S.E.2d at 451 (internal citations and quotation marks omitted). The Court went on to say that

> mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

Id. at 332, 677 S.E.2d at 451. Thus, the issue is whether the State presented substantial evidence that defendant changed his residence or actual place of abode, even temporarily.

Here, the testimony of Melissa and Joy support a reasonable inference that defendant resided with Joann at her home in Wilkes County. Specifically, Melissa testified that, even though defendant often left on weekends, he would be at Joann's house all week, including the evenings; Joy claimed that defendant would be at Joann's house more often than not. Furthermore, Melissa testified that defendant engaged

in certain "activities of life," *id.*, like mowing the yard, that would be normal for someone residing at Joann's. In sum, the evidence tended to show that defendant had more than just a "physical presence" at Joann's but, instead, had established a residence there. Thus, the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a "temporary home address," *see id.* at 331, 677 S.E.2d at 451, in Wilkes County. Accordingly, this evidence tended to show that defendant changed his "home address," as that term is described in *Abshire*, and was sufficient to defeat defendant's motion to dismiss.

We find the facts of this case analogous to *Abshire*. In *Abshire*, the defendant, a registered sex offender, was charged with violating section 14-208.11 by failing to notify the Caldwell County Sheriff's department that she changed her address *Id.* at 326, 677 S.E.2d at 448. The evidence at trial tended to show that, in July 2006, the defendant notified the Caldwell County Sheriff's Office that she had changed her address to a house on Gragg Price Lane in Hudson, North Carolina. *Id.* at 324-25, 677 S.E.2d at 447. This home was owned by Ross Price ("Mr. Price"). *Id.* at 325, 677 S.E.2d at 447. In September, the defendant's children's school became concerned about the children's poor attendance. *Id.* A school social worker visited Mr. Price's home and was told that the defendant had not lived at that address for a couple of weeks. *Id.* Although Mr. Price stated that the defendant still received mail there and had been "in and out" of the residence, he did not know where the defendant was currently residing. *Id.* A Caldwell County Sheriff's Detective also visited Mr. Price's home in an attempt to find the defendant; Mr. Price told him that the defendant "got mad a couple of weeks ago and went to go stay with her father" at his house on Poovey Drive in Granite Falls. *Id.*

Based on this, the defendant was arrested for failing to register her change of address to Poovey Drive. *Id.* at 326, 677 S.E.2d at 447-48. After her arrest, the defendant submitted a statement to the sheriff's department, claiming that, although she was staying with her father on Poovey Drive, she still received mail at Mr. Price's house and planned on returning there, at some point in the future, to live. *Id.* at 326, 677 S.E.2d at 448. Moreover, during the trial, she testified that she visited her house on Gragg Price Lane daily and that she considered it her "home." *Id.* at 327, 677 S.E.2d at 448.

At trial, the defendant made a motion to dismiss, arguing that there was insufficient evidence that she changed her address. *Id.* The trial court denied her motion. *Id.* A divided panel of this Court agreed

with the defendant and vacated her conviction. *State v. Abshire*, 192 N.C. App. 594, 605, 666 S.E.2d 657, 665. The defendant appealed to the Supreme Court. *Abshire*, 363 N.C. at 327, 677 S.E.2d at 448.

On appeal, our Supreme Court first discussed the definition of a sex offender's "home address" for purposes of the registration statutes. *Id.* at 329, 677 S.E.2d at 449. The Court noted that the intent of the legislature was clear and that even a sex offender's "temporary home address must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders in our state." *Id.* at 331, 677 S.E.2d at 450-51. Viewing the evidence in a light most favorable to the the State, our Supreme Court held that there was sufficient evidence that the defendant changed her address to defeat the motion to dismiss. *Id.* at 333, 677 S.E.2d at 452. Specifically, the Court concluded that the jury could have reasonably inferred that although "[the] defendant carried out the core necessities of daily living at Gragg Price Lane[,]" she resided at her father's house on Poovey Drive. *Id.* In other words, even though the defendant still received mail and maintained a presence on Gragg Price Lane, her "place of abode," even if it was temporary, was at her father's. *Id.* Consequently, the Supreme Court held that the trial court properly denied the defendant's motion to dismiss and reversed this Court. *Id.*

Similar to *Abshire*, the evidence here showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," *id.*, at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, Joy and Melissa testified that defendant was often at Joann's all week. Furthermore, Melissa testified that defendant engaged in activities that only someone living at Joann's would do. Thus, as in *Abshire*, the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," *Abshire* makes it clear that his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a second, temporary residence. Accordingly, the State's evidence was sufficient to defeat defendant's motion to dismiss. We note that although defendant may have "changed" his address by temporarily residing at Joann's house, he still had an obligation under the law to remain registered in Burke County since he also had his permanent domicile there.

Conclusion

Because the indictment's language was sufficient to put defendant on notice that he was indicted for failing to register his address with the Wilkes County Sheriff's Office, any conflict in the indictment did not constitute a fatal variance. In addition, the trial court did not err in allowing the State to amend the dates of the offense because the amendment did not substantially alter the charges against defendant. Finally, because the State presented substantial evidence that defendant had a temporary residence in Wilkes County, the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
SUSAN DENISE SHAW

No. COA14-124

Filed 16 December 2014

1. **Search and Seizure—traffic stop—information received from other officers provided reasonable suspicion**

In a driving while impaired prosecution, the trial court did not err by denying defendant's motion to suppress. The officer who conducted the traffic stop had been radioed by other officers and informed that they had observed defendant weaving outside her lane of travel. This information gave the officer reasonable, articulable suspicion that defendant was driving while impaired, justifying the traffic stop.

2. **Constitutional Law—right to confrontation—not violated by non-hearsay**

In a driving while impaired prosecution, the trial court did not err by admitting an officer's testimony that other officers had informed him that they had observed defendant weaving outside her lane of travel. This testimony did not violate the Confrontation Clause because it was admitted to prove that the officer was told that defendant was weaving, not to prove that defendant was in fact weaving.

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.

Roy Cooper, Attorney General, by J. Rick Brown, Associate Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

DAVIS, Judge.

Susan Denise Shaw ("Defendant") appeals from her conviction of driving while impaired ("DWI"). On appeal, she contends that the trial court erred by denying her motion to suppress. After careful review, we affirm.

Factual Background

At approximately 12:30 a.m. on 26 June 2010, Officer Robert Gormican ("Officer Gormican") of the Charlotte-Mecklenburg Police Department ("CMPD") was on patrol and participating in a "DWI saturation operation." This operation involved multiple CMPD officers working together to patrol areas where impaired driving was known to be prevalent. The operation called for two officers driving an undercover car to patrol a stretch of road near Freedom Drive and Morehead Street in Mecklenburg County. The undercover officers were tasked with identifying potentially intoxicated drivers and radioing officers in both marked and unmarked patrol cars to intercept them.

Officers E. Morales ("Officer Morales") and M. Wallin ("Officer Wallin") were operating one of the undercover CMPD vehicles as part of this operation when, at approximately 12:28 a.m., they radioed Officer Gormican and informed him that they "were behind a blue Mitsubishi on Freedom Drive coming up Morehead, and it was weaving outside its lane of travel several times." Officer Gormican was in an unmarked patrol car approximately one mile away and responded by traveling eastbound down Morehead Street toward Freedom Drive in order to locate the Mitsubishi. Upon approaching the traffic light at the intersection of Morehead Street and Freedom Drive, Officer Gormican spotted the Mitsubishi and the trailing undercover vehicle pass in front of him and continue traveling down Freedom Drive. From the far left lane on Morehead Street, Officer Gormican observed both vehicles to his right

and noticed that the Mitsubishi's tail lights were not illuminated. He activated his blue lights and initiated a traffic stop of the Mitsubishi.

After the Mitsubishi had pulled off the road into an empty parking lot, Officer Gormican approached the vehicle, which was occupied solely by Defendant. Upon asking Defendant for her driver's license and registration, Officer Gormican detected a strong odor of alcohol and ordered her out of her vehicle. Officer Gormican performed several field sobriety tests as well as two Alco-Sensor Breathalyzer tests and then placed Defendant under arrest for DWI.

Defendant was convicted of DWI on 28 April 2011 in Mecklenburg County District Court by the Honorable Theo X. Nixon. She appealed the district court's judgment to Mecklenburg County Superior Court. Defendant filed a pretrial motion seeking to suppress all evidence stemming from the traffic stop that ultimately led to her arrest on the ground that Officer Gormican lacked reasonable suspicion to stop her vehicle. A hearing on the motion to suppress was held on 22 February 2013.

During the hearing, Defendant entered into evidence Officer Gormican's Digital Motor Vehicle Recording, which showed that contrary to Officer Gormican's testimony, Defendant's tail lights were in fact operational and illuminated prior to the traffic stop.

On 28 February 2013, the trial court entered an order denying her motion that contained the following pertinent findings of fact:

> 1. On June 26, 2010 at approximately 12:30AM, Officer R. Gormican of the Charlotte Mecklenburg Police Department ("CMPD") was participating in a Driving While Impaired "saturation operation" in the vicinity of Freedom Drive and W. Morehead Street in Charlotte, Mecklenburg County, North Carolina.
>
> 2. The area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity, as well as the fact that numerous establishments serving alcohol late into the night were located in that immediate area.
>
> . . . .
>
> 4. At approximately 12:30AM, Officers Morales and Wallin radioed to Officer Gormican that they had observed a blue

> Mitsubishi weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street.
>
> . . . .
>
> 6. Officer Gormican testified that he observed that the brake-lights on the blue Mitsubishi appeared to be functional on June 26, 2010, but tail-lights on that vehicle did not. The defendant offered and the State consented to the admission of Officer Gormican's Digital Motor Vehicle Recording ("DMVR") in evidence at the suppression hearing. From a review of that recording in open court, it did not appear that the recording supported the Officer's testimony that the tail-lights were not functional, but this discrepancy did not substantially impeach the overall credibility of the officer's testimony.
>
> 7. Officer Gormican pursued the blue Mitsubishi a short distance on Freedom Drive and immediately initiated a traffic stop of that vehicle.

Based on these findings of fact, the trial court made the following pertinent conclusions of law:

> 2. Considering the totality of the circumstances, Officer Gormican had sufficient reasonable and articulable suspicion to justify the traffic stop of the defendant on or near Freedom Drive in Charlotte, North Carolina as a result of a traffic violation.
>
> 3. Before placing the defendant under arrest for impaired driving, Officer Gormican had sufficient probable cause to believe that the defendant had committed that offense.
>
> 4. Both reasonable suspicion to stop and probable cause to arrest may be based on the collective knowledge of law enforcement officers other than the stopping and/or arresting officer himself. *State v. Bowman*, 193 N.C. App 104, 666 S.E.2d 831 (2008), *State v Battle*, 109 N.C. App. 367, 427 S.E.2d 156 (1993).

Following the denial of her motion to suppress, Defendant entered a conditional plea of guilty, reserving her right to appeal the trial court's denial of her motion to suppress. Defendant was sentenced to 30 days imprisonment. The sentence was suspended, and Defendant was placed on 12 months unsupervised probation. As a term of special probation,

Defendant was ordered to complete 24 hours of community service within the first 30 days of her probation. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying her motion to suppress.

> An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. This Court's review of the denial of a motion to suppress evidence is limited in scope to whether the underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial judge's conclusions of law are reviewed *de novo*.

State v. Hodges, 195 N.C. App. 390, 395, 672 S.E.2d 724, 728 (2009) (internal citations, quotation marks, and ellipses omitted).

I. Reasonable Suspicion

[1] Defendant first argues that the trial court erred in denying her motion to suppress on the ground that Officer Gormican lacked reasonable suspicion to conduct a traffic stop of her vehicle. Specifically, Defendant asserts that the trial court's conclusion that reasonable suspicion existed to justify the traffic stop was improperly based on hearsay statements from Officers Morales and Wallin to Officer Gormican that they had observed Defendant weave several times outside of her lane of travel. We disagree.

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L.Ed.2d 570, 576 (2000). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citation and quotation marks omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008). Investigatory traffic stops "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training."

State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory traffic stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (internal citation and quotation marks omitted).

This Court has held that an officer's observation of weaving, in conjunction with other factors, can create the requisite reasonable and articulable suspicion to justify an investigatory traffic stop. *State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 891-92 (2013), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). These other factors may include traveling at an unusual hour or driving in an area in close proximity to bars and nightclubs. *Id.* at __, 745 S.E.2d at 891. Moreover, our Supreme Court has ruled that a defendant's "weaving constantly and continuously [within her lane of travel] over the course of three-quarters of a mile" at 11:00 p.m. on a Friday night constituted reasonable suspicion to initiate a traffic stop. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828 (internal quotation marks omitted).

In determining that Officer Gormican possessed reasonable suspicion to conduct the traffic stop, the trial court relied on the principle that reasonable suspicion may properly be based on the collective knowledge of law enforcement officers. This doctrine provides that

> [i]f the officer making the investigatory stop (the second officer) does not have the necessary reasonable suspicion, the stop may nonetheless be made if the second officer receives from another officer (the first officer) a request to stop the vehicle, and if, at the time the request is issued, the first officer possessed a reasonable suspicion that criminal conduct had occurred, was occurring, or was about to occur. . . . Where there is no request from the first officer that the second officer stop a vehicle, the collective knowledge of both officers may form the basis for reasonable suspicion by the second officer, if and to the extent the knowledge possessed by the first officer is communicated to the second officer.

State v. Battle, 109 N.C. App. 367, 370-71, 427 S.E.2d 156, 159 (1993) (internal citations omitted).

In *Battle*, the defendant moved to suppress his Breathalyzer test results on the ground that the arresting officer lacked the requisite reasonable suspicion to justify the initial stop of his vehicle. One officer radioed the arresting officer to "be on the lookout" for the defendant's

vehicle based on his suspicion that the defendant was driving while impaired. *Id.* at 368-69, 427 S.E.2d at 157-58. The officer who radioed the arresting officer had earlier observed the defendant in a parking lot sitting behind the wheel of his parked car. He ordered the defendant out of the car and after performing two field sobriety tests and detecting a strong odor of alcohol on the defendant's breath formed the opinion that the defendant was impaired. He told the defendant not to drive and left the parking lot. *Id.* at 368, 427 S.E.2d at 157. However, believing that the defendant might nevertheless attempt to drive, the officer contacted the arresting officer and told him to be on the lookout for the defendant's car. The arresting officer spotted and followed the defendant's vehicle for a few blocks without observing any conduct justifying a stop but nevertheless stopped the defendant's vehicle and arrested him for DWI. *Id.* at 368-69, 427 S.E.2d at 157-58.

On appeal, this Court reversed the trial court's order suppressing the evidence obtained as a result of the traffic stop on the ground that the first officer's radio report was sufficient to justify the second officer's stop of the vehicle. *Id.* at 372-73, 427 S.E.2d at 159-60. We held that an officer making a traffic stop need not have personally observed the defendant's conduct giving rise to reasonable suspicion if (1) "the officer making the stop has received a request to stop the defendant from another officer, if that other officer had, prior to the issuance of the request, the necessary reasonable suspicion"; or (2) "the officer making the stop received, prior to the stop, information from another officer, which, when combined with the observations made by the stopping officer, constitute the necessary reasonable suspicion." *Id.* at 371, 427 S.E.2d at 159.

In the present case, Officers Morales and Wallin observed Defendant's vehicle "weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street," and radioed this information to Officer Gormican prior to his initiation of the stop. Defendant does not challenge the trial court's findings that "[t]he area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity" or that "numerous establishments serving alcohol late into the night were located in that immediate area." Because these findings of fact have not been challenged by Defendant, they are binding on appeal. *See State v. Clark*, 211 N.C. App. 60, 65, 714 S.E.2d 754, 758 (2011) ("[A]ny findings of fact which the defendant fails to challenge on appeal are binding for purposes of appellate review."), *disc. review denied*, 365 N.C. 556, 722 S.E.2d 595 (2012).

We reject Defendant's contention that the trial court erred in considering evidence of the statements made by Officers Morales and Wallin to Officer Gormican based on the theory that these statements were hearsay. Defendant's argument is foreclosed by our decision in *State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982). In *Gray*, an officer conducted a traffic stop of the defendant relying solely on a radio report received from another officer that the defendant was driving with expired tags. *Id.* at 570, 286 S.E.2d at 359. The defendant moved to suppress evidence of drugs discovered as a result of the stop on the ground that the arresting officer's testimony concerning the statement received from the first officer was hearsay. *Id.* at 573, 286 S.E.2d at 361.

This Court affirmed the trial court's denial of the motion to suppress on the ground that the statement "was not offered to prove that defendant was driving with expired tags, but to prove that [the arresting officer] *was told* by a fellow officer that defendant was driving with expired tags." *Id.* We further concluded that "[t]he evidence tended to show that [the arresting officer] had received information which would justify his forming a reasonable suspicion that defendant was involved in criminal activity. As such, the evidence was not hearsay." *Id.*

The same reasoning applies in the present case. Officer Gormican testified that he was contacted by Officers Morales and Wallin, who told him that they had observed Defendant's vehicle "weaving outside its lane of travel several times." Officer Gormican therefore followed Defendant and initiated the traffic stop. As in *Gray*, his receipt of this information justified his reasonable suspicion that Defendant was driving while impaired, which in turn justified stopping Defendant's vehicle. Accordingly, Defendant's argument is overruled.

II. Confrontation Clause

[2] Defendant's final argument on appeal is that Officer Gormican's testimony regarding the statements of Officers Morales and Wallin violated her Sixth Amendment rights under the Confrontation Clause. This argument also lacks merit.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L.Ed.2d 177, 194 (2004).

However, our Supreme Court has held that evidence admitted as nonhearsay does not trigger the protection of the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 473 ("[A]dmission of nonhearsay raises no Confrontation Clause concerns." (citations and internal quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Because we conclude that Officer Gormican's testimony as to the information he received from Officers Morales and Wallin was nonhearsay, we reject Defendant's argument on this issue.

Conclusion

For these reasons, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR

No. COA14-490

Filed 16 December 2014

Evidence—detective vouching for witness's credibility—plain error

The trial court committed plain error in a prosecution for larceny and obtaining property by false premises by permitting a detective to testify that she moved forward with her investigation into the allegations that a witness had made against defendant, despite a great deal of family drama, because she believed that the witness was telling her the truth. The challenged testimony constituted an impermissible vouching for the witness's credibility; given the importance that the jury probably gave to the detective's assessment of the relative credibility of the positions taken by the witness and defendant and the fact that the outcome in this case depended largely on the witness's credibility, the admission of the detective's testimony constituted plain error.

Judge BRYANT dissenting.

Appeal by defendant from judgments entered 16 September 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Associate Attorney General Melody Hairston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

ERVIN, Judge.

Defendant Bo Anderson Taylor appeals from judgments entered based upon his convictions for misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred by allowing the admission of evidence affirming the truthfulness of the alleged victim and by allowing the State to elicit extensive testimony that Defendant had exercised his right to remain silent as part of its case in chief. 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 Defendant is entitled to a new trial.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In October 2010, Defendant and his girlfriend, Gail Lacroix, were living with Defendant's sister, Crystal Medina. In view of the fact that Ms. Lacroix was Defendant and Ms. Medina's step-mother, no one in the family was happy about the relationship between Defendant and Ms. Lacroix.

Because she did not have any room in her house to accommodate Defendant and Ms. Lacroix, Ms. Medina allowed them to stay in a shop located in her backyard. At the time that Defendant and Ms. Lacroix moved in, the Medinas were planning to separate and Ms. Medina's husband was in jail.

The Medinas had formerly owned and operated a residential and commercial concrete business and had purchased several tools for use in the business, including two lasers that had been purchased for $1,495 each. The tools in question were stored in locked trailers located in Ms.

Medina's backyard. Defendant had access to the keys to these trailers. As part of the divorce settlement, Ms. Medina planned to let her husband keep the tools while she would keep the house. In view of the fact that she "didn't trust [her husband's] family," Ms. Medina had photographed all of the tools and recorded their serial numbers.

On 2 October 2010, Defendant pawned a hammer drill at Picasso Pawn for $50. On 4 October 2010, Defendant pawned two generators at Pawn USA for $300. Defendant returned to Picasso Pawn on 13 October 2010 and pawned an air compressor for $35. On 6 November 2010, Defendant pawned two lasers at National Pawn for $200. On each of these occasions, Defendant signed a statement indicating that he owned the items that were being pawned.

In November 2010, Ms. Medina found a pawnshop ticket on the floor of her truck indicating that Defendant had pawned the lasers. Upon making this discovery, Ms. Medina called Defendant to ask about the ticket. However, Defendant hung up on her. Although Ms. Medina subsequently confronted Defendant at her home, he denied knowing anything about the ticket. At that point, Ms. Medina left to go to an appointment. Upon her return, Defendant and Ms. Lacroix had packed up their belongings and left. After Defendant and Ms. Lacroix departed, Ms. Medina discovered another pawnshop ticket in the shop in which Defendant and Ms. Lacroix had been staying.

Ms. Medina did not immediately call the police because she did not want Defendant to get in trouble. Instead, Ms. Medina just wanted to recover the tools. After having failed to get Defendant, who knew that he did not have permission to pawn the tools, to return the items in question, Ms. Medina contacted the New Hanover County Sheriff's office and reported that Defendant had stolen two lasers, three generators, an air compressor, and a hammer drill from the trailers in her backyard.

The investigation into the allegations that Ms. Medina had made against Defendant was conducted by Detective Angie Tindall of the New Hanover County Sheriff's Department. Although Detective Tindall left messages for Defendant with numerous family members, she never reached him. As part of her investigation, Detective Tindall checked into the validity of Ms. Medina's claims after being told by a family member that Defendant had been asked to pawn the items for Ms. Medina because Ms. Medina had stolen $500 from her employer. However, Detective Tindall was unable to find any support for this accusation. As a result of the fact that Ms. Medina was in a position to provide the serial numbers for the items that had been pawned, Detective Tindall was able

to locate the missing tools and obtain the return of most of the missing property to Ms. Medina. In spite of her recognition that this matter was replete with family drama, Detective Tindall proceeded with the investigation because Ms. Medina "seemed to be telling [her] the truth."

2. Defendant's Evidence

Defendant traveled to South Carolina in order to turn himself in on unrelated criminal charges on 1 October 2010. Ms. Medina wired $200 to Defendant in order to enable him to post bond. However, Ms. Medina told Defendant that she needed him to repay the money that she had loaned him for the purpose of making bond promptly because she had taken $500 from the safe at Friendly Check Cashing, where she was employed, in order to secure Defendant's release and to pay for a party that she planned to host. More specifically, Ms. Medina told Defendant that she needed to replace all of the money that she had taken from the safe before an audit that was going to be conducted on the following Monday. As part of the repayment process, Ms. Medina gave Defendant two broken generators and told him that he could have them if he could get them running.

On 2 October 2010, Defendant, with Ms. Medina's permission, pawned a drill that he had received from Ms. Medina, gave half of the money that he received as a result of this transaction to Ms. Medina, and used the other half to purchase gas which he used to drive to Leland as part of an attempt to get the broken generators running. Ms. Medina's fiancé, Juan, helped Defendant load the generators into a truck since they were too heavy for Defendant to lift on his own.

At some point, Defendant was able to pawn the two generators for $300 and handed the proceeds to Ms. Medina outside Friendly Check Cashing. After the transfer had been completed, Defendant and Ms. Medina entered Friendly Check Cashing, where Ms. Medina put the cash in a rolled up newspaper, slipped the newspaper to Defendant from behind the glass, and told Defendant to give the cash to her manager, who was working beside her. Upon receiving these instructions, Defendant took $250 from the newspaper and gave it to the manager, who took the cash and then swiped her ATM card for the apparent purpose of replacing the remaining $250 that Ms. Medina had taken from the store's safe.

On 6 November 2011, Defendant pawned two lasers that he had received from Ms. Medina at National Pawn for $200 and took the proceeds directly to Picasso Pawn for the purpose of making a payment relating to certain items of jewelry that Ms. Medina had pawned there.

While at Picasso Pawn, Defendant pawned an air compressor that Ms. Medina had thrown away for $35. Defendant left the pawn ticket for the lasers in Ms. Medina's truck, along with the receipt for the payment that he had made to assist in the process of redeeming her jewelry.

Defendant denied having stolen anything from Ms. Medina, asserted that Ms. Medina was aware that he was pawning the tools, and testified that "she was basically hand in hand with everything I did." Similarly, Ms. Lacroix testified that she knew that Defendant was pawning certain items, that Defendant and Ms. Medina had discussed the transactions in which Defendant had engaged and the manner in which the resulting proceeds would be used, and that she and Defendant had moved away from Ms. Medina's property because they were fighting about the pawn tickets and Defendant's relationship with Ms. Lacroix.

According to Defendant, the members of his family frequently called the police about each other's activities. Although Ms. Medina denied that she was referring to Defendant, Defendant pointed out that Ms. Medina had written a Facebook message calling upon people to "Bring That White Trash Down" by helping her get "dirt" on Defendant, who was known by the nickname of "White Trash."

B. Procedural History

On 7 November 2010, a warrant for arrest was issued charging Defendant with obtaining property by false pretenses. On 18 November 2010, a warrant for arrest was issued charging Defendant with felonious larceny and two additional counts of obtaining property by false pretenses. On 21 February 2011, the New Hanover County grand jury returned bills of indictment charging Defendant with felonious larceny, felonious breaking or entering into a trailer, and five counts of obtaining property by false pretenses. The charges against Defendant came on for trial before the trial court and a jury at the 12 September 2011 criminal session of New Hanover County Superior Court. On 15 September 2011, the jury returned verdicts finding Defendant guilty of misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 8 to 10 months imprisonment based upon his consolidated convictions for misdemeanor larceny and felonious breaking or entering a trailer and to two consecutive terms of 11 to 14 months imprisonment based upon his consolidated convictions for obtaining property by false pretenses. On 15 October 2013, Defendant filed a petition seeking the issuance of a writ of *certiorari* by this Court. This Court granted Defendant's *certiorari* petition on 31 October 2013.

II. Substantive Legal Analysis

In his initial challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by permitting Detective Tindall to testify that she moved forward with her investigation into the allegations that Ms. Medina had made against Defendant because she believed that Ms. Medina was telling her the truth. More specifically, Defendant contends that the challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and Defendant. Defendant's argument has merit.

A. Standard of Review

As he candidly concedes in his brief, Defendant did not object to the admission of the challenged portion of Detective Tindall's testimony at trial. For that reason, our evaluation of the validity of Defendant's contention is limited to determining whether the admission of the challenged portion of Detective Tindall's testimony constituted plain error. A plain error is an error that is "so fundamental that it undermines the fairness of the trial, or [has] a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). In order to obtain relief on plain error grounds, "[D]efendant 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).

B. Relevant Legal Principles

"It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citing *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986)). "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). For that reason, it is well established that "a witness may not vouch for the credibility of a victim," *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858-59 (2010), with this rule being applicable regardless of whether the improper vouching for the credibility of another witness occurs during the testimony of an expert, *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (stating that "[e]xpert opinion testimony is not admissible to establish the credibility of the victim as a witness"), *aff'd* 356 N.C. 428, 571 S.E.2d 584 (2002), or a lay witness. *State v. Freeland*, 316 N.C. 13, 16-17, 340 S.E.2d 35, 36-37 (1986) (holding that

the trial court erred by allowing the alleged victim's mother to testify that her daughter tells the truth).

C. Plain Error Analysis

In the course of Detective Tindall's testimony on direct examination, the State and Detective Tindall engaged in the following colloquy:

> [Prosecutor]: At any point did you ever question this case, this has a lot of family drama?
>
> [Det. Tindall]: Yes
>
> [Prosecutor]: What made you go forward?
>
> [Det. Tindall]: [Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.

By testifying that Ms. Medina seemed to be telling her the truth, Detective Tindall vouched for Ms. Medina's credibility,[1] a result that is clearly forbidden by basic principles of North Carolina evidence law. *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508. As a result of the fact that testimony of the type given by Detective Tindall is clearly inadmissible, the only remaining question for our consideration is whether the jury would have probably reached a different outcome had it not been allowed to hear the challenged portion of Detective Tindall's testimony.

The importance of Ms. Medina's testimony to the State's case against Defendant should be apparent from even a cursory examination of the record. Simply put, the State's case hinged almost entirely on Ms. Medina's credibility. As a result of the fact that Defendant freely admitted that he had pawned the tools that Ms. Medina accused him of converting to his own use, the extent to which the jury convicted or acquitted Defendant necessarily depended on whether the jury believed Defendant's claim to have been authorized to pawn the tools in question by Ms. Medina or whether the jury believed the State's assertion that Defendant took the tools from the storage trailers and pawned them without obtaining Ms. Medina's permission.

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1. Although our dissenting colleague argues that Detective Tindall's testimony did not vouch for the credibility of a witness, the record reflects that Ms. Medina testified at trial and that Detective Tindall's explanation for her decision to continue the investigation stemmed from her belief that Ms. Medina was telling the truth. Under that set of circumstances, we have no hesitation in concluding that Detective Tindall vouched for Ms. Medina's credibility.

The only evidence presented at trial to the effect that Defendant lacked permission to pawn the Medinas' tools consisted of Ms. Medina's testimony to that effect, which Defendant directly disputed when he took the witness stand. As a result of the fact that law enforcement officers have the responsibility of conducting a fair investigation before initiating criminal charges against anyone, the jury "most likely gave [Detective Tindall's] opinion more weight than a lay opinion." *Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508. As a result, given the importance that the jury probably gave to Detective Tindall's assessment of the relative credibility of the positions taken by Ms. Medina and Defendant and the fact that the outcome in this case depended largely on Ms. Medina's credibility, we have no hesitation in holding that the admission of the challenged portion of Detective Tindall's testimony constituted plain error. *Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (stating that "the admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility"); *see also Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508 (holding that the trial court committed plain error by allowing the admission of non-expert testimony that the Department of Social Services had substantiated a claim of sexual abuse given that the only evidence to that effect in the record was the children's testimony and their prior consistent statements).

In attempting to persuade us to reach a different result, the State relies upon our decision in *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397-98 (2004), in which a law enforcement officer testified that he had refrained from conducting a more thorough investigation of the available physical evidence in a sexual assault case because the victim of the sexual assault was able to positively identify her assailant. In upholding the defendant's conviction, we rejected the defendant's argument that the officer had impermissibly vouched for the witness' credibility, holding that, instead of expressing an opinion that the victim had, in fact, been assaulted, the officer had merely explained why he did not request more thorough testing of the physical evidence during the course of his investigation and stated that the officer's testimony was "helpful to the fact-finder in presenting a clear understanding of his investigative process." *O'Hanlan*, 153 N.C. App. at 563, 570 S.E.2d at 762. Although the State asserts that the challenged portion of Detective Tindall's testimony was admissible on the basis of the same logic that we deemed persuasive in *O'Hanlan*, we do not believe that *O'Hanlan* is controlling here given that, in *O'Hanlan*, the defendant specifically challenged the officer's failure to conduct additional testing of the physical evidence on cross-examination while Defendant never questioned Detective Tindall's decision to

proceed to have charges taken out against Defendant.[2] In view of the fact that Defendant did not directly challenge Detective Tindall's decision to proceed against him, there was no need for the State to explain why she did so.[3] As a result, *O'Hanlan* provides no basis for a decision in the State's favor.[4]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court committed plain error by permitting Detective Tindall to improperly vouch for Ms. Medina's credibility. As a result, Defendant is entitled to a new trial.

NEW TRIAL.

Judges ELMORE concurs.

BRYANT, Judge, dissenting.

The majority remands for a new trial based on their determination that the trial court committed plain error in allowing Detective Tindall's

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2. Similarly, in an attempt to suggest that Detective Tindall's testimony was admissible, our dissenting colleague relies upon our decision in *State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994), in which we held that the trial court did not err by admitting the testimony of an investigating officer to the effect that he had not taken notes during the interview of a particular witness because he believed that the witness was lying given that the officer had been questioned on cross-examination about his failure to take notes during his interview of the witness. We do not believe that *Westall* is relevant to this case given that Detective Tindall made the statement that is discussed in the text on direct examination and had never been subject to cross-examination concerning the reason that she decided to pursue the investigation.

3. Admittedly, Defendant questioned Ms. Medina on cross-examination in such a manner as to challenge her credibility. Although the State argues that Defendant's decision to question Ms. Medina in this manner authorized the admission of the challenged portion of Detective Tindall's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 608(a) (providing that "[t]he credibility of a witness may be attacked by evidence . . . in the form of reputation or opinion as provided in [N.C. Gen. Stat. § 8C-1,] Rule 405(a)," subject to the limitation that "(1) such evidence may refer only to character for truthfulness or untruthfulness" and that "(2) evidence of truthful character is admissible only after the character of the witness has been attacked by opinion or reputation evidence or otherwise"), we do not find this argument persuasive given that Detective Tindall's testimony was not focused on Ms. Medina's "character for truthfulness or untruthfulness" and given that Ms. Medina's character, as compared to her credibility, had not been attacked.

4. As a result of our determination that Defendant is entitled to a new trial for the reason discussed in the text, we need not address Defendant's remaining challenge to the trial court's judgments.

testimony that "[Ms. Medina] seemed to be telling me the truth[.]" Because I do not believe the admission of that testimony meets the threshold needed for plain error, I respectfully dissent.

As acknowledged in the majority opinion, "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *Hannon*, 118 N.C. App. at 451, 455 S.E.2d at 496 (citation omitted). And, I would hold that in this case, the jury's ability to make such a credibility determination about Ms. Medina—a woman thirty-one years old and mother of four—who testified before them, was unimpeded.

Detective Tindall testified that she investigated the claims made by Ms. Medina, and the detective was aware of the "family drama" surrounding defendant and Ms. Medina.

> A family member advised me that [defendant] was asked to pawn the items for [Ms. Medina], that [Ms. Medina] had stolen Five Hundred Dollars from her employer. I investigated that and learned that there was no evidence of this occurring so, therefore, [Ms. Medina] was never charged and I had no evidence.

When asked what made her move forward, Detective Tindall testified, "[Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest." Detective Tindall expressed a lay opinion in response to a proper question regarding why she moved forward with her investigation and charges.[1] Furthermore, Detective Tindall provided the basis for her opinion: "she gave me all the information possible that she had . . . ." *See State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994) (holding no error where the detective expressed his lay opinion that the defendant was not being truthful during an interview as a basis for the detective's failure to take any notes during the interview).

For error to rise to the level that it requires a new trial, when no objection was made at trial and the alleged error is brought forth for the first time on appeal, such error must be

> fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been

1. N.C. Gen. Stat. § 8C-1, Rule 701 (2013) ("If the witness is not testifying as an expert, [her] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.").

> 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 . . . .

Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333 (citation omitted). We apply the plain error rule cautiously and only in exceptional cases where the defendant can show extreme prejudice. Such is not the case on this record. Defendant challenges the detective's response to a question regarding the investigation. The response was not one in which the detective was vouching for the credibility of a trial witness. Such a response cannot be deemed a fundamental error resulting in the denial of a fair trial to defendant. Therefore, because defendant cannot meet his burden and show plain error, defendant is not entitled to a new trial. Accordingly, I would overrule defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.

KEITH TEDDER, Employee, Plaintiff
v.
A&K ENTERPRISES, Employer and PROTECTIVE INSURANCE COMPANY,
Carrier, Defendants

No. COA14-551

Filed 16 December 2014

1. Workers' Compensation—temporary total disability—calculation of average weekly wage—temporary employees

The Industrial Commission erred in a workers' compensation case by its calculation of the average weekly wage for temporary total disability compensation for a temporary employee. In calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period.

2. Workers' Compensation—ongoing temporary total disability—temporary employee—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff temporary employee was entitled to ongoing temporary total disability payments. Under the applicable standard of review, Dr. Burke's testimony was

competent evidence supporting the Commission's finding that plaintiff was unable to continue work as a delivery driver because of his back injury.

Appeal by defendants from opinion and award entered 10 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 2014.

Goodman McGuffey Lindsey & Johnson, LLP, by Michael A. Cannon, for defendants-appellants.

David Gantt Law Office, by David Gantt, for plaintiff-appellee.

DIETZ, Judge.

This workers' compensation case concerns the proper method of calculating average weekly wages for temporary employees. After two years of unemployment and a few months in a low-paying seasonal job, Plaintiff Keith Tedder began a seven-week temporary position with Defendant A&K Enterprises that paid $625 per week.

Unfortunately, Tedder injured his back after the first week in this temporary position and could not continue working. He then applied for workers' compensation benefits. In awarding benefits, the Industrial Commission calculated Tedder's average weekly wage at $625, despite finding that Tedder was a temporary employee, that he could not expect to earn that wage full time, and that the $625 calculation was "unfair" to A&K.

The Commission's calculation cannot be sustained. The purpose of the average weekly wage calculation is to approximate what the employee would be earning were it not for the injury, not to provide an earnings safety net for the chronically unemployed or underemployed.

Consistent with this statutory purpose, we hold that in calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. Here, the short duration of Tedder's temporary employment must result in an average weekly wage that is substantially less than $625. Accordingly, although we affirm the Commission's conclusion that Tedder is eligible for temporary total disability compensation, we reverse the Commission's average weekly wage determination and remand for a new determination consistent with this opinion.

Factual Background

I. Tedder's Employment History

Keith Tedder is a 48-year-old single father whose work experience consists entirely of heavy lifting and driving trucks. Over the years, Tedder has worked as a delivery driver for a number of different companies, loading and unloading items weighing up to 150 pounds. In June 2004, while delivering packages for an employer in Asheville, Tedder injured his back. He later settled his workers' compensation claim with that employer.

To alleviate the pain resulting from his 2004 injury, Tedder underwent a right L4-5 laminectomy and discectomy on 7 November 2005. Dr. Michael Goebel, who performed the surgery, noted that Tedder experienced a surprising recovery. On 14 February 2006, Dr. Goebel found that Tedder had reached maximum medical improvement and assigned a 10% permanent partial impairment rating to his back. He released Tedder to medium-duty work, placing permanent restrictions on lifting more than fifty pounds, as well as limitations on bending, stooping, twisting, squatting, crouching, and prolonged sitting or standing.

After his release from Dr. Goebel's care in April 2006, Tedder did not find a job until March 2007, when he began working for Carolina Mulch as a delivery driver. He worked that job for eighteen months before being laid off in September 2008. While at Carolina Mulch, Tedder was able to perform all the duties of a delivery driver, including loading and unloading very heavy items without difficulty. He regularly exceeded Dr. Goebel's permanent restrictions without incident. Although he occasionally experienced a sore back when he worked overtime, Tedder did not seek any medical assistance for his back while working for Carolina Mulch.

After being laid off from Carolina Mulch in September 2008, Tedder was unemployed for more than two years. In November 2010, Tedder accepted a position with Volt Management Corporation, a temporary staffing agency that contracted with Federal Express to provide extra delivery drivers during the press of the holiday season. Tedder worked approximately eight to ten hours per day, two days per week for Volt, earning at most $260 per week. Tedder did not seek any medical treatment for his back during his employment with Volt.

II. Tedder's Job at A&K

In February 2011, as Tedder's seasonal work at Volt drew to a close, Defendant A&K Enterprises asked Volt for recommendations to fill an open position for a temporary delivery driver. A&K is a small

"mom-and-pop" delivery company and subcontractor for Federal Express. The company hires temporary employees during the peak holiday season and also on an as-needed basis. A&K was searching for a temporary employee to fill in for one of its full-time delivery drivers who was scheduled to undergo surgery. A&K anticipated that the full-time employee would be absent for seven weeks on medical leave.

Volt referred Tedder to A&K, and A&K ultimately hired Tedder as a temporary driver working five days per week for $625 per week. The Full Commission expressly found that Tedder was "a temporary employee hired to work for a limited time period of seven weeks."

III. Tedder's Injury and Ongoing Treatment

On 8 March 2011, just one week after beginning his temporary employment with A&K, Tedder felt a sharp pain in his lower back while bending over to pick up a package. He was able to complete the remainder of his shift, but the route took him twice as long due to intense pain in his lower back. The next day, Tedder called to inform the owners of A&K that he was unable to work due to the pain he was experiencing. A&K hired another temporary worker to cover the remainder of its full-time employee's seven-week medical leave.

Following his 8 March 2011 injury, Tedder sought care from a number of medical professionals to address the pain in his back. Despite this ongoing care, however, Tedder continued to experience sharp pain in his lower back, as well as pain and numbness in his left buttock, leg, and foot. He scheduled an appointment at the Carolina Spine & Neurosurgery Center in early 2012, where he was examined by Dr. John Silver. Dr. Silver, a board certified neurosurgeon, determined that the 8 March 2011 accident exacerbated Tedder's pre-existing back condition. He recommended that Tedder undergo a Functional Capacity Evaluation to determine his physical limitations. Dr. Silver referred Tedder for an epidural injection and for additional evaluation with Dr. Margaret Burke.

Before beginning treatment with Dr. Burke, Tedder underwent an independent medical evaluation (at Defendants' request) with Dr. Richard Broadhurst, an expert in occupational and environmental medicine. Dr. Broadhurst recommended that until he receive further treatment, Tedder could return to work at the sedentary level with a ten pound maximum lifting restriction, along with significant limitations on movement.

Tedder began treatment under the care of Dr. Burke, a physiatrist, on 29 March 2012. Dr. Burke diagnosed Tedder with chronic left L5

radiculopathy and prescribed a course of physical therapy. In her deposition testimony, Dr. Burke stated that Tedder's condition was not purely degenerative in nature, and that the 8 March 2011 accident exacerbated Tedder's pre-existing back condition. Tedder has continued treatment with Dr. Burke, who is his ongoing pain management physician. As of the date of her post-hearing deposition conducted 14 January 2013, Dr. Burke had not released Tedder at maximum medical improvement.

Since his injury in March 2011, Tedder has not returned to employment with A&K or any other employer. Tedder filed for workers' compensation benefits on 2 May 2011. A&K and its insurer denied the compensability of the claim. Deputy Commissioner Myra L. Griffin granted Tedder's claim in an opinion and award filed 15 April 2013, determining that he was entitled to temporary total disability compensation and calculating his statutory average weekly wages at $625 per week. Defendants timely appealed to the Full Commission.

The Full Commission, in a unanimous decision by Commissioners Pamela T. Young, Bernadine Ballance, and Danny Lee McDonald, affirmed the deputy commissioner's award on 10 March 2014. Defendants timely appealed to this Court.

Analysis

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The findings of the Commission are conclusive on appeal where competent evidence exists, "even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). We review the Full Commission's conclusions of law *de novo*. *Conyers v. New Hanover Cnty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008).

I. Computation of Tedder's Average Weekly Wages

[1] Defendants first challenge the Commission's computation of Tedder's average weekly wages. "The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (citation and internal quotation marks omitted). We therefore review the Commission's calculation of Tedder's average weekly wages *de novo*. *Id.*

Average weekly wages are determined by calculating the amount the injured worker would be earning but for his injury. *Loch v. Entm't Partners*, 148 N.C. App. 106, 111, 557 S.E.2d 182, 185 (2001). The calculation is governed by N.C. Gen. Stat. § 97-2(5), which sets out five distinct methods for calculating an injured employee's average weekly wages. *Conyers*, 188 N.C. App. at 255, 654 S.E.2d at 748. The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate. *Id.* Methods 1, 3, and 5 are relevant in this case:

> [Method 1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52 . . . .
>
> . . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> . . . .
>
> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2013).[1]

Under this statutory hierarchy, when an employee has worked at his job continuously for the preceding 52 weeks, average weekly wages must be calculated under Method 1 by simply dividing the total earnings during that 52-week period by 52. The Commission found, and we agree, that this method is inappropriate because Tedder only worked at A&K for one week, nowhere near the 52 weeks necessary to use Method 1.

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1. The Commission determined, and the parties concede, that Methods 2 and 4 are inapplicable to the factual circumstances of this case, and therefore we need not address those methods in this opinion.

Method 3 can be used when the employee was on the job less than 52 weeks. Under Method 3, average weekly wages are calculated by dividing the total earnings on the job by the number of weeks (or portions of weeks) the employee worked. Under Method 3, Tedder's average weekly wage is $625, a figure obtained by dividing his total earnings, $625, by the total number of weeks worked, one. But Method 3 can be used only if "results fair and just to both parties will be thereby obtained." N.C. Gen. Stat. § 97-2(5). Here, the Commission found as fact that Tedder was "a temporary employee hired to work for a limited time period of seven weeks." Based on this finding, the Commission determined, and we agree, that Method 3 is inappropriate because the result "would be unfair . . . due to the temporary nature of the employment relationship shared by defendant-employer and plaintiff."

Having determined that Methods 1 and 3 were inappropriate (and that Methods 2 and 4 were inapplicable), the Commission resorted to Method 5. This "catch-all" method does not dictate any particular methodology; it instructs the Commission to employ whatever method "will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). It is available only where use of the previous four methods "would be unfair." *Id.*

The Commission, ostensibly applying Method 5, determined that Tedder's average weekly wage was $625—effectively treating Tedder as if he was a full-time, permanent employee of A&K. We reject this computation because it squarely conflicts with the statute's unambiguous command to use a methodology that "will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). As the Commission found, Tedder would have earned that $625 wage for no more than seven weeks, until his temporary job ended. He would then be unemployed and searching for work, as he was for most of the preceding two years. Indeed, a $625 per week wage so vastly overstates Tedder's actual "average" earnings that, when applying Method 3, the Commission expressly found that a $625 average weekly wage was "unfair" to A&K. Accordingly, we must reverse and remand this case for a new average weekly wage calculation.

We leave it to the Commission on remand to determine the appropriate average weekly wage consistent with the statutory language of Section 97-2(5). However, to assist with that calculation, we provide the following guidance based on existing precedent from our appellate courts.

First, the Supreme Court's decision in *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), is instructive. In *Joyner*, the

claimant was a relief truck driver who worked only as needed. *Id.* at 519-20, 146 S.E.2d at 448. The Court described the driver's employment as "inherently part-time and intermittent." *Id.* at 522, 146 S.E.2d at 450. In calculating the driver's average weekly wage, therefore, the Court held that it was unfair to the employer not to take into consideration both peak and slack periods in the plaintiff's employment. *Id.* Accordingly, the Supreme Court held that the employee's average weekly wages should be calculated under the fifth method by taking the total wages he actually earned in the 52 weeks prior to his injury and dividing that amount by 52, the number of weeks in a year. *Id.*

This Court later applied *Joyner* to cases involving employees who worked only part of the year. *See Conyers*, 188 N.C. App. at 260-61, 654 S.E.2d at 751-52. In *Conyers*, the plaintiff was a bus driver who worked ten months per year. *Id.* at 254, 654 S.E.2d at 747. We held that the fifth method was most appropriate to take into account the slack periods in the plaintiff's employment. *Id.* at 261, 654 S.E.2d at 751. Noting that the purpose of the calculation is to "most nearly approximate the amount which the [bus driver] would be earning were it not for the injury," we held that the plaintiff's average weekly wages should be determined by dividing the wages she earned in the 52 weeks before her accident by 52. *Id.*

Finally, in *Thompson v. STS Holdings, Inc.*, 213 N.C. App. 26, 33, 711 S.E.2d 827, 831 (2011), this Court addressed the average weekly wage calculation for an employee who worked contract jobs for various employers throughout the year. At the time of his injury, the employee had worked a total of 14 days for his current employer. *Id.* at 28, 711 S.E.2d at 828. This Court held that the employee's contract work for other employers during the year could not be considered in calculating his average weekly wages. *Id.* at 33-34, 711 S.E.2d at 831-32. We again held, as we did in *Conyers*, that an employee's average weekly wages under Method 5 should be calculated by taking the "wages earned by [the employee] while in the employ of [the current employer] in a fifty-two week period, then dividing that amount by fifty-two." *Id.* at 33, 711 S.E.2d at 831.

In light of *Joyner*, *Conyers*, and *Thompson*, we hold that in calculating average weekly wages for employees in temporary positions, the Commission must consider the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. One approach that would satisfy this requirement is to calculate the total amount the employee would have earned in the temporary position and divide that amount by 52. We do not suggest that

this is the *only* appropriate methodology in every case, as the intent of Method 5 is to provide flexibility in reaching a result that "will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). But in this case, and others with similar facts, we hold that calculating the total amount the employee could expect to earn in the temporary position, and then dividing that amount by 52, is an appropriate means of approximating the amount the injured employee would be earning were it not for the injury.

We are mindful that this methodology, when applied to Tedder, will result in a compensation rate only slightly above the statutory minimum. But treating Tedder as if his "average weekly wages" were $625—in other words, treating Tedder as if he had a history of long-term, full-time employment in his temporary position at A&K—is a financial windfall for Tedder and an unjust result for A&K. This, in turn, violates the guiding principle and primary intent of the statute—obtaining "results that are fair and just to both employer and employee." *Conyers*, 188 N.C. App. at 256, 654 S.E.2d at 748. Accordingly, we reverse and remand this case to the Industrial Commission to recalculate Tedder's average weekly wages consistent with this opinion.

II. Determination of Temporary Total Disability

[2] Defendants next argue that the Commission erred by concluding that Tedder is entitled to ongoing temporary total disability payments. Defendants' argument is straightforward. In 2004, Tedder suffered a compensable back injury. In 2006, Tedder's treating physician, Dr. Goebel, found that Tedder had reached maximum medical improvement and assigned a permanent "medium-duty" restriction on lifting more than fifty pounds as well as limits on bending, stooping, twisting, squatting, crouching, and prolonged sitting or standing. Dr. Goebel never lifted that permanent restriction.

After his 2011 injury, Tedder again underwent treatment. His treating physician, Dr. Burke, testified that, as of 9 January 2013, she believed Tedder had shown improvement and that "I think anything up to medium would be fine." Defendants argue that, because Tedder had medium-duty work restrictions before his 2011 injury, and had returned to medium-duty work capacity as of 9 January 2013, he was no longer disabled under the terms of the Workers' Compensation Act. For the reasons that follow, we reject this argument and affirm the Commission's finding that Tedder is entitled to ongoing disability payments.

The definition of disability under the Workers' Compensation Act "specifically relates to the incapacity to earn wages, rather than only to physical infirmity." *Medlin v. Weaver Cooke Constr., LLC*, ___ N.C. ___, ___, 760 S.E.2d 732, 736 (2014). In *Medlin*, our Supreme Court reaffirmed the test for establishing disability under the Workers' Compensation Act set out in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). *Hilliard* articulated three factual elements that a plaintiff must prove to support the legal conclusion of disability:

> We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 595, 290 S.E.2d at 683.

Defendants contend that Dr. Burke's testimony proves Tedder was able to return to medium-duty work as of 9 January 2013, the same work level he had before his 2011 injury. Thus, Defendants argue that Tedder's inability to find work was not "caused by" his 2011 injury because he had the same functional capacity in January 2013 that he had before his injury in 2011.

We agree that the portion of Dr. Burke's testimony on which Defendants rely supports their position. But under the deferential standard of review afforded to decisions of the Industrial Commission, we must affirm if there is "any competent evidence" supporting its findings of fact, even if there is evidence supporting a contrary finding. *See, e.g.*, *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394-95 (2008). Here, although there is evidence supporting Defendants' position, there is at least some competent evidence supporting the Commission's contrary findings.

Dr. Burke's testimony is not a model of clarity. Dr. Burke testified that "I certainly think [Tedder] can do a job. I think anything up to medium would be fine." But she also testified that "I think at this point *I would anticipat*e him being able to do medium work." She explained that while she expects this to be the case, she had not yet completed a Functional Capacity Evaluation, "so I can't be very specific about exactly what he could lift, carry, stoop, bend, and all those other things at this point." Dr. Burke concluded that "it is my overall feeling of his level of

functioning, that [medium-duty work] is what *he's going to be able to do*." Thus, Dr. Burke did not unequivocally conclude that Tedder was capable, as of 9 January 2013, of performing medium-duty work. Her testimony also could be interpreted as an indication that she *anticipates* he will be capable of medium-duty work in the future as he continues his treatment.

Moreover, in addition to the somewhat ambiguous exchange above, Dr. Burke testified that while Tedder was "close" to achieving maximum medical improvement, he had not yet reached that point. She indicated that Tedder was still experiencing "some numbness and tingling in the left foot," as well as "some tightness over the lumbar spine." Finally, she opined that she did not believe Tedder would be "in the shape [he is] in now" but for the 8 March 2011 injury.

Under the applicable standard of review, this testimony is competent evidence supporting the Commission's finding that Tedder was unable to continue work as a delivery driver because of his back injury. Accordingly, we affirm the Commission's award of temporary total disability compensation.

Conclusion

For the foregoing reasons, we affirm the Industrial Commission's conclusion that Plaintiff Keith Tedder is entitled to temporary total disability compensation. We reverse and remand for a determination of average weekly wages consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEPHENS concur.

[238 N.C. App. 180 (2014)]

THE TOWN OF BLACK MOUNTAIN, NORTH CAROLINA AND THE COUNTY OF BUNCOMBE, NORTH CAROLINA, PLAINTIFFS
v.
LEXON INSURANCE COMPANY AND BOND SAFEGUARD INSURANCE COMPANY, DEFENDANTS

No. COA14-740

Filed 16 December 2014

1. Cities and Towns—subdivision performance bonds—assignment of bonds—standing

In an action to enforce subdivision performance bonds, the Town of Black Mountain had standing to sue defendant bond insurance companies for breach of contract. The assignment by the original obligee on the bonds, Buncombe County, to the Town of Black Mountain gave the Town standing to sue defendants.

2. Cities and Towns—subdivision performance bonds—governmental function—action not barred by statute of limitations

An action for breach of contract on subdivision performance bonds was not barred by the statute of limitations. Buncombe County's entry into the bonds to assure compliance with subdivision ordinance requirements was a governmental function. Therefore, because the section 1-52 statute of limitations does not include the State or its subdivisions, the County (and the Town of Black Mountain, by assignment of the bonds) was not subject to the statutory time limitation.

Appeal by defendants from order entered 4 March 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2014.

Cannon Law, P.C., by William E. Cannon, Jr. and Ronald E. Sneed, P.A., by Ronald E. Sneed, for plaintiffs-appellees.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges and Daniel R. Hansen, for defendants-appellants.

HUNTER, Robert C., Judge.

The Town of Black Mountain, North Carolina ("the Town") and the County of Buncombe, North Carolina ("the County") (collectively "plaintiffs") filed suit against Lexon Insurance Company and Bond Safeguard

Insurance Company ("defendants") seeking to enforce a series of subdivision performance bonds. The trial court entered summary judgment in plaintiffs' favor. On appeal, defendants argue that summary judgment for plaintiffs was improper because: (1) neither the Town nor the County has standing to enforce the bonds; and (2) the statute of limitations for plaintiffs' claim has run.

After careful review, we affirm the trial court's order.

Background

From March 2005 through February 2007, defendants entered into four subdivision performance bonds ("the bonds") as sureties for The Settings of Black Mountain, LLC and Richmarc Black Mountain, LLC (collectively "developers").[1] Approval from the County for the developers to begin construction on a residential subdivision was conditioned on obtaining the performance bonds to secure completion of the project. Thus, the obligee on each of the bonds in question was the County, not the Town. Each of the bonds contained a clause indicating that defendants, as sureties, would not be required to complete the infrastructure or pay the principal amount of the bond until they received a resolution from the obligee indicating that the improvements had not been installed or completed by the developers. The bonds also contained a provision holding defendants and the developers jointly and severally liable for any amounts due upon default.

The real property that was secured by the bonds was annexed by the Town at varying times between May 2005 and February 2007. Defendants assert that they lacked knowledge of the annexation until 5 January 2012. In 2009, the Town sought confirmation from the developers that they intended and had the means to complete the infrastructure secured by the bonds. In a letter dated 23 October 2009, attorneys for the developers indicated that they were working toward closing a recapitalization loan. On 18 December 2009, a principal in one of the development companies stated via e-mail that "we still believe we have viable entities, though obviously troubled. We are committed to finishing our communities without need of the bonds[.]" Indeed, construction activity by the developers continued into 2010. Ultimately the companies failed. Richmarc Black Mountain, LLC filed its final annual report on 7 June 2011, and The Settings at Black Mountain, LLC was administratively dissolved on 21 August 2011.

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1. Although plaintiffs named all four bonds in their complaint, the construction secured by one of the bonds has since been completed; thus, only three remaining bonds are the subject of plaintiffs' claim.

On 5 January 2012, the County contacted defendants and asked if they would consent to an assignment of the bonds to the Town. In its inquiry, the County conceded that, due to the annexation, "Buncombe County no long[er] has any jurisdiction over the properties and cannot enforce any rights per its ordinances." Defendants did not consent to the assignment.

On 1 August 2011 and 20 December 2011, the Town sent defendants notice that the developers had ceased all construction activity. On 22 June 2012, the County assigned its rights in the bonds to the Town, which accepted assignment on 9 July 2012. On that same day, the Town adopted a resolution finding the infrastructure to be incomplete. The Town sent defendants notice of their claims under the bonds on 24 July 2012. Following nonpayment by defendants, plaintiffs filed their complaint for breach of contract on 25 October 2012. Both the County and the Town brought suit because they anticipated that defendants would challenge standing if either party sued separately; thus, their claims are pled in the alternative pursuant to Rule 8 of the North Carolina Rules of Civil Procedure.

Plaintiffs and defendants each moved for summary judgment and were heard on their respective motions 10 February 2014. The trial court entered an order granting summary judgment for plaintiffs on 4 March 2014. Defendants filed timely notice of appeal.

Discussion

I. Standing

[1] Defendants first argue that neither the Town nor the County has standing to bring suit. Specifically, defendants contend that once the Town annexed the property covered by the bonds, the bonds were extinguished, leaving no rights for the County to assign. We disagree.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). Summary 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) (internal quotation marks omitted). The burden of proof rests with the movant to show that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). We review the record in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Defendants rely on *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984), in support of their contention that the bonds were extinguished when the subject properties were annexed by the Town. In *Stillings*, the Court stated the issue it considered as follows: "Does an exclusive solid waste collection franchise granted by a county remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city, pursuant to statutory mandate, begins providing its own garbage collection service?" *Id.* at 691, 319 S.E.2d at 235. The Court answered this question in the negative. *Id.* In holding that the exclusive waste collection franchise entered into by the county and a private party terminated in the geographic areas annexed by the city, the Court noted that the garbage collection company, "had no rights which the [c]ity was bound to respect." *Id.* at 694-96, 319 S.E.2d at 237-38. According to the statutory mandate in N.C. Gen. Stat. § 160A-47, the city was required to provide garbage collection services without charge to its residents in newly annexed areas. *Id.* at 694, 319 S.E.2d at 237. Therefore, annexation created a conflict between the exclusive franchise rights held by the plaintiffs and the statutory mandate imposed on the city. In recognition of the rule that "[c]orporations which receive franchises take the granted privileges subject to the police power of the state," the Court ultimately held that "[b]y annexation of the property in question, the county's franchise terminated and the police power of the [c]ity became operative." *Id.*

Defendants argue that, pursuant to *Stillings*, "once a town annexes territory that is the subject of a private contract between the county and a private citizen, the annexation effectively nullifies the contract." Thus, defendants contend that the bonds were extinguished when the annexation took place, rendering them unenforceable by either the County or the Town.

We do not read *Stillings* so broadly. The *Stillings* Court did not hold that the franchise agreement between the garbage collection company and the county was terminated in its entirety; rather, the contract was terminated only in those geographical areas annexed by the city. *See Stillings*, 311 N.C. App. at 696, 319 S.E.2d at 238. Therefore, *Stillings* does not support the idea that annexation automatically terminates an entire agreement between a county and a private party. Furthermore, the conflict between the exclusive waste collection franchise and the police powers of the annexing city was crucial to the *Stillings* Court's holding. Here, unlike in *Stillings*, the bonds do not conflict with the Town's police power. There is no statute requiring the Town to behave adversely to the agreement between defendants and the County. Rather

than attempting to terminate the bonds, the Town seeks to enforce them. This situation contrasts sharply with the facts of *Stillings*, where the annexing city was required by statute to provide free garbage collection services in direct contravention of the exclusive franchise agreement between the county and the plaintiffs. Based on these material distinctions, we decline to extend the *Stillings* holding to the facts of this case.

We agree with defendants that the County lost standing to enforce the bonds after annexation. The bonds were created pursuant to the County's "subdivision control ordinance," allowing the County to "provide orderly growth and development" by entering into surety bonds with developers to "assure successful completion of required improvement." *See* N.C. Gen. Stat. § 153A-331 (2013). But the County's power to issue subdivision control ordinances was geographically limited by N.C. Gen. Stat. § 153A-122 (2013), providing that such ordinances are only applicable "to any part of the county not within a city." Therefore, after annexation, the County no longer had statutory authority to call the bonds. The County's attorney admitted as much in his 5 January 2012 e-mail to defendants requesting their consent to assignment, wherein he stated that "Buncombe County no long[er] has any jurisdiction over the properties and cannot enforce any rights per its ordinances." We also agree with defendants that, prior to assignment, the Town did not have standing to enforce or call the bonds because it was not a party to the agreements.

However, we find nothing in the law or within the agreements themselves indicating that assignment of the bonds from the County to the Town was impermissible or without legal effect. *See North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 465-66, 160 S.E. 484, 485-86 (1931) (holding that an indemnity bond was freely assignable as a chose in action). Indeed, defendants "do not contest the general law that, absent contrary language or public policy, bonds can be assigned." Here, the bonds do not contain any language restricting their assignability, and we believe public policy favors assignability under these facts. It is uncontested that substantial infrastructure remains incomplete as a result of the developers' financial troubles. If neither the Town nor the County are able to call the bonds, defendants would in effect receive a windfall by being released from their obligation to pay the sums owed under the bonds.

Accordingly, we hold that the assignment of the bonds from the County to the Town was sufficient to allow the Town to enforce the agreements against defendants. Thus, the assignment conferred standing

upon the Town to sue for the alleged breach of those agreements. We affirm the trial court's order as to this issue.

II. Statute of Limitations

[2] Defendants also argue that summary judgment for plaintiffs was improper because their cause of action is time-barred by the statute of limitations. We disagree.

N.C. Gen. Stat. § 1-52(1) (2013) provides that actions concerning a "contract, obligation or liability arising out of a contract" have a three-year limitations period. Plaintiffs do not dispute that section 1-52 applies to claims for breach of contract. However, they assert protection under the doctrine of *nullum tempus occurrit regi*, which generally allows for governmental bodies to be exempt from statutory time limitations in bringing civil lawsuits. In *Rowan Cnty. Bd. of Educ. v. United States Gypsum Co.*, 87 N.C. App. 106, 359 S.E.2d 814 (1987) ("*Rowan I*"), and *Rowan Cnty. Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992) ("*Rowan II*"), our Courts analyzed the doctrine of *nullum tempus* in North Carolina and developed a framework for its application. "If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State." *Rowan II*, 332 N.C. at 9, 418 S.E.2d at 654 (emphasis in original).

Because section 1-52 is silent as to its application to the State or its subdivisions, this issue turns on whether plaintiffs are engaged in a proprietary or governmental function. The *Rowan II* Court noted that the distinction between governmental and proprietary action in the context of sovereign immunity is the same as the distinction to determine whether the State benefits from the protection of *nullum tempus*. *Rowan II*, 332 N.C. at 9, 418 S.E.2d at 654. Thus, the case most helpful to this analysis is *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998).

In *Derwort*, the issue before this Court was whether Polk County's enactment of a subdivision control ordinance pursuant to sections 153A-121 and 153A-331 rendered it immune from suit under the public duty doctrine. *Id.* at 792, 501 S.E.2d at 381. The Court noted that section 153A-121 was included under the heading titled "Delegation and Exercise of the General Police Power," and that section 153A-331 allowed counties to issue ordinances "in a manner that . . . will create

conditions essential to public health, safety, and the general welfare." *Id.* Citing *Lynn v. Overlook Development*, 98 N.C. App. 75, 78, 389 S.E.2d 609, 611 (1990), it also noted that "[a] municipality ordinarily acts for the benefit of the public, not a specific individual, in providing protection to the public pursuant to its statutory police powers." *Id.* at 791, 501 S.E.2d at 381. The Court went on to hold that "[t]he plain language of the statute and our case law thus indicate that subdivision control is a duty owed to the general public, not a specific individual," and therefore the county was immune from suit by virtue of the public duty doctrine. *Id.* at 792, 501 S.E.2d at 381.

However, defendants argue that *City of Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967), is more applicable than *Derwort*, and therefore, we should find that the act of suing under the bonds is a proprietary rather than governmental function. In *Burton*, the Court noted that generally municipal corporations are immune from application of a statute of limitations because "construction and maintenance of public streets and of bridges constituting a part thereof are governmental functions[.]" *Id.* at 210, 152 S.E.2d at 151. However, the Court held that the City of Reidsville was engaged in a proprietary function when it sued for breach of contract with a private party in the construction of a bridge that was not used by the public, was not maintained by the city, and was not connected to any public streets. *Id.* Here, unlike in *Burton*, there is evidence in the record that the subdivision secured by the bonds allowed public access. Specifically, the developers were required to allow for limited public use of the subdivision clubhouse. Additionally, the developers were required to include easements sufficient for the Town to maintain and access all waterlines. Based on this distinction, we do not find Burton controlling.

Here, the County entered into the bonds pursuant to section 153A-331, the same statute utilized by Polk County in *Derwort*. Section 153A-331 provides that counties are authorized to enact subdivision control ordinances for a variety of purposes consistent with their governmental police powers, such as: (1) "provid[ing] for the orderly growth and development of the county"; (2) "creat[ing] conditions that substantially promote public health, safety, and the general welfare"; and (3) "provid[ing] for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county plans, policies and standards." *Id.* The statute goes on to allow counties to enter into bonds like those at issue in this case "[t]o assure compliance with these and other ordinance requirements[.]" *Id.*

Because the enabling statute allowing for the creation of the bonds between defendants and the County explicitly states that such bonds exist to "assure compliance" with subdivision ordinance requirements, which this Court has characterized as "a duty owed to the general public, not a specific individual," *Derwort*, 129 N.C. App. at 792, 501 S.E.2d at 381, and the subdivision is open to the public, we conclude that plaintiffs are engaged in a governmental function by attempting to enforce the bonds against defendants. *See also State Art Museum Bldg. Comm'n v. Travelers Indem. Co.*, 111 N.C. App. 330, 335, 432 S.E.2d 419, 422 (1993) ("A court may [] consider whether or not the State's action is for the 'common good of all' and therefore governmental, or for pecuniary profit and therefore proprietary."); *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975) (noting that "governmental functions . . . are those historically performed by the government, and which are not ordinarily engaged in by private corporations."). Therefore, under the *Rowan* rulings, plaintiffs are not subject to the statutory time limitation in section 1-52.

Even assuming that the County and the Town were engaged in a proprietary function sufficient to trigger the three-year time limitation in section 1-52, we would still find that summary judgment for plaintiffs is proper. Defendants argue that this cause of action accrued before 25 October 2009, three years before the complaint was filed on 25 October 2012, because by that time plaintiffs knew or should have known that the construction work would not be completed within a reasonable time. We disagree. The bonds themselves do not specify any particular date by which time the construction needed to be completed. Although there is evidence that the Town was concerned in mid-2009 by the relative lack of progress on the construction, as late as 18 December 2009, a principal in the development companies stated that they were "committed to finishing [the] communities without need of the bonds." Indeed, construction activity by the developers continued well into 2010. Therefore, because it is clear that the developers themselves had not yet given up on the project, we disagree with defendants' contention that there is a genuine issue of fact regarding whether plaintiffs knew or should have known prior to 25 October 2009 that the project would not be completed within a reasonable time.

Conclusion

After careful review, we hold that the Town has standing to bring suit against defendants for breach of contract. Furthermore, plaintiffs are engaged in a governmental function and are exempt from the

otherwise applicable statute of limitation. Therefore, we affirm the trial court's order granting summary judgment for plaintiffs.

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

ERIC TUCKER, PLAINTIFF
v.
FAYETTEVILLE STATE UNIVERSITY AND
JAMES A. ANDERSON, CHANCELLOR, DEFENDANTS

No. COA14-178

Filed 16 December 2014

Public Officers and Employees—basketball coach—forced retirement accepted—loyalty to team—administrative remedies not exhausted

The trial court correctly dismissed plaintiff's employment termination action under N.C.G.S. § 1A-1, Rule 12 (b)(6). Plaintiff, the former basketball coach at a state university, retired in the face of the university's indicated intent to pursue termination but alleged in his complaint that he had accepted forced retirement and not pursued administrative relief out of loyalty to his basketball team. Plaintiff was not required to exhaust his administrative remedies if the only remedies available would be inadequate, but he provided no authority that loyalty to the team satisfied his burden of showing an inadequate remedy. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint.

Appeal by plaintiff from order entered 8 November 2013 by Judge Lucy Inman in Cumberland County Superior Court. Heard in the Court of Appeals 13 August 2014.

McGeachy, Hudson & Zuravel, by Donald C. Hudson, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for defendant-appellees.

CALABRIA, Judge.

Plaintiff Eric Tucker ("plaintiff") appeals from an order dismissing his complaint with prejudice and, alternatively, granting Fayetteville State University's ("FSU") and University Chancellor James A. Anderson's ("Anderson") (collectively, "defendants") motion for summary judgment. We affirm.

Plaintiff had a written employment contract and had been employed as the head coach of the FSU women's basketball team for sixteen years. During plaintiff's tenure, he never had any negligent evaluations, reprimands, or warnings. According to plaintiff, he always executed his duties in an exemplary manner.

In April 2009, FSU's Department of Police and Public Safety ("FSU DPPS") investigated allegations regarding plaintiff's inappropriate language towards team members, assault on a team member, and threats to terminate team members' athletic scholarships. As a result of FSU DPPS's report, Anderson decided there were grounds for termination. FSU subsequently informed plaintiff that he could either resign his position or FSU would begin the process of terminating his employment. In a letter dated 21 April 2009, plaintiff notified the FSU athletic director of his decision to retire. On 1 July 2009, plaintiff did in fact retire, even though his contract did not expire until 30 June 2010.

On 23 December 2009, plaintiff filed a complaint against defendants seeking compensatory damages for breach of contract, alleging FSU lacked just cause to terminate his employment and forced him to resign against his will. Defendants filed a motion to dismiss. On 22 April 2010, the trial court granted defendants' motion and dismissed the action with prejudice pursuant to Rule 12(b)(6). On appeal, this Court reversed the dismissal. After the case was remanded, plaintiff voluntarily dismissed that complaint without prejudice.

On 12 April 2013, plaintiff timely refiled his complaint against defendants, alleging, *inter alia*, that defendants breached his employment contract because defendants lacked just cause to terminate his employment and forced him to resign against his will. Plaintiff alleged that "the grievance system set up by the Defendants does not allow for the Plaintiff to receive the compensatory damages to which he is entitled based upon the alleged breach of contract and the resulting damage to the Plaintiff's ability to engage in his profession." Defendants subsequently filed a motion to dismiss pursuant to N.C.R Civ. P. 12(b)(1) and 12(b)(2) on the grounds that plaintiff failed to exhaust his administrative remedies and sovereign immunity. Defendants also included a motion for summary judgment on the grounds that there was no genuine issue

of material fact with respect to the breach of plaintiff's employment contract. On 8 November 2013, the trial court entered an order dismissing plaintiff's complaint with prejudice and in the alternative granted defendants' motion for summary judgment. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in granting both defendants' motion to dismiss the complaint and defendants' motion for summary judgment. We disagree.

"An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. An appellate court's review of such a dismissal is *de novo*." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (citations and quotations omitted).

"Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-43 (2013). The actions of the University of North Carolina and its constituent institutions are subject to the judicial review procedures of N.C. Gen. Stat. § 150B-43. *Huang v. N.C. State University*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). Since FSU is a constituent institution of the University of North Carolina pursuant to N.C. Gen. Stat. § 116-4 (2013), any action taken is subject to specific review procedures. "Because no statutory administrative remedies are made available to employees of the University [of North Carolina], those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts." *Huang*, 107 N.C. App. at 713-14, 421 S.E.2d at 814. "Therefore, before a party may ask the courts for relief from a University decision: (1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by the University must be exhausted." *Id.* at 714, 421 S.E.2d at 814. Additionally, "the complaint should be carefully scrutinized to ensure that the claim for relief is not inserted for the sole purpose of avoiding the exhaustion rule." *Id.* at 715, 421 S.E.2d at 816 (citation omitted).

As an initial matter, the correct procedure for seeking review of an administrative decision is to file a petition in court, explicitly stating the exceptions taken to the administrative decision. *Id.* at 715, 421 S.E.2d at 815. "The burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a

claim must include such allegation in the complaint." *Id.* (citations omitted). "In order, however, to rely upon futility or inadequacy, allegations of the facts justifying avoidance of the administrative process must be pled in the complaint." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004) (citation and internal quotation marks omitted).

In the instant case, according to plaintiff's employment contract, plaintiff was "subject to Fayetteville State University's Employment Policies for Personnel Exempt from the State Personnel Act" (the "employment policies"). The employment policies are incorporated by reference and include grievance policies and procedures for employees to secure review of decisions concerning discharge or termination of employment. Therefore, plaintiff was entitled to all of the procedures available in the employment policies. Those procedures included, *inter alia*, a written grievance to the Director of Human Resources, a hearing before a grievance committee, and ultimately review of the grievance by the University of North Carolina Board of Governors. Once plaintiff completed that process, he would have been entitled to judicial review of the decision pursuant to N.C. Gen. Stat. § 150B-43.

Nevertheless, plaintiff elected not to pursue any of the administrative remedies available to him, arguing that the administrative remedies provided by FSU were so inadequate that he essentially had no effective administrative remedies. Plaintiff contends that due to his unique position as a basketball coach, the outcome of any administrative remedy "would have been so unfair to the team and the coach as to render such procedures virtually meaningless." Specifically, plaintiff contends that, as a basketball coach, proceeding with an administrative remedy would cause damage to the basketball team, and "a coach who has formed close bonds with the players on his team could not be reasonably expected to damage the team in that manner."

Plaintiff correctly relies on *Huang* for the proposition that he was not required to exhaust his administrative remedies "when the only remedies available from the agency are shown to be inadequate." *Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815 (citation omitted). *Huang*, as a tenured professor, filed a complaint in superior court seeking compensatory damages rather than pursuing administrative remedies, believing them to be inadequate. *Id.* at 712, 421 S.E.2d at 814. Plaintiff, like Huang, is an aggrieved party in a contested case. Unlike Huang, plaintiff supports his argument with his loyalty to the basketball team. However, plaintiff provides no authority to support his contention that his loyalty to the basketball team satisfies his burden of showing the inadequacy of

the administrative remedy. Since plaintiff submitted a letter indicating his decision to retire rather than requesting a hearing, then filed a complaint, plaintiff not only failed to meet his burden of showing that the administrative remedies were inadequate, but also essentially avoided the exhaustion rule. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint. Since we find that the trial court properly granted defendants' motion to dismiss because plaintiff failed to carry his burden of proving that the administrative remedies available to him were inadequate, and therefore failed to exhaust his administrative remedies, we do not reach the issue of sovereign immunity.

Although plaintiff also argues that the trial court erred in granting defendants' motion for summary judgment, since the trial court lacked subject matter jurisdiction, we need not address plaintiff's remaining arguments. The trial court properly dismissed plaintiff's complaint with prejudice. We therefore affirm the order of the trial court.

Affirmed.

Judges ELMORE and STEPHENS concur.

WELLS FARGO BANK, N.A., successor by merger with WACHOVIA BANK, NATIONAL ASSOCIATION, Plaintiff

v.

JOHN M. CORNEAL; and wife, JORENE S. PROPER, and SUBSTITUTE TRUSTEE SERVICES, INC., Substitute Trustee, Defendants

No. COA14-660

Filed 16 December 2014

1. Appeal and Error—interlocutory orders—substantial right—counterclaims—risk of inconsistent verdicts

Although defendants conceded that their appeal in a breach of contract and judicial foreclosure case was from an interlocutory order, defendants showed that it affected a substantial right entitling them to immediate review since their counterclaims and plaintiff's claims shared a common factual issue such that separate litigation of these claims may result in inconsistent verdicts.

2. Contracts-breach—judicial foreclosure—dismissal of counterclaims-unfair and deceptive trade practices-North Carolina Debt Collection Act

The trial court did not err in a breach of contract and judicial foreclosure case by granting plaintiff's motion to dismiss defendants' counterclaims under N.C.G.S. § 1A-1, Rule 12(b)(6). Defendants failed to state a claim under the Unfair and Deceptive Trade Practices Act or the North Carolina Debt Collection Act.

Appeal by defendants from order entered 18 February 2014 by Judge Walter H. Godwin, Jr. in Superior Court, Dare County. Heard in the Court of Appeals 23 October 2014.

Womble Carlyle Sandridge & Rice by Jesse A. Schaefer, for plaintiff-appellee.

David R. Dixon, for defendants-appellants.

STROUD, Judge.

John M. Corneal and his wife, Jorene S. Proper, ("defendants") appeal from the trial court's order granting a motion to dismiss their counterclaims. Finding no error, we affirm the trial court's order.

I. Background

On or about 5 December 2008, defendants and Wachovia Bank, National Association executed a note, in which defendants promised to pay a principal amount of $389,890. The note's payment schedule includes a balloon payment on 4 December 2011, the maturity date. The parties secured the note by a deed of trust on a parcel of Hatteras real property owned by Corneal. Wells Fargo Bank, N.A. ("plaintiff") is Wachovia Bank's successor by merger.

Defendants failed to make the balloon payment upon maturity of the note. On or about 27 January 2012, plaintiff notified defendants of their right to cure the default. On or about 27 March 2012, plaintiff mailed defendants a notice of foreclosure.

On 10 July 2013, plaintiff sued defendants for breach of contract and judicial foreclosure. On 30 September 2013, defendants answered, raised affirmative defenses, and brought counterclaims for violations of the Unfair and Deceptive Trade Practices Act ("UDTPA") and the North Carolina Debt Collection Act ("NCDCA"). *See* N.C. Gen. Stat. ch.

75 (2013). On 2 December 2013, plaintiff moved to dismiss defendants' counterclaims pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). On 17 February 2014, the trial court held a hearing on plaintiff's motion. On 18 February 2014, the trial court granted plaintiff's motion. On 19 March 2014, defendants timely filed a notice of appeal.

II. Appellate Jurisdiction

[1] Although defendants concede that the trial court's order is interlocutory, they contend that the order is immediately appealable because it affects a substantial right. Immediate appeal is available from an interlocutory order that affects a substantial right. *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014). The appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature. *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011). It is not the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. *Id.* at 79, 711 S.E.2d at 190.

In determining whether a particular interlocutory order is appealable, we examine (1) whether a substantial right is affected by the challenged order and (2) whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. *Id.* at 78, 711 S.E.2d at 189. We take a "restrictive" view of the substantial right exception and adopt a case-by-case approach. *Id.*, 711 S.E.2d at 189.

A party has a substantial right to avoid two separate trials of the same issues. *Id.* at 79, 711 S.E.2d at 190. Issues are the "same" if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts. *Id.*, 711 S.E.2d at 190. "The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Id.* at 80, 711 S.E.2d at 190.

Here, defendants assert that "the issues brought to the jury by the complaint, the defenses that remain, and the counterclaims are the same—the effect and meaning of the promissory note, deed of trust, and the bank's actions (or lack thereof) surrounding the execution of the same." Defendants' counterclaims include the allegation that,

at the loan's execution, Wachovia Bank, plaintiff's predecessor-in-interest, promised that defendants could refinance the loan upon maturity. Defendants' affirmative defenses of estoppel and unclean hands also include this allegation. Accordingly, we hold that defendants have shown that their counterclaims and plaintiff's claims share a common factual issue, such that separate litigation of these claims may result in inconsistent verdicts. *See id.* at 79, 711 S.E.2d at 190. Defendants thus have successfully demonstrated that the trial court's order affects a substantial right. *See id.* at 77, 711 S.E.2d at 189. We therefore have jurisdiction to review this order. *See Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439.

III. Motion to Dismiss

[2] Defendants contend that the trial court erred in dismissing their counterclaims pursuant to Rule 12(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion 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. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the 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 the plaintiff's claim.

Guyton v. FM Lending Servs., Inc., 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citations and quotation marks omitted). We conduct a de novo review of the pleadings to determine their legal sufficiency. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429, *disc. rev. dismissed and appeal dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

B. Unfair and Deceptive Trade Practices Act

To establish a prima facie UDTPA claim, a plaintiff must show that: (1) the defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act

proximately caused injury to the plaintiff. *Phelps Staffing, LLC v. C.T. Phelps, Inc.*, ___ N.C. App. ___, ___, 740 S.E.2d 923, 928 (2013); *see also* N.C. Gen. Stat. ch. 75.

> A practice is properly deemed unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers or amounts to an inequitable assertion of power or position. To prove deception, while it is not necessary to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, a plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.

Capital Resources, LLC v. Chelda, Inc., ___ N.C. App. ___, ___, 735 S.E.2d 203, 212 (2012) (citations and quotation marks omitted), *disc. rev. dismissed and cert. denied*, ___ N.C. ___, 736 S.E.2d 191 (2013). A UDTPA action is distinct from a breach of contract action; a plaintiff must allege and prove egregious or aggravating circumstances to prevail on a UDTPA claim. *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 340, 713 S.E.2d 495, 504, *disc. rev. denied,* 365 N.C. 353, 718 S.E.2d 376 (2011).

In *Overstreet v. Brookland, Inc.*, the defendant promised to the plaintiff that no part of a subdivision would be used for non-residential purposes, but one year later, sold a subdivision lot to a buyer whom it knew would use the lot for non-residential purposes. 52 N.C. App. 444, 451-52, 279 S.E.2d 1, 6 (1981). This Court held that the defendant had not violated the UDTPA, because no evidence indicated that the defendant intended to break its promise *at the time* defendant made the promise. *Id.* at 452-53, 279 S.E.2d at 6-7. Similarly, in *Opsahl v. Pinehurst Inc.*, the defendant's agent represented that a projected completion date was firm and would be met. 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986), *disc rev. improvidently allowed per curiam*, 319 N.C. 222, 353 S.E.2d 400 (1987). The defendant, however, failed to meet the projected completion date. *Id.*, 344 S.E.2d at 76-77. This Court held that the defendant had not violated the UDTPA. *Id.* at 70, 344 S.E.2d at 77.

Here, defendants alleged that plaintiff broke its promise to allow defendants to refinance the loan upon maturity. Defendants, however, did not allege that plaintiff intended to break its promise at the time that it made the promise. In light of *Overstreet* and *Opsahl*, we hold that defendants' allegation that plaintiff broke its promise, standing alone,

does not constitute a UDTPA claim. *See Overstreet*, 52 N.C. App. at 452-53, 279 S.E.2d at 6-7; *Opsahl*, 81 N.C. App. at 70, 344 S.E.2d at 77.

C. North Carolina Debt Collection Act

To establish a NCDCA claim, a plaintiff must show, among other elements, that: (1) the obligation owed is a "debt"; (2) the one owing the obligation is a "consumer"; and (3) the one trying to collect the obligation is a "debt collector." *Green Tree Servicing LLC v. Locklear*, ___ N.C. App. ___, ___, 763 S.E.2d 523, 527 (2014); *see also* N.C. Gen. Stat. §§ 75-50 to -56 (2013). A "consumer" means "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). Defendants did not allege that they incurred the debt for "personal, family, household or agricultural purposes." *See id.* Accordingly, we hold that defendants did not state a NCDCA claim.

IV. Conclusion

Because defendants have failed to state a claim under the UDTPA or the NCDCA, we affirm the trial court's order dismissing defendants' counterclaims.

AFFIRMED.

Judges GEER and BELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 16 December 2014)

Case	County / Agency	Disposition
BURNETTE v. FOX No. 14-266	Haywood (12CVS29)	No Error
FINNEY v. FINNEY No. 14-420	Haywood (06CVD26)	Affirmed
GUPTA v. CARTER No. 14-334	Wake (13CVD14441)	Affirmed
IN RE J.W. No. 14-598	Durham (13J173-175)	Affirmed
IN RE K.J.C. No. 14-452	Robeson (13JB62)	Affirmed
IN RE M.N.M. No. 14-587	Rowan (12JT11)	Affirmed
IN RE Y.M.C. No. 14-699	Wake (13JA660-662)	Affirmed
JABEZ CONSOL. HOLDINGS, INC. v. WELLS FARGO BANK, N.A. No. 14-552	Mecklenburg (13CVS14695)	Affirmed
JACKSON v. JACKSON No. 14-440	Durham (13CVD4785)	Vacated
KAPLAN v. KAPLAN No. 14-386	Buncombe (10CVD1643)	Affirmed
OLAVARRIA v. MARRIOTT No. 14-579	Wake (13CVS3778)	Affirmed
RICHARDSON v. PCS PHOSPHATE CO., INC. No. 14-615	N.C. Industrial Commission (W28174)	Affirmed
SARTORI v. N.C. DEP'T OF PUB. SAFETY No. 14-567	N.C. Industrial Commission (TA-22787)	Vacated and Remanded
SETTLERS EDGE HOLDING CO., LLC v. RES-NC SETTLERS EDGE, LLC No. 14-252	Yancey (10CVS279)	Dismissed

STATE v. ANDERSON No. 14-444	Guilford (12CRS96238-40) (12CRS96242) (12CRS96244) (12CRS96247) (13CRS24056)	No Error
STATE v. ANDREWS No. 14-544	Forsyth (12CRS60457) (12CRS60457)	No Error
STATE v. AUSTIN No. 14-617	Buncombe (12CRS441-442)	Remanded for correction of clerical error.
STATE v. BLACKMON No. 14-594	Mecklenburg (11CRS223305) (11CRS33155)	No Error
STATE v. BRITT No. 14-413	Robeson (11CRS5511) (11CRS56104)	No Error
STATE v. BROWN No. 14-814	Onslow (12CRS56333) (12CRS56335-36) (12CRS56338-39) (13CRS52796-98) (13CRS52799-804) (13CRS52807)	No Error in part; Vacated and Remanded in part
STATE v. BULLABOUGH No. 14-678	Mecklenburg (10CRS78869-70)	New Trial In Part; Remanded With Instructions In Part
STATE v. FIGURELLI No. 14-483	Johnston (13CRS52186) (13CRS52188)	Affirmed
STATE v. FREDERICK No. 14-338	Sampson (10CRS52051) (10CRS52053-54)	Affirmed
STATE v. GADDY No. 14-360	Mecklenburg (12CRS235086) (12CRS235088) (12CRS235090)	Remanded for resentencing
STATE v. GASH No. 14-581	Buncombe (13CRS50747-48)	No Error

STATE v. HAMPTON No. 14-394	Mecklenburg (08CRS254123)	No Error
STATE v. HARRIS No. 14-681	Iredell (13CRS3175) (13CRS3177) (13CRS3179)	No Error
STATE v. HARRIS No. 14-705	Craven (87CRS3525) (87CRS4136)	Affirmed
STATE v. HOLLEMAN No. 14-555	Stanly (10CRS50736) (10CRS50738-39)	No Error
STATE v. HUBBARD No. 14-546	Cumberland (12CRS56386)	No Error
STATE v. HUFFSTETLER No. 14-727	Cleveland (12CRS50635)	No Error
STATE v. JOHNSON No. 14-481	Mecklenburg (11CRS255943)	No Prejudicial Error
STATE v. JORDAN No. 14-716	Buncombe (12CRS58869-70)	Affirmed
STATE v. LIGHTSEY No. 14-576	Onslow (12CRS57424-26)	No error in part; vacated in part.
STATE v. McKOY No. 14-796	Scotland (12CRS50970-71)	No Error
STATE v. MILTON No. 14-664	Onslow (12CRS50988)	No prejudicial error in part; dismissed in part
STATE v. MONROE No. 14-556	Hoke (10CRS50069)	No Error
STATE v. MOSES No. 14-605	Forsyth (12CRS61452)	Vacated and Remanded
STATE v. PAGE No. 14-600	Robeson (10CRS54508)	New Trial
STATE v. PATE No. 14-464	Cherokee (10CRS51499)	No Error

Case	County	Disposition
STATE v. PATTERSON No. 14-714	Davidson (11CRS53220) (11CRS5345) (11CRS5358) (12CRS2656)	No Error
STATE v. PATTERSON No. 14-618	New Hanover (13CRS58149)	No Error
STATE v. PETTIGREW No. 14-672	Franklin (05CRS51895)	No Error
STATE v. PETTY No. 14-641	Mecklenburg (12CRS236412) (12CRS39339)	No Error as to Trial, Ineffective Assistance of Counsel Claim Dismissed Without Prejudice
STATE v. RACHELS No. 14-571	Davidson (11CRS5353) (11CRS54866)	No error in part; no prejudicial error in part.
STATE v. ROBINSON No. 14-409	Guilford (12CRS89510) (12CRS89511) (13CRS73433)	No Error
STATE v. SMITH No. 14-663	Duplin (11CRS50335) (11CRS50343)	Reversed and Remanded
STATE v. WYSE No. 14-679	Yadkin (13CRS604)	Affirmed
TAYLOR v. TAYLOR No. 14-673	Buncombe (12CVD4993)	Affirmed in Part and Vacated in Part
WHITE v. WHITE No. 14-274	Pasquotank (09CVD770)	Affirmed
WIMES v. N.C. BD. OF NURSING No. 14-525	Wake (12CVS16201)	Affirmed

DAVID BOTTOM and KRYSTAL DAWN SANCHEZ BOTTOM, Plaintiffs
v.
JAMES W. BAILEY, JR., 1031 EXCHANGE SERVICES, LLC, HOMETRUST BANK, a federally chartered mutual savings bank, and MORGAN STANLEY SMITH BARNEY, Defendants

No. COA14-564

Filed 31 December 2014

1. Banks and Banking—negligence—no duty of care owed to non-customer

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for negligence based on acts committed by one of its customers. When a customer of Morgan Stanley perpetrated a check kiting scheme by writing checks between a HomeTrust Bank account that held plaintiffs' money and a Morgan Stanley account not owned by plaintiffs, Morgan Stanley did not owe plaintiffs a duty of care because plaintiffs were not its customers.

2. Banks and Banking—withdrawal by fiduciary from principal's account—account not in principal's name

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of N.C.G.S. § 32-9 based on acts committed by one of its customers. N.C.G.S. § 32-9 applies when a fiduciary makes fraudulent withdrawals on the account of his or her principal. Because the Morgan Stanley account was not in plaintiffs' names, plaintiffs had no claim against Morgan Stanley under the statute.

3. Banks and Banking—Bank Secrecy Act—no private cause of action

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of 31 U.S.C. § 5311, the Bank Secrecy Act, based on acts committed by one of its customers. While plaintiffs argued that the Act and related regulations required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes," the Act does not create a private cause of action.

4. Banks and Banking—aiding and abetting—breach of fiduciary duty—insufficient specificity

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley

for aiding and abetting a breach of fiduciary duty. The only North Carolina case with precedential value recognizing such a cause of action, *Blow v. Shaughnessy*, 88 N.C. App. 484, was abrogated by the United States Supreme Court. Even assuming the cause of action existed in North Carolina, plaintiffs' complaint made only conclusory allegations and did not state the claim with sufficient specificity.

5. Conspiracy—civil conspiracy—failure to state a claim

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for civil conspiracy. Plaintiffs' complaint failed to allege one of the elements of civil conspiracy—an agreement between two or more individuals. Moreover, plaintiffs' complaint made only conclusory allegations without offering any supporting factual allegations.

6. Unfair Trade Practices—civil conspiracy—claim predicated upon properly dismissed claim

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for unfair and deceptive practices. Plaintiffs' claim for unfair and deceptive practices was predicated upon their claim for civil conspiracy, which the Court of Appeals held was properly dismissed. Therefore, their claim for unfair and deceptive practices was also properly dismissed.

Appeal by plaintiff from order entered 7 February 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2014.

Fisher Stark Cash, P.A., by W. Perry Fisher, II, Brad A. Stark and Colin A. McCormick, for plaintiff-appellants.

Moore & Van Allen PLLC, by Mark A. Nebrig and M. Cabell Clay, and Greenberg Traurig, P.A., by Bradford D. Kaufman (pro hac vice) and Joseph C. Coates, III (pro hac vice), for defendant-appellee Morgan Stanley Smith Barney.

STEELMAN, Judge.

Where plaintiffs' complaint, viewed as admitted, failed to state a claim against defendant upon which relief may be granted, the trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, with prejudice.

I. Factual and Procedural History

David Bottom and Krystal Bottom (plaintiffs) owned real property in Buncombe County. On 11 November 2010, plaintiffs contracted with 1031 Exchange Services, LLC (1031) to provide intermediary services for a tax-deferred exchange pursuant to 26 U.S.C. § 1031. On 19 November 2010, plaintiffs sold the property, and the proceeds from the sale, $224,529.75, were deposited by 1031 into a fiduciary account at HomeTrust Bank (HomeTrust). Without plaintiffs' knowledge or permission, HomeTrust automatically transferred approximately $204,529.75 of the deposited funds into a separate sweep account in the name of 1031 at HomeTrust. HomeTrust comingled these monies with other accounts of James W. Bailey (Bailey), sole owner and manager of 1031, and various entities controlled by him. Funds in this separate account were then transferred back and forth between HomeTrust and Morgan Stanley Smith Barney (Morgan Stanley).

On 1 February 2011, Bailey was indicted in federal court for engaging in a 10-year check-kiting scheme involving the transfer of funds between HomeTrust and Morgan Stanley. Pursuant to this scheme, which involved more than $13,000,000, Bailey would write and deposit checks issued from accounts at HomeTrust into Morgan Stanley accounts, and vice versa, even though the accounts lacked sufficient funds to cover the transfers.

Morgan Stanley's parent company made numerous inquiries to its Asheville office over the 10-year period. Morgan Stanley generated one or more reports indicating suspicious or wrongful activities involving Bailey's Morgan Stanley accounts. On one or more occasions, representatives of Morgan Stanley questioned Bailey regarding his account activities. Morgan Stanley did not file Suspicious Activity Reports (SARs) with federal law enforcement or the Department of the Treasury as to Bailey's activities.

On 30 November 2010, Bailey, on behalf of 1031, attempted to deposit three non-certified checks drawn upon a HomeTrust account with Morgan Stanley in the total amount of $4,800,000. Plaintiffs' funds were a portion of the funds used to cover the $4,800,000. Morgan Stanley requested that the checks be certified. Bailey subsequently obtained three certified checks from HomeTrust in the amount of $4,800,000, and deposited them with Morgan Stanley.

On 13 December 2010, HomeTrust informed 1031 that there were insufficient funds to cover the 30 November 2010 certified checks. A hold was subsequently placed on 1031's account. On 26 December 2010,

plaintiffs received notice that 1031's account had been frozen; the next day, plaintiffs went to HomeTrust seeking the return of their funds. HomeTrust declined to disburse plaintiff's funds.

On 9 February 2011, the federal government executed a seizure warrant upon HomeTrust for all of 1031's accounts, including the sweep account. This warrant was served on 16 February 2011. On 22 August 2011, HomeTrust sent 10 checks to the United States government totaling $44,231.58, from various accounts controlled by Bailey and his controlled entities. None of those funds came from the sweep account.

On 16 July 2013, plaintiffs filed an amended complaint against Bailey, 1031, Hometrust, and Morgan Stanley. The amended complaint alleged breach of contract, negligence, negligent misrepresentation, and breach of fiduciary duty by Bailey and 1031; breach of implied contract, negligence, breach of fiduciary duty, violation of N.C. Gen. Stat. § 32-9, conversion, violation of 31 U.S.C. § 5311 *et seq.*, and aiding and abetting a breach of fiduciary duty by HomeTrust; and negligence, violation of N.C. Gen. Stat. § 32-9, violation of 31 § U.S.C. 5311 *et seq.*, and aiding and abetting a breach of fiduciary duty by Morgan Stanley. The complaint also alleged unfair and deceptive practices and civil conspiracy, and sought equitable tracing or constructive trust, and an equitable lien, against all defendants.

On 17 September 2013, Morgan Stanley moved to dismiss plaintiffs' complaint against it, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, on the grounds that plaintiffs were not customers of Morgan Stanley, that Morgan Stanley owed no duty to plaintiffs, fiduciary or otherwise, and that therefore plaintiffs "fail to allege the ultimate facts necessary to establish the essential elements of their claims[.]" On 7 February 2014, the trial court granted Morgan Stanley's motion to dismiss plaintiffs' complaint, with prejudice.

Plaintiffs appeal.

II. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's

ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"[T]o prevent a Rule 12(b)(6) dismissal, a party must . . . state enough to satisfy the substantive elements of at least some legally recognized claim. Additionally, we are not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citations and quotations omitted).

III. Analysis

Although plaintiffs make ten different arguments, they all concern a single issue: that the trial court erred in granting Morgan Stanley's motion to dismiss. We disagree.

Plaintiffs' complaint alleged that Morgan Stanley was negligent, that it violated N.C. Gen. Stat. § 32-9 and 31 U.S.C. § 5311, and that it aided and abetted Bailey and 1031 in their breach of fiduciary duty. Plaintiffs also alleged civil conspiracy and unfair and deceptive practices.

A. Negligence

[1] "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." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010). "The sine qua non of a negligence claim is a legal duty owed by defendant to the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003). Plaintiffs contend that, despite not being customers of Morgan Stanley, they were owed a duty by Morgan Stanley.

In *Sterner*, we addressed the issue of "whether a securities broker/dealer has a legal duty to 'supervise' and 'monitor' the investments ordered by its customer on behalf of that customer's client." *Id.* In that case, the plaintiff, Sterner, brought an action against brokerage firms. Sterner, who was not a customer of the defendants, entrusted her money to Penn, a person who was a customer of defendants; Penn invested and subsequently lost her money. Sterner brought suit against defendants, alleging that they were negligent in failing to oversee the investments made by Penn, who was their customer. The trial court granted the defendants' motion to dismiss. On appeal this Court held, after extensive analysis, that defendants were not investment advisors to Penn, nor to Sterner, that defendants had no duty to supervise and monitor Penn's actions to protect Sterner, and that Sterner's claim for negligence

failed because defendants owed no duty to Sterner. *Id.* at 631, 583 S.E.2d at 674.

In reaching our decision in *Sterner*, we relied upon *Eisenberg v. Wachovia Bank*, 301 F.3d 220 (4th Cir. 2002). *Eisenberg* was a North Carolina case in which the plaintiff was "the victim of a fraudulent investment scheme" perpetrated by a person named Reid. *Id.* at 222. At Reid's direction, plaintiff transferred $1,000,000 into Reid's account at Wachovia Bank in North Carolina. Reid took the money, and plaintiff brought action against Wachovia, alleging negligence, specifically contending that Wachovia breached its duty in permitting Reid to open a fraudulent account and failing to discover Reid's improper use of the account. The federal district court granted Wachovia's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On appeal, the United States Court of Appeals for the Fourth Circuit held that:

> We consider whether a bank owes a duty of care to a noncustomer who is defrauded by the bank's customer through use of its services. We cannot find an applicable precedent from a North Carolina court and look to case law from other jurisdictions. We conclude that the North Carolina Supreme Court, if it were to decide this issue, would hold that Wachovia did not owe Eisenberg a duty of care under the facts presented.
>
> Whether Wachovia owes a duty of care to Eisenberg depends on the relationship between them. *See* W. Page Keeton et al., *Prosser and Keeton on Torts* § 53 at 356 (5th ed. 1984) ("It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other ...."); *cf. Newton v. New Hanover Co. Bd. of Educ.*, 342 N.C. 554, 467 S.E.2d 58, 63 (1996) (holding nature and scope of duty owed by owner of land depends upon status of injured person as invitee, licensee or trespasser). Eisenberg had no direct relationship with Wachovia. He was not a Wachovia bank customer and, so far as the allegations indicate, has never conducted business with Wachovia. Eisenberg instead transacted with Reid, a Wachovia bank customer.

Id. at 225. The Court noted that a bank has no duty to anyone but its own customers, and that despite the fact that a bank account may have been used in the course of perpetrating a fraud, the bank's only duty was to

its customers, not to those with whom its customers had dealings. *Id.* at 225-26. The Fourth Circuit Court of Appeals concluded that since there was no relationship between Wachovia and plaintiff, that Wachovia did not owe plaintiff a duty of care, and that plaintiff's claim was properly dismissed. *Id.* at 227.

In the instant case, we hold the precedent of *Eisenberg* and *Sterner* to be both controlling and persuasive. Morgan Stanley had no relationship with plaintiffs, and therefore owed them no duty. The trial court did not err in dismissing plaintiffs' claim of negligence with respect to Morgan Stanley.

This argument is without merit.

B. N.C. Gen. Stat. § 32-9

[2] N.C. Gen. Stat. § 32-9 provides that:

> If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

N.C. Gen. Stat. § 32-9 (2013).

In the instant case, plaintiffs alleged that Morgan Stanley had actual knowledge of either 1031's breach of fiduciary duty or Bailey's misconduct. However, N.C. Gen. Stat. § 32-9 does not address the factual situation recited in plaintiffs' complaint. The language of the statute, on its face, applies to the fiduciary's fraudulent mishandling of the principal's account. In the instant case, the Morgan Stanley account was not in the names of plaintiffs. While the complaint is unclear, it seems to suggest that the account or accounts with Morgan Stanley were in Bailey's name. The language of N.C. Gen. Stat. § 32-9 is clear: it applies when the fiduciary makes fraudulent withdrawals *on the account of his principal*, of which the bank should be aware. Because the complaint does not allege that the account with Morgan Stanley was in the name of plaintiffs, no

claim arises under that statute. The trial court did not err in dismissing plaintiff's claim against Morgan Stanley based upon a violation of N.C. Gen. Stat. § 32-9.

This argument is without merit.

C. 31 U.S.C. § 5311

[3] 31 U.S.C. § 5311 *et seq.*, known as the Bank Secrecy Act, are federal laws requiring "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311 (2001). We note in passing that the instant action concerns none of these things; the action at issue is neither criminal nor regulatory, does not involve intelligence nor counterintelligence, and does not, based upon the allegations in plaintiff's complaint, concern international terrorism. The instant action is a civil claim, between private parties, for breach of contract, negligence, and other assorted civil wrongs. Although the question has not been addressed within our jurisdiction, other courts have held that the Bank Secrecy Act does not create a private cause of action. *See e.g. El Camino Res., LTD. V. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) *aff'd*, 712 F.3d 917 (6th Cir. 2013) (holding that "it is now well settled that the anti-money-laundering obligations of banks, as established by the Bank Secrecy Act, obligate banks to report certain customer activity to the government but do not create a private cause of action permitting third parties to sue for violations of the statute"); *see also Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517, 531 (2001) (holding that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not").

In plaintiffs' amended complaint, they contend that the Bank Secrecy Act required HomeTrust and Morgan Stanley to "establish, implement, and maintain programs designed to detect and report suspicious activity indicative of financial crimes as further set forth herein." Rather than citing to the Bank Secrecy Act itself for a basis for this contention, however, plaintiffs cite to Title 12 of the Code of Federal Regulations, specifically a subsection concerning compliance with the Bank Secrecy Act. The regulation in question requires:

(b) *Establishment of a BSA compliance program—*

> (1) *Program requirement.* Each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR Chapter X. The compliance program must be written, approved by the bank's board of directors, and reflected in the minutes of the bank.
>
> (2) *Customer identification program.* Each bank is subject to the requirements of 31 U.S.C. 5318(1) and the implementing regulations jointly promulgated by the OCC and the Department of the Treasury at 31 CFR 1020.220, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.
>
> (c) *Contents of compliance program.* The compliance program shall, at a minimum:
>
> (1) Provide for a system of internal controls to assure ongoing compliance;
>
> (2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party;
>
> (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and
>
> (4) Provide training for appropriate personnel.

12 C.F.R. § 21.21 (2014). Plaintiffs contend, without citing further legal basis, that this regulation required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes[,]" and that Morgan Stanley's failure to file a SAR concerning Bailey or 1031 constituted a failure to "take appropriate actions to prevent [] Bailey's crimes." We are not persuaded.

The intent of the Bank Secrecy Act, as expressed therein, is to aid in "criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. Plaintiffs impute an intent to this statute, and to 12 C.F.R. § 21.21, to protect third party non-customers of banks. Plaintiffs offer no legal authority for this

assertion. We readily acknowledge that the purpose of the Bank Secrecy Act is to require banks to produce reports where they may be of value in federal criminal investigations. The instant case, however, is not a criminal investigation. Despite Bailey having been indicted in federal court, the instant case involves private state claims, not a federal criminal charge.

Even assuming *arguendo* that plaintiffs' allegations were sufficient on their face, the statutes upon which plaintiffs rely do not explicitly create a private cause of action. Absent such language, no private cause of action exists. We hold that plaintiffs' allegations are insufficient to support a claim. The trial court did not err in dismissing plaintiffs' claim of violation of 31 U.S.C. § 5311 *et seq.* with respect to Morgan Stanley.

This argument is without merit.

D. Aiding and Abetting a Breach of Fiduciary Duty

[4] With respect to plaintiffs' claim of aiding and abetting a breach of fiduciary duty:

> The court finds that no such cause of action exists in North Carolina. It is undisputed that the Supreme Court of North Carolina has never recognized such a cause of action. The only North Carolina Court of Appeals decision recognizing such a claim, *Blow v. Shaughnessy*, 88 N.C. App. 484, 489, 364 S.E.2d 444, 447–48 (1988), involved allegations of securities fraud, and its underlying rationale was eliminated by the United States Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

Laws v. Priority Tr. Servs. of N.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009) *aff'd sub nom. Laws v. Priority Tr. Servs. of N. Carolina, LLC*, 375 F. App'x. 345 (4th Cir. 2010). We recognize that the United States Supreme Court, in *Cent. Bank of Denver*, abrogated the rationale of *Blow*, and that *Blow* is no longer valid precedent. *See e.g. Land v. Land*, ___ N.C. App. ___, 729 S.E.2d 731 (2012) (unpublished).

Plaintiffs nonetheless contend that case law exists in support of their claim. Plaintiffs cite to *Greensboro Rubber Stamp Co. v. Southeast Stamp & Sign, Inc.*, 212 N.C. App. 691, 718 S.E.2d 736 (2011) (unpublished) in support of this position. However, that case is not controlling precedent for two reasons: first, it is unpublished, and thus not binding upon this Court, N.C. R. App. P. 30(e)(3); and second, it relies upon *Blow*, the operative holding of which was abrogated by the United States

Supreme Court. Plaintiffs also cite to two cases from the North Carolina Business Court, and one case from the United States Bankruptcy Court for the Middle District of North Carolina, in support of this claim. The North Carolina Business Court "is a special Superior Court, the decisions of which have no precedential value in North Carolina." *Estate of Browne v. Thompson*, ___ N.C. App. ___, ___, 727 S.E.2d 573, 576 (2012) *disc. review denied*, 366 N.C. 426, 736 S.E.2d 495 (2013). Neither do the decisions of the United States Bankruptcy Court constitute precedent binding upon this Court. *In re Bass*, 217 N.C. App. 244, 254, 720 S.E.2d 18, 26 (2011) *rev'd on other grounds*, 366 N.C. 464, 738 S.E.2d 173 (2013).

While we need not address whether a claim for aiding and abetting a breach of fiduciary duty exists at law in North Carolina, we note that plaintiffs' amended complaint does not state such a claim with the required specificity. Plaintiffs allege that Morgan Stanley provided substantial assistance to Bailey's alleged breach of fiduciary duty "by, including but not limited to allowing [] Bailey and 1031 [] to engage in the acts and omissions set forth herein and by failing to recognize or take action to end the [] scheme." The tort of aiding and abetting a breach of fiduciary duty, according to *Blow*, requires "(1) the existence of a securities law violation by the primary party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation." *Blow*, 88 N.C. App. at 490, 364 S.E.2d at 447. Even assuming *arguendo* that this cause of action was still valid, plaintiffs only offer conclusory allegations, without more, that Morgan Stanley was aware of Bailey's fraudulent acts and rendered substantial assistance to Bailey. We hold that the trial court did not err in dismissing plaintiffs' claim of aiding and abetting a breach of fiduciary duty with respect to Morgan Stanley.

This argument is without merit.

E. Civil Conspiracy

[5] In their amended complaint, plaintiffs contend that Morgan Stanley conspired with the other defendants to injure plaintiffs, or alternatively that defendants collectively aided and abetted one another.

"The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008) (quoting *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989)).

In the instant case, plaintiffs offer nothing but bare allegations of this misconduct. Specifically, plaintiffs allege:

> 176. Defendants combined to injure Plaintiffs without reasonable or lawful excuse and conspired, assisted and facilitated the fraudulent scheme upon Plaintiffs as set forth herein.
>
> 177. In the alternative, the Defendants aided and abetted one another in committing the acts and omissions set forth herein with reckless disregard for the rights of the Plaintiffs.
>
> 178. As a direct and proximate result of this conspiracy or aiding and abetting, Plaintiffs have been damaged and will be damaged in the amount of $224,529.75, plus interest and all associated tax consequences for Plaintiffs' inability to complete their agreed upon 1031 exchange.

This sparsely worded claim attempts to allege the existence of a conspiracy, but fails to allege one of the vital elements of a conspiracy, an agreement between two or more individuals. The claim suggests that defendants – Bailey, 1031 and Morgan Stanley – conspired, but fails to allege how this conspiracy came to be, or when, or where, or why. The complaint asserts mere conclusions concerning the elements of civil conspiracy, without offering a scintilla of factual allegation in support of the claim.

The alternative claim asserted in paragraph 177 is nothing more than a thinly disguised attempt to bring in through a back door the aiding and abetting claim previously rejected in section III D of this opinion. Alternatively, it is an attempt to assert a conspiracy without an agreement. Both of these theories fail.

We hold that the trial court did not err in dismissing plaintiffs' claim of civil conspiracy with respect to Morgan Stanley.

This argument is without merit.

F. Unfair and Deceptive Practices

[6] In their amended complaint, plaintiffs contend that Morgan Stanley's "acts and omissions . . . were in or affecting commerce and constitute unfair and deceptive [] practices as prescribed by Chapter 75 of the North Carolina General Statutes." Plaintiffs' claims consist entirely of conclusory statements that Morgan Stanley "engaged in a conspiracy

to defraud Plaintiffs[,]" and that this alleged conspiracy "proximately caused actual injury and damages to Plaintiffs."

As we have already stated, the allegations contained in plaintiffs' complaint are insufficient to support a claim for conspiracy. Inasmuch as plaintiffs' claim for unfair and deceptive practices is predicated upon the existence of a conspiracy, we hold that the trial court did not err in dismissing that claim.

This argument is without merit.

IV. Conclusion

Plaintiffs' complaint, taken as true, failed to establish a duty incumbent upon Morgan Stanley, and therefore failed to establish a cause of action for negligence. The complaint failed to make sufficient allegations that any private civil actions arose under state or federal statute. The complaint failed to establish all of the elements of aiding and abetting a breach of fiduciary duty. The complaint failed to allege the existence of an agreement, and therefore failed to establish a claim for civil conspiracy. The complaint failed to allege unfair and deceptive practices arising from a conspiracy.

The trial court did not err in dismissing plaintiffs' complaint as to Morgan Stanley.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER concur.

CAROLINA MARLIN CLUB MARINA ASSOCIATION, INC. d/b/a MOREHEAD-BEAUFORT YACHT CLUB, Plaintiff
v.
HARRY PREDDY and VALERIE PREDDY, Defendants

No. COA14-377

Filed 31 December 2014

1. Waters and Adjoining Lands—dredging of marina—description of boat slip—bottom not included

In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court's finding that the description of a boat slip in the Declaration of Unit Ownership was two dimensional only and did not include the bottom was supported by competent evidence and was therefore binding.

2. Waters and Adjoining Lands—dredging of marina—public waters—public trust doctrine not applicable—common property of association

In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court did not err by concluding that the entire marina basin, including the boat slips, was common property. The marina was navigable, and the waters in the marina were public trust waters subject to defendants' riparian rights, but the public trust doctrine was of little significance because the inquiry concerned control of the submerged land rather than an allegation of trespass. While there was evidence that members owned the submerged land beneath their boat slips as private parties, the trial court considered that evidence and found that the boat slips were in a common area.

3. Waters and Adjoining Lands—marina dredging—ownership of docks, pilings and bottom—conclusion supported by findings and evidence

In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court's conclusion that the docks, pilings, and bottom under the each boat slip were community property was supported by the findings and the evidence.

4. Waters and Adjoining Lands—marina dredging—assessment—individual maintenance of boat slips

In an action between condominium owners and a condominium association concerning the dredging of a marina, certain owners unsuccessfully argued against paying the assessment based on their maintenance of their boat slips. The description of a "slip" did not encompass the submerged land beneath the slips; moreover, there was both evidence and findings that the defendants benefitted from the dredging.

5. Waters and Adjoining Lands—marina dredging—approval of assessment

In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court did not err by concluding that a dredge assessment was properly approved where there was insufficient notice of an initial meeting, but the assessment was approved at a subsequent special members meeting. The fact that some members had already paid the assessment and dredging had already occurred was of no consequence.

6. Attorney Fees—underlying judgment upheld—award upheld

An award of attorney fees was upheld where the argument against the award was premised on the reversal of the underlying judgment, which was upheld.

Appeal by defendants from judgment entered 14 August 2013 by Judge L. Walter Mills in Carteret County District Court. Heard in the Court of Appeals 8 September 2014.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III, for plaintiff-appellee.

Amie M. Huber, Attorney at Law, PLLC, by Amie M. Huber, for defendants-appellants.

McCULLOUGH, Judge.

Harry Preddy and Valerie Preddy ("defendants") appeal from a judgment entered in favor of Carolina Marlin Club Marina Association, d/b/a Morehead Beaufort Yacht Club (the "Association"). For the following reasons, we affirm.

I. Background

On 11 April 1988, the Department of Natural Resources and Community Development and the Coastal Resources Commission issued a permit to Gene McClung ("declarant") "authorizing development [of private property] in Carteret County at Newport River, adjacent to Ware and Runsel Creeks[.]" Thereafter, in accordance with the permit, declarant constructed an upland marina on the private property by excavating a basin with channel to the Newport River.

In connection with the construction of the marina, on 22 June 1989, declarant made and entered into a Declaration of Unit Ownership (the "Declaration") subjecting the marina to the North Carolina Condominium Act, Chapter 47C of the North Carolina General Statutes (the "Condominium Act"), as a condominium development known as Carolina Marlin Club Marina. Additionally, as provided in the Declaration, declarant created the Association as a non-profit corporation charged with maintaining and administering the common facilities; performing maintenance on buildings, docks, the basin, and other improvements; administering and enforcing covenants and restrictions in the Declaration; and levying, collecting, and disbursing assessments and charges allowed by the Declaration. The Declaration, along with the bylaws of the Association, was recorded in the Carteret County Register of Deeds office on 23 June 1989.

As originally recorded, the Declaration described the marina as common areas and docking facilities, referred to as units or slips, for forty-four vessels. However, shortly after the Declaration was recorded, declarant, in accordance with Article VI of the Declaration, constructed additional docking facilities so as to increase the total number of slips to seventy-four. An amendment to the Declaration entered into on 8 December 1989 and recorded on 15 December 1989 subjected the additional slips to the terms and conditions of the Declaration.

By General Warranty Deed made and entered into on 15 June 1992 and recorded on 22 June 1992, defendants acquired from declarant "Slip #46, Carolina Marlin Club Marina, a condominium as described in [the] Declaration . . . together with the undivided interest in the common areas appurtenant to each such slip or unit[.]" At all times relevant to this appeal, defendants had a 1/73 undivided interest in the Association as the Association owned one slip.

Since the time defendants acquired Slip #46, the Association has levied assessments for numerous maintenance projects. This case concerns

the validity of a special assessment levied against members for dredging in 2010.

In 2009, the Association determined extensive dredging was needed in the access channel and marina basin, including the areas beneath individual slips. At that time, the Association held a Coastal Area Management Act ("CAMA") permit allowing it to maintain a water depth of six feet. In preparation for dredging, at the December 2009 annual members meeting, the members voted and passed an assessment of $2,750.00 per slip (the "spoils assessment") to cover the estimated $200,750.00 cost of modifying and enlarging the dredge spoils area to accommodate future dredging spoils. However, bids for the spoils rebuild were less than expected, resulting in excess funds upon completion of the project.

In January 2010, a newly elected board called a special meeting for 6 February 2010. Two proposals were to be submitted for member approval: (1) approval of the 2010 operating budget and (2) use of the excess funds from the spoil assessment and an additional $500.00 special assessment (the "dredge assessment") to cover the balance of the dredging costs.

Notice of the 6 February 2010 special members meeting was included in the Association's "Smooth Sailing Newsletter," which was emailed to defendants on 17 January 2010. Around the same time, Mr. Preddy, the webmaster for the Association, posted notice on the website indicating "there was going to be a special meting . . . on February 6th at 1:00." A second notice that the time of the 6 February 2010 special members meeting had been changed to 3:00 was later sent to defendants by email on 26 January 2010.

Additionally, Mr. Preddy received a call from the Association's President, Mr. Joseph Barwick, on 1 February 2010 informing him that Mr. Barwick had been designated as his representative. During their conversation, Mr. Preddy raised his concern over not receiving notice of the special meeting in the mail. Mr. Preddy recalled that Mr. Barwick informed him that the emails were his notice.

Despite Mr. Preddy's concerns regarding the notice provided by email, defendants attended the meeting on 6 February 2010. At the meeting, Mr. Preddy orally objected to the notice of the meeting and submitted a written objection, joined by other members, to the board. Defendants, however, remained at the meeting and Mr. Preddy voted against the assessment as the owner of Slip #46.

The minutes from the 6 February 2010 special members meeting indicate the dredge assessment was approved.

Following approval of the dredge assessment, several members, including defendants, sent letters to the N.C. Department of Environment and Natural Resources, Division of Coastal Management (the "NCDENR-DCM") disputing the Association's authority to dredge the submerged lands beneath their slips by claiming that they owned the property. Upon reviewing the objections, the NCDENR-DCM, based on an opinion from the N.C. Attorney General's office that the submerged lands under the slips in question were privately owned by the members, revoked the Association's permit to dredge the marina by letter dated 5 March 2010. However, on 20 October 2010, a modified CAMA permit was issued allowing the Association to dredge the marina basin, including the submerged land under those slips owned by members granting the Association permission to dredge. Defendants and five other members refused to allow the Association to dredge beneath their slips.

Dredging of the marina pursuant to the modified CAMA permit took place late in 2010. The access channel and all portions of the marina basin, except those six slips owned by members who objected, were dredged.

At a special members meeting of the Association on 22 May 2010, the Association put to a vote certain amendments to the bylaws. An amendment to allow electronic notice of meetings was passed by the members. Thereafter, on 11 January 2011, notice of a special meeting to be held 5 February 2011 was sent to members by US mail and email. As stated in the notice, "[t]he purpose of the meeting [was] to **<u>revote</u>** a proposal to (1) use remaining funds from the dredge spoils project for the dredging project and (2) to assess the members $500 per slip for the purpose of dredging the channel, basin and slips." Sixty-three members voted in favor of the dredge assessment at the special members meeting.

Following approval of the dredge assessment, defendants were billed for $500.00. When defendants refused to pay, the Association commenced this suit against defendants by means of the issuance of a summons and the filing of a complaint in Carteret County District Court on 16 March 2011. In the complaint, the Association sought to collect the dredge assessment, interest, attorneys' fees, and costs.

Defendants responded to the complaint by filing an answer and counterclaim on 16 May 2011. In their response, defendants asserted each slip was private property and the dredge assessment could not be

used to maintain private property. Following an arbitration decision in favor of the Association, defendant filed a request for a trial *de novo* on 12 August 2011. The case came on for a bench trial in Carteret County District Court before the Honorable L. Walter Mills on 21 February 2013. The trial carried over to 22 February 2013, was continued, and later tried to its conclusion on 17 April 2013. Upon the consideration of the evidence, on 14 August 2013, the trial court entered judgment in favor of the Association. Defendants filed notice of appeal to this Court on 9 September 2013.

II. Discussion

On appeal, defendants challenge specific findings of fact and conclusions of law made by the trial court.

> When reviewing a judgment from a bench trial, "our standard of review '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.' " *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668–69, 646 S.E.2d 851, 854 (2007) (citation omitted). The trial court's " '[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.' " *Id.* at 669, 646 S.E.2d at 854 (citation omitted). This Court reviews the trial court's conclusions of law *de novo*. *Id.*

Southern Seeding Service, *Inc. v. W.C. English*, *Inc.*, 217 N.C. App. 300, 303-04, 719 S.E.2d 211, 214 (2011).

Finding of Fact #9

[1] In the first issue on appeal, defendants challenge the trial court's finding of fact number nine, which provides, "[t]he description of a slip, as set forth [in the Declaration], is two-dimensional only. The slip is the area between the pilings and the dock and would not include the bottom. That all boat slips subject to the Declaration are in the basin which constitutes common area." Specifically, defendants argue there is no evidence in the record that the description of a slip is two-dimensional only and does not include the bottom. Defendants argue the testimony of Mr. Preddy and Mr. Barwick, together with the description of a slip in the Declaration, support the proposition that the slips are three-dimensional, including the bottom. We are not persuaded.

The terms "unit" and "slip" are used interchangeably throughout the Declaration. Article I of the Declaration provides that the terms "shall

mean and refer to an individual docking space, or slip, designated for separate ownership or occupancy, the boundaries of which are described pursuant to [the] Declaration." Article II of the Declaration then provides for the identification of slips and common areas. Concerning slips, the Declaration describes the boundaries as follows: "Each unit, or slip, is bounded by the dock running longitudinally with the shoreline at its shoreward end; on either side by the centerlines of its adjoining finger piers, extended to the centers of the mooring pilings on either side of the slip opening; and at its outer end by a line connecting the centers of said two mooring pilings."

During the trial, Mr. Preddy testified using an aerial diagram of the marina to identify different portions of the marina. When questioned specifically about the boundaries of his slip, Mr. Preddy read through the description of a slip in the Declaration and used the diagram to plot the boundaries of Slip #46. In plotting the boundaries described in the Declaration, Mr. Preddy never indicated that the slip extended to the submerged land.

Mr. Barwick also testified concerning the description of a slip in the Declaration. Despite defendants' insinuations on appeal, Mr. Barwick never stated that the description of a slip encompassed the submerged land. Although Mr. Barwick acknowledged that the slips were bounded by lines running through the center of the mooring pilings, which are placed into the bottom, Mr. Barwick maintained that the slip is described in the Declaration longitudinally with the shoreline. When questioned whether he contends the Association owned the submerged land beneath the individual slips, Mr. Barwick responded, "[y]es, because the declaration makes no reference to the bottom whatsoever. The only thing the declaration does is provide the longitudinal parameters of a slip which they define very clearly as a docking space."

Although there is evidence to the contrary, based on the description of the slip boundaries in the Declaration and the testimony of Mr. Preddy and Mr. Barwick concerning the boundaries of Slip #46, we hold the trial court's ninth finding is supported by competent evidence and, therefore, is binding on appeal.

Defendants do not specifically challenge any of the trial court's other findings of fact. As a result, the remaining findings are binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal.")

Conclusion of Law #1

[2] Defendants next challenge conclusion of law number one. In conclusion one, the trial court concluded "[t]he marina basin and the slips located therein contain public trust waters subject to the riparian rights of the [Association] and, as such, all areas in the marina basin including slips are common area properties subject to the control of the Association . . . ." Defendants break this issue down into two parts: whether (1) the marina basin and the slips contain public trust waters subject to the Association's riparian rights; and (2) all areas in the marina basin including the slips are common area properties subject to the Association's control.

Concerning part one, defendant claims the public trust doctrine is inapplicable to this case because each slip is private property.

North Carolina has long applied the common law to recognize that "[t]itle to public trust waters is 'held in trust for the people of the State[.]' " *RJR Technical Co. v. Pratt*, 339 N.C. 588, 592, 453 S.E.2d 147, 150 (1995) (quoting *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 526, 44 S.E. 39, 42 (1903)). As codified in N.C. Gen. Stat. § 1-45.1 (2013), the public's rights in public trust waters "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State[.]" When determining whether certain waters are public trust waters, the determinative inquiry is navigability. As our Supreme Court recognized in *Gwathmey v. State*, 342 N.C. 287, 301, 464 S.E.2d 674, 682 (1995), "if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose." Pursuant to this Court's decision in *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 693 S.E.2d 208 (2010), the test for navigability applies equally to natural and manmade waterways.

In *Fish House*, the plaintiff and the defendant owned adjacent tracts of land, upon which each operated a fish house along a manmade canal situated on the western border of the plaintiff's property and to the east of the defendant's property. *Id.* at 131-32, 693 S.E.2d at 210. After the defendant had used the canal for years, the plaintiff commenced a trespass action to enjoin the defendant from entering the canal. *Id.* at 132, 693 S.E.2d at 210. On appeal by the plaintiff from the trial court's dismissal of the action, this Court affirmed the trial court, holding "the [c]anal, although manmade, [was] a navigable waterway held by the state in trust for all citizens of North Carolina." *Id.* at 134, 693 S.E.2d at 211. In so holding, the Court addressed the question of "whether the test

for navigability is different when applied to a manmade canal." *Id.* at 134, 693 S.E.2d at 211. Relying on our Supreme Court's *Gwathemy* decision, the South Carolina case of *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990), which this Court found instructive, and portions of the NCDENR-DCM's CAMA Handbook for Development in Coastal Carolina that define navigable waters and identify various public trust areas, this Court held "the controlling law of navigability concerning the body of water in its natural condition reflects only upon the manner in which the water flows without diminution or obstruction." *Id.* at 135, 693 S.E.2d at 212. Thus, this Court held "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes navigable water under the public trust doctrine of this state." *Id.* at 135, 693 S.E.2d at 212.

Subsequent to *Fish House*, this Court has addressed whether those owning property bounded or traversed by manmade waterways have riparian rights in those waterways. In *Newcomb v. County of Carteret*, 207 N.C. App. 527, 701 S.E.2d 325 (2010), this Court explained the following:

> Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water. All watercourses are regarded as navigable in law that are navigable in fact. For that reason, riparian rights are available to the owners of property that are adjacent to or encompass bodies of water that are navigable in fact.

Id. at 541, 701 S.E.2d at 337 (quotation marks and citations omitted). Recognizing the holding in *Fish House* and "that the concept of 'navigability' as used in the 'public trust' and the riparian rights contexts is identical," in *Newcomb* this Court held the extent to which the plaintiffs had riparian rights in a manmade harbor did not hinge upon whether the harbor was natural or manmade. *Id.* at 542, 701 S.E.2d at 325. Thus, "given that [the harbor was] clearly 'capable of navigation by watercraft,' the owners of property bordering the harbor clearly [had] riparian rights in its waters." *Id.*

In the present case, it is clear that the marina is navigable; thus, as the trial court found and concluded, the waters in the marina are public trust waters. Moreover, as the Association owns all lands bounded or traversed by the public trust waters, it has riparian rights in the waters. Thus, we hold conclusion of law number one is an accurate statement of the law as applied to this case and the trial court did not err in concluding that the waters in the marina are public trust waters subject to defendants' riparian rights.

Nevertheless, we agree with defendants that the public trust doctrine has little significance in this case. As both parties acknowledge on appeal, there is no allegation of trespass by the Association; in fact, the Association concedes that defendants have the right to enter the marina, dock their boat at their private slip, and use the common areas. The critical inquiry in this case is whether the entire marina basin, including the submerged land under defendants' privately owned slip, is common property subject to the control of the Association, or whether the submerged land under defendants' slip was transferred by declarant to defendants by the 15 June 1992 deed, which incorporates the Declaration.

Similar to defendants' contention regarding the description of a slip addressed in the first issue on appeal, in part two of defendants' challenge to conclusion one, defendants claim not all areas in the marina basin are common area subject to the control of the Association. Specifically, defendants argue their slip extends to the basin floor and encompasses the submerged land under their slip. In support of their argument, defendants again cite to the description of a slip in the Declaration and point out that Article III of the Declaration provides that each slip "shall be conveyed and treated as an individual property interest capable of independent use and fee simple ownership[.]" Defendants further cite testimony by Mr. Barwick indicating that members own their own slip; the 5 March 2010 letter to the Association by James H. Gregson, Director of the NCDENR-DCM, revoking the CAMA permit to dredge the marina based on an opinion of the N.C. Attorney General's office that the submerged lands under the slips are owned by the slip owners; testimony by Betty Gray, owner of Slip #62, concerning dredging in 2001, when less than all slips were dredged and the owners of individual slips covered the costs of dredging their own slips without an assessment against all members; and testimony by Ms. Gray concerning a 2008 letter sent by the Association to members indicating "[d]redging of privately owned slips is not included in permissible uses of the assessment."

Upon review, we acknowledge that the evidence cited by defendants tends to show members own the submerged land under their slips as private property. However, we are also cognizant that this same evidence was presented to and considered by the trial court; and upon consideration of the evidence, the trial court found the description of a slip in the Declaration to be two-dimensional, encompassing the area defined as a docking space between the finger piers and mooring pilings that does not include the submerged land underneath a slip. Thus, as the trial court further found, "all boat slips subject to the Declaration are in

the basin which constitutes common area." Because evidence supports the trial court's finding, it is binding on appeal and confines our analysis of conclusion one.

Accepting the trial court's finding, we hold the submerged land underneath defendants' slip is not defendants' private property, but is part of the marina basin, which is a common area. As the trial court concluded in uncontested conclusion of law number two, "[d]efendants own a 1/73 undivided interest in the Association and its property and the exclusive right to utilize [Slip #]46, subject to the Declaration . . . and the Amendments thereto." Thus, the trial court did not err in concluding the entire marina basin is common property subject to the control of the Association.

Conclusion of Law #3

[3] Defendants also take issue with the trial court's third conclusion of law, "[a]ll the docks, pilings and bottom (soil) under each slip are common property." Defendants' contentions with this conclusion are essentially the same as those advanced in opposition to conclusion of law one – "defendants['] boat slip and bottom soil under each slip is private property." For the reasons discussed above, we hold conclusion three is supported by the trial court's findings and the evidence.

Conclusion of Law #4

[4] In the fourth issue on appeal, defendants contend the trial court erred by making conclusion of law four, which provides "[t]he Association, by a 2/3 vote of its membership at a properly called meeting, had the right to create assessments for the dredging and maintenance of all of the marina facilities, including the slips and the land or silt under them." Defendants raise three separate challenges to conclusion four: whether (1) the 6 February 2010 special members meeting was properly noticed; (2) the Association had the right to create assessments for the dredging and maintenance of all the marina facilities, including the slips; and (3) whether the assessment was passed by a 2/3 vote.

Although defendants raise these challenges in regards to conclusion four, conclusion four does not conclude there was proper notice or that the assessment was approved by a two-thirds vote. Conclusion four merely provides that "the Association . . . had the right to create assessments[,]" such as the one at issue in this case, "by a 2/3 vote of its membership at a properly called meeting[.]" Defendants' first and third challenges to conclusion four are more properly asserted in regards to conclusion of law number five, which provides "[t]he assessment of

$500.00 was properly approved." Therefore, we only address defendants' second challenge to conclusion four and address defendants' remaining challenges in response to defendants' attack on conclusion five.

Defendants argue the Association does not have the right to create assessments for dredging and maintenance of all the marina facilities, including the slips. In support of their argument, defendants cite provisions in the Condominium Act and the Declaration.

Under the Condominium Act, "[e]ach unit owner is responsible for maintenance, repair and replacement of his unit." N.C. Gen. Stat. § 47C-3-107(a) (2013). Additionally, "[a]ny common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited[.]" N.C. Gen. Stat. § 47C-3-115(c)(2) (2013).

Considering these statutes in conjunction with the provisions of the Declaration defining a "unit" or "slip" as "an individual docking space . . . designated for separate ownership or occupancy," indicating a "unit" or "slip" is to be conveyed and treated as "an individual property interest capable of independent use and fee simple ownership[,]" and identifying the different elements of the condominium and defining "common elements" as "all of the condominium with the exception of [u]nits[,]" defendants assert they are solely responsible for maintaining Slip #46. In defendants' own words, "[b]ecause . . . [d]efendants did not agree to have their slip dredged and did not benefit by having the other individual slips dredged, fewer than all of the units must be assessed; therefore, in accordance with the above statutes, [d]efendants are not required to pay for the dredging of other slips."

While we agree with defendants that members are responsible for maintaining their own slips, defendants' argument against paying the assessment at issue in this case fails for two reasons.

First, as found by the trial court and already discussed above, the description of a "slip" does not encompass the submerged land underneath individual slips. The submerged land is part of the marina basin, which is common area controlled by the Association.

Article IX of the Declaration provides, "[t]he common expenses of the condominium shall be shared by the slip owners in the same proportion that the undivided interest in the common areas appurtenant to each owner's slip bears to the total of all undivided interest in the common areas appurtenant to all condominium slips." As found by the trial court, "Article X of the Declaration provides for [a]ssessments."

Defendants acknowledge Article X on appeal but claim the only provision allowing for an assessment for dredging, Section 2, does not list an individual slip as part of the maintenance and upkeep allowed in an assessment. Citing *Armstrong v. Ledges Homeowners Association*, 360 N.C. 547, 633 S.E.2d 78 (2006), defendants further assert that the final statement in Article X, Section 2, that assessments shall be used for "such other needs as may arise[]" is ambiguous, unclear, indefinite, and uncertain and raises the issue of the reasonableness of the Declaration. We disagree.

Given the trial court's finding that the description of a slip does not include the submerged land beneath the slip, defendants' arguments are misguided. Among the identified uses for assessments, Section 2 of Article X expressly provides that an assessment shall be used for "the maintenance and upkeep of all streets, roadways, parking areas, docks, piers, bulkheads, pilings, *and maintenance of water depths in the basin, the access channel and in the channel to the Intracoastal Waterway*[.]" (Emphasis added). The Declaration further provides that "the Association may levy special assessments for the purpose of defraying in whole or in part, the cost of any construction reconstruction, repair, or replacement of capital improvements upon the marina area" and "[t]he Association, at its expense, shall be responsible for the maintenance, repair, and replacement of all the project areas, including those portions thereof which are contained within the area defined as a unit[.]"

Accepting the trial court's finding that the slip does not include the submerged land underneath the slip, we hold the provisions discussed above allow the Association to levy assessments for the maintenance of the common areas, including those portions of the marina basin beneath the slips.

Second, contrary to defendants' argument that they did not benefit from dredging, the trial court considered evidence and made findings that "the members of the Association and the [d]efendants benefitted from the dredging" and "the marina will be unable to function as a marina without proper dredging and the removal of spoil material within the marina is to the benefit of all members." Furthermore, the trial court found in finding of fact number forty-four that "[t]he $500.00 assessment was the balance due from [d]efendants for the dredging of the entire basin and access channel and was not that portion to be allocated for the slip of the [d]efendants." Defendants did not specifically challenge any of these findings.

Where the assessment owed by defendants was for the dredging of the entire basin and access channel, defendants' argument that they did not benefit from the dredging because the submerged land beneath their slip was not dredged fails.

Conclusion of Law #5

[5] In the fifth issue on appeal, defendants challenge the trial court's conclusion that "[t]he assessment of $500.00 was properly approved by the Association (Plaintiff) and the [d]efendants are obligated to pay said assessment to the [Association] plus eighteen percent (18%) interest through date of filing of judgment."

As noted above, defendants first argue they did not receive proper notice of the 6 February 2010 special members meeting. Defendants further assert that they did not waive the notice required by the bylaws and the substance of the notice provided was inadequate. Apart from defendants' challenge to the notice, defendants also argue the dredge assessment was not properly approved by two-thirds of the members. As a result of these alleged failures, defendants contend they are not bound by the action taken at the meeting, namely, the obligation to pay the dredge assessment.

Concerning the notice of the 6 February 2010 special meeting to members, the trial court made the following findings:

> 29. A newsletter advising that a meeting would be had on February 6, 2010 was emailed to the [d]efendants eleven (11) days prior to said meeting.
>
> 30. Later, a separate email was sent to the [d]efendants more than ten (10) days prior to said meeting, advising the [d]efendants of the meeting.
>
> 31. On or about February 1, 2010 the [d]efendant, Harry Preddy, called Joe Barwick, the new president and commodore of the Association, and complained about the notice not being mailed to him. The [d]efendants had actual notice of said meeting.
>
> 32. The special meeting was held on February 6, 2010 and the [d]efendant, Harry Preddy, prior to the meeting, presented an opinion that the meeting was not properly noticed yet stayed at the meeting and participated in the same. . . .

> 33. The February 6, 2010 meeting was held . . . . The [d]efendants voted no during said meeting for the assessment and yes for the budget.
>
> 40. On February 4, 2011, the Plaintiff called for another special meeting concerning the dredge assessments. Notice of such meeting was sent via US mail and through email. At said meeting, 63 members of the Association voted for the assessment with no votes cast against. The Defendants protested but did not vote.

In order to determine whether this notice was proper, we look to both the Condominium Act and the North Carolina Nonprofit Corporation Act, Chapter 55A of the North Carolina General Statutes (the "NCA"). The Condominium Act provides in pertinent part:

> Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

N.C. Gen. Stat. § 47C-3-108(a) (2013). Under the NCA, N.C. Gen. Stat. § 55A-1-41 specifies general principles governing notice. It provides that "[n]otice may be communicated in person; by electronic means; or by mail or private carrier." N.C. Gen. Stat. § 55A-1-41(b)(2013). Yet, "[i]f [the NCA] prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of [the NCA], those requirements govern." N.C. Gen. Stat. § 55A-1-41(h). "Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice." N.C. Gen. Stat. § 55A-1-41(i). Specifically regarding notice of special meetings, the NCA provides, "[a] corporation shall give notice

of meetings of members by any means that is fair and reasonable and consistent with its bylaws." N.C. Gen. Stat. § 55A-7-05(a)(2013).

While both the Condominium Act and the NCA provide electronic email is an option for notice, the NCA makes clear that the bylaws control when they are not inconsistent with the statutes.

In this case, at the time notice of the 6 February 2010 special meeting was sent electronically, Article III, Section C, of the Association's bylaws provided that:

> Notice of all member's meetings[, both annual and special,] shall be given in writing by the Secretary to each member, unless waived in writing, such notice to state the time and place of the meeting, and the purpose of the meeting. Such notice shall be given not less than 10, nor more than 60, days prior to the meeting date. Such notice shall be delivered personally, or mailed in the U.S. Mails, postage prepaid, to the last known address of such member.

It is obvious to this Court that the electronic notices of the 6 February 2010 special members meeting to defendants did not comply with the requirements in the bylaws.

What is more, the Association does not even argue electronic notice was proper. Instead the Association responds to defendants' arguments that defendants did not waive the notice requirements in the bylaws and the content of the notice in the newsletter was inadequate. Without citing supporting authority, the Association argues that because defendants had actual notice of the special members meeting, defendants have waived notice or should be estopped from challenging the notice as improper. The association further argues the substance of the notice was adequate and, in any event, defendant cannot challenge the validity of the Association action as *ultra vires*. *See* N.C. Gen. Stat. § 55A-3-04 (2013).

Yet, we need not address these issues in the present case. Assuming arguendo that the 6 February 2010 meeting was not properly noticed and defendants are not bound by the actions taken by the Association, we hold defendants are bound by the approval of the assessment at the subsequent special members meeting held on 5 February 2011.

Prior to the 5 February 2011 meeting, a special meeting was held on 22 May 2010, at which members of the Association approved an amendment to the bylaws allowing for electronic notice of meetings. Thereafter, on 11 January 2011, a special members meeting was called for 5 February 2011 to revote the proposals to use the excess funds from

the spoil assessment and impose the dredge assessment on members. As the trial court found, this meeting was properly noticed via US Mail and through email. Members of the Association then approved the dredge assessment with sixty-three votes in favor of the assessment; there were zero votes against. It was not until after the dredge assessment was approved at the 5 February 2011 meeting that the Association took legal action to collect the dredge assessment from defendants and began assessing interest.

In their reply brief, defendants argue the Association cannot cure defects in the 6 February 2010 meeting by revoting at a subsequent special members meeting called for the same purpose. As defendants state it, the Association cannot "retroactively ratify . . . improper actions." In support of their argument, defendants cite *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982), for the definition of ratification and other cases standing for the propositions that statutes do not apply retroactively and are presumed to be prospective only. We are not persuaded by defendants' argument.

It seems to this Court that if notice of the 6 February 2010 meeting was improper, the only corrective action that the Association could take would be to hold another, properly noticed, special members meeting to revote the assessment. The fact that some members had already paid the assessment and dredging had already occurred is of no consequence. In this case, the Association is seeking to collect the assessment from defendants, who have refused to pay.

In regard to approval of the assessment by two-thirds vote, defendants argue certain proxy votes at the 6 February 2010 special members meeting should not have counted under Roberts Rules of Order. Assuming arguendo that defendant's assertion is correct, as noted above, the dredge assessment was approved at the subsequent 5 February 2011 special members meeting by sixty-three members. Thus, defendant's argument is overruled.

Considering the above, we hold the trial court did not err in concluding the dredge assessment was properly approved in conclusion five.

<u>Conclusion of Law #6</u>

[6] Defendant's last challenge on appeal is to the trial court's conclusion of law number six, which provides "[p]ursuant to the Declaration, the [d]efendants are entitled to pay to the [Association] interest, reasonable attorney's fees and the cost of this action." Specifically, defendants contend the award of attorney's fees for the Association should be stricken.

As defendants acknowledge, the Condominium Act provides that "[t]he court may award reasonable attorney's fees to the prevailing party." N.C. Gen. Stat. § 47C-4-117 (2013). "It is left to the sound discretion of the trial court whether attorney fees will be granted." *Rosenstadt v. Queens Towers Homeowners' Ass'n., Inc.*, 177 N.C. App. 273, 276, 628 S.E.2d 431, 433 (2006).

On appeal, defendants' argument against the award of attorney's fees is premised on the reversal of the trial court's judgment. Having upheld the trial court's judgment, we find no abuse of discretion in the award of attorney's fees for the Association.

III. Conclusion

For the reasons discussed above, we affirm the trial court's judgment in favor of the Association.

Affirmed.

Judges ERVIN and BELL concur.

CHARLES CLARK, Employee, Plaintiff
v.
SUMMIT CONTRACTORS GROUP, INC., Employer, AMERICAN INTERSTATE INSURANCE COMPANY, Carrier, Defendants

No. COA14-698

Filed 31 December 2014

Workers' Compensation—erroneous denial—timely filing of claim—medical compensation—other compensation

The Industrial Commission erred by denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C.G.S. § 97-24(a). It was filed before defendants' last payment of "medical compensation" in Florida, plaintiff had been paid no "other compensation" since the Florida workers' compensation benefits did not qualify as "other compensation," and defendant's liability had not otherwise been established under the North Carolina's Workers' Compensation Act.

Appeal by plaintiff from order entered 10 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2014.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr. and W. Chad Winebarger, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Charles Clark appeals from the order of the North Carolina Industrial Commission denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C. Gen. Stat. § 97-24(a).

After careful review, based on *McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 618 S.E.2d 833 (2005), we reverse the Full Commission's order because plaintiff timely filed his claim under section 97-24(a)(ii) and remand for further proceedings.

Background

The facts of this case are largely undisputed. Plaintiff is a resident of Florida, and defendant-employer Summit Contractors Group, Inc. ("Summit") is a Florida company doing business in North Carolina. American Interstate Insurance Company ("AIIC") is Summit's carrier on the risk (collectively, Summit and AIIC are referred to as "defendants"). In 2009, plaintiff was employed by Summit as a superintendent to supervise the construction of apartment complexes in Greensboro, North Carolina. While on the job on 5 August 2009, plaintiff injured his shoulder; he reported his injury to defendants the next morning. Plaintiff initially received medical care from a chiropractor in Greensboro, and, sometime thereafter returned to his home in Florida where he continued to receive medical treatment. On 12 August 2009, a "First Report of Injury or Illness" was filed on behalf of plaintiff with the Florida Department of Financial Services Division of Workers' Compensation. Plaintiff received indemnity benefits for his injury under Florida law until 25 August 2011.

On 20 January 2012, more than two years after he was injured, plaintiff filed a Form 18 "Notice of Accident to Employer" with the North Carolina Industrial Commission for the 5 August 2009 injury. Defendants consequently filed a Form 61 "Denial of Workers' Compensation Claim" on 1 March 2012, asserting that the North Carolina Industrial Commission did not have jurisdiction over the matter because plaintiff did not file his claim with the Commission within two years from the date of the alleged incident pursuant to N.C. Gen. Stat. § 97-24.

The matter came on for hearing before the Full Commission on 9 December 2013. The Full Commission entered an order denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina. Specifically, the Full Commission concluded that because plaintiff failed to file a claim within two years after "the last payment of compensation 'under this Article,' i.e., the North Carolina Workers' Compensation Act[,]" the Industrial Commission lacked jurisdiction over his claim. Plaintiff timely appealed.

Standard of Review

"Appellate review of a decision by the Industrial Commission is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Heatherly v. The Hollingsworth Co.*, 211 N.C. App. 282, 285, 712 S.E.2d 345, 348-49 (2011) (internal quotation marks omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 285, 712 S.E.2d at 349.

Analysis

Appellant's sole argument on appeal is that the Full Commission erred by concluding that plaintiff's claim was not timely filed. We agree.

"Dismissal of a claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement[.]" *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86-87, 401 S.E.2d 138, 140 (1991). "[T]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Id.* at 86, 401 S.E.2d at 140.

N.C. Gen. Stat. § 97-24 (2013) establishes the timeframe within which a claim for compensation must be filed with the North Carolina Industrial Commission. Section 97-24(a) provides that

> [t]he right to compensation under [North Carolina's Workers' Compensation Act] shall be forever barred unless
>
> (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or
>
> (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years

> after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a). On appeal, plaintiff does not allege that he filed his claim in North Carolina within two years after the accident, as set out in subsection (i); instead, he contends that his claim was timely filed under subsection (ii) because he filed the North Carolina claim within two years after defendants last provided "medical compensation" in Florida.

Under section 97-24(a)(ii), a plaintiff must show that: (1) his claim was filed within two years after the last payment of "medical compensation," (2) no "other compensation" was paid, and (3) the employer's liability has not otherwise been established under the Act. *Id.* Here, the record clearly shows that defendant's liability had not otherwise been established under the Act because defendants had not been held liable for plaintiff's injuries pursuant to a North Carolina workers' compensation claim; defendants' liability had only been established under Florida's workers' compensation laws. Thus, the third element is satisfied. Accordingly, whether plaintiff can satisfy the remaining two elements of N.C. Gen. Stat. § 97-24(a)(ii) turns on this Court's understanding of the terms "medical compensation" and "other compensation" as they are contemplated within the North Carolina Workers' Compensation Act.

A. "Medical Compensation"

While it is clear that, pursuant to plaintiff's Florida workers' compensation claim, defendants made payments for his medical treatment in Florida, the issue is whether those payments constituted "medical compensation" under the Act.

N.C. Gen. Stat. § 97-2(19) states that:

> [t]he term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original

> artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

Defendants contend that "[n]one of plaintiff's medical payments were made 'in the judgment of' the North Carolina Industrial Commission or in a matter before the North Carolina Industrial Commission." Thus, according to defendants, plaintiff did not receive any payments of "medical compensation" and subsection (ii) is inapplicable. In contrast, plaintiff contends that defendants' last payment of "medical compensation" was on 14 November 2012, eleven months after he filed his Form 18; therefore, he satisfied section 97-24(a)(ii) because he filed his North Carolina claim within two years after that last payment.

There is no basis for defendants' contention that "medical compensation" only includes payments made in a matter pending before the North Carolina Industrial Commission. In contrast, our caselaw establishes that an employee's claim is timely filed under section 97-24(a)(ii) if it is filed within two years after the defendant's last payment of "medical compensation" to the plaintiff regardless of where the medical treatment occurs and regardless of whether that payment was ordered as a result of a pending workers' compensation action in North Carolina. *See McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 427-27, 618 S.E.2d 833, 836 (2005). In *McGhee*, the plaintiff-employee lived and worked in Richmond, Virginia, and the employer's home office was in North Carolina. *Id.* at 424, 618 S.E.2d at 835. While returning from a business trip, the plaintiff got into a car accident in Wilmington, North Carolina on 1 August 1998. *Id.* The plaintiff did not file a Form 18 with the North Carolina Industrial Commission until 9 August 2001, more than two years after the accident. *Id.* at 426, 618 S.E.2d at 836. However, the Full Commission concluded that plaintiff had timely filed a claim within two years after the last payment of medical compensation pursuant to N.C. Gen. Stat. § 97-24(a)(ii) because the employer paid medical providers in Virginia in August 2000 to treat the plaintiff's medical condition that arose as a result of the car accident. *Id.*

On appeal, this Court agreed, concluding that the employer's payments to medical providers in Virginia constituted "medical compensation" under section 97-2(19). *Id.* Specifically, this Court noted that "[n]othing in the definition [of 'medical compensation'] limits the geographical locale of the medical treatment to North Carolina[.]" *Id.* Furthermore, at the time those payments were made, the defendants "had paid no other compensation pursuant to the Workers'

Compensation Act, nor had their liability been otherwise established." *Id.* There is no indication that the defendants' payments to the Virginia medical providers were ordered by the Industrial Commission; in fact, the plaintiff's Form 18 "Notice of Accident" had not been filed with the Industrial Commission at the time that "[the] defendants last paid medical compensation for [the] plaintiff's compensable injuries[.]" *Id.* Consequently, defendants' contention that "medical compensation" only includes payments for medical treatment "made pursuant to the judgment or umbrella of the North Carolina Industrial Commission" is without merit.

Here, as in *McGhee*, defendants admitted, and the Full Commission found as fact, that they paid plaintiff's out-of-state medical expenses on 14 November 2012 pursuant to plaintiff's Florida workers' compensation claim, months after plaintiff filed his Form 18 in North Carolina. Furthermore, as in *McGhee*, those payments had not been ordered as a result of a pending workers' compensation claim in North Carolina. Therefore, defendants' payment of medical expenses in 14 November 2012 constituted "medical compensation" as set out in section 97-2(19). Since plaintiff filed his Form 18 before this last payment of "medical compensation," he met the first element under section 97-24(a)(ii).

B. "Other Compensation"

The next issue is whether the benefits plaintiff received under Florida law constitute "other compensation" for purposes of section 97-24(a)(ii). If they do, plaintiff would be unable to satisfy the second element under section 97-24(a)(ii).

" 'Compensation' under the Workers' Compensation Act means 'the money allowance payable to an employee or to his dependents *as provided for in this Article*, and includes funeral benefits provided herein.' " *McGhee*, 173 N.C. App. at 427, 618 S.E.2d at 836 (citing N.C. Gen. Stat. § 97–2(11) (2003)) (emphasis added). In *McGhee*, this Court interpreted the term "other compensation" and determined that any benefits "paid . . . in lieu of workers' compensation benefits and not made payable . . . pursuant to [North Carolina's] Workers' Compensation Act" did not qualify as "other compensation," *id.*, and we are bound by that definition, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In *McGhee*, 173 N.C. App. At 427, 618 S.E.2d at 836, the plaintiff received short-term disability benefits from the employer. On appeal, the defendants argued that the short-term disability benefits constituted "other compensation," making section 97-24(a)(ii) inapplicable. *Id.* However, this Court disagreed, concluding that because the short-term

disability benefits were "paid to [the] plaintiff in lieu of workers' compensation benefits and not made payable to [the] plaintiff pursuant to the Workers' Compensation Act[,]" they did not quality as "other compensation" under section 97-24(a)(ii). *Id.* at 427, 618 S.E.2d at 836-37.

Based on *McGhee*, since the workers' compensation benefits plaintiff received in Florida were also "not made payable to [him] pursuant to [North Carolina's] Workers' Compensation Act," *id.*, they do not qualify as "compensation," as defined in section 97-2(11) (2013), or "other compensation," as defined in *McGhee*, for purposes of N.C. Gen. Stat. § 97-24(a)(ii). Accordingly, plaintiff has also satisfied the second element under section 97-24(a)(ii).

Conclusion

In sum, plaintiff timely filed his Form 18 because: (1) it was filed before defendants' last payment of "medical compensation" in Florida; (2) based on *McGhee*, which we are bound by, *see In re Civil Penalty*, 342 N.C. at 384, 379 S.E.2d at 37, plaintiff has been paid no "other compensation" since the Florida workers' compensation benefits do not qualify as "other compensation"; and (3) defendant's liability has not otherwise been established under North Carolina's Workers' Compensation Act. Therefore, we reverse the Full Commission's order denying plaintiff's claim for compensation and remand for further proceedings.

REVERSED.

Chief Judge McGEE and Judge BELL concur.

LIANE ELLIS, Plaintiff
v.
WILLIAM D. ELLIS, Defendant

No. COA14-451

Filed 31 December 2014

1. Divorce—alimony—condoned marital misconduct—no abuse of discretion

The trial court did not abuse its discretion by awarding plaintiff wife only two years of alimony. In its order, the trial court addressed all of the factors prescribed by N.C.G.S. § 50-16.3A(b). Specifically, the trial court properly considered plaintiff's extramarital affair and the "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony."

2. Divorce—alimony—condoned marital misconduct

The trial court did not err by considering plaintiff wife's extramarital affair when it awarded her two years of alimony. N.C.G.S. § 50-16.3A(b) allows the trial court to consider acts of condoned marital misconduct in determining awards of alimony.

3. Attorney Fees—alimony—within trial court's discretion

The trial court did not abuse its discretion by denying plaintiff wife's claim for attorney fees in an action for alimony. Under N.C.G.S. § 50-16.4, the decision to award attorney fees is within the trial court's discretion. Furthermore, the trial court found that plaintiff was not entitled to attorney fees because she did not act in good faith during the course of the litigation and acted contrary to the custody terms in the interim order.

Appeal by plaintiff from order entered 23 September 2013 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 22 October 2014.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for defendant-appellee.

BRYANT, Judge.

Where the trial court made findings of fact to support its award of alimony for a specific period, and properly considered condoned acts of marital misconduct by a dependent spouse in making its decision regarding alimony, we affirm the order of the trial court. Awarding of attorneys' fees in a claim for alimony is within the discretion of the trial court.

Plaintiff Liane Ellis and defendant William D. Ellis, both Canadian citizens, were married on 29 December 1996. Two minor children were born of the marriage.

In 2007, defendant was transferred by his employer to England with his family. Two years later, while residing in England, defendant discovered that plaintiff had engaged in an extra-marital affair with a hockey player beginning in 2006. Plaintiff and defendant agreed not to separate and underwent marital counseling to repair their marriage.

In 2010, defendant was promoted by his employer and transferred to Charlotte, North Carolina with his family. On 21 December 2011, plaintiff filed a complaint against defendant for child custody, child support, equitable distribution, post-separation support and alimony, divorce from bed and board, and interim distribution. Defendant filed an answer and counterclaim seeking a temporary parenting arrangement, a forensic examination, child custody, child support, and equitable distribution. An order adopting the parties' interim agreement was entered 6 March 2013.

On 21 May 2013, plaintiff and defendant agreed to a permanent custody and visitation consent order. On 26 May, plaintiff filed a motion alleging defendant was in contempt for violating the interim order. A trial was held on 31 May concerning the parties' claims for equitable distribution, child support, alimony, attorneys' fees, and contempt. On 23 September, the trial court entered an order regarding the claims for equitable distribution, child support, alimony, and attorneys' fees, and denying plaintiff's motion for contempt. Plaintiff appeals.

Plaintiff raises three issues on appeal addressing whether the trial court erred in: (I) awarding plaintiff only two years of alimony; (II) considering plaintiff's marital misconduct in calculating its award of alimony; and (III) not awarding attorneys' fees to plaintiff.

I.

[1] Plaintiff argues the trial court erred in awarding plaintiff only two years of alimony. We disagree.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citation omitted), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

Plaintiff contends the trial court erred in its award of alimony because the trial court failed to make specific findings of fact addressing why it awarded only two years of alimony when other findings of fact made by the trial court indicated plaintiff was entitled to more than two years of alimony. Pursuant to North Carolina General Statutes, section 50-16.3A, "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." N.C. Gen. Stat. § 50-16.3A(b) (2013). "In determining the amount, duration, and manner of payment of alimony," the trial court must consider sixteen relevant factors, including marital misconduct, duration of marriage, and earning capabilities of the parties. *Id.*

In its order awarding alimony, the trial court made findings of fact addressing all sixteen statutory factors before concluding plaintiff was entitled to an award of alimony lasting for two years. Plaintiff's argument that the trial court failed to make any findings of fact concerning why it limited its award of alimony to two years is without merit, since the trial court clearly stated in its first finding of fact that:

> Plaintiff/Mother engaged in illicit sexual misconduct during the marriage and prior to the [date of separation]. Specifically, she engaged in sexual intercourse with a professional hockey player that she met while working at the arena in Canada. Plaintiff/Mother was not separated from Defendant/Father at the time and engaged in the behavior without his knowledge or approval. Plaintiff/Mother felt she was entitled to have this extramarital affair because she was a "bored housewife" and she felt she gave up the right to pursue her career goals to support Defendant/Father's career goals.

> The Court finds that Defendant/Father did condone the illicit sexual misconduct of Plaintiff/Mother so the behavior cannot act as a bar to alimony. *However, the Court considers the nature of the behavior and Plaintiff/Mother's resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony.*

(emphasis added). It is well-established by this Court that "a trial court's failure to make *any* findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23 (2003) (emphasis added) (citation omitted); *see also* N.C. Gen. Stat. § 50-16.3(A)(c) (2013) (holding that where a trial court decides, in its discretion, to award alimony, the trial court must give its reasons for the award's amount, duration, and manner of payment).

Here, the trial court clearly stated that it had considered plaintiff's "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony." As such, this finding of fact is sufficient to explain the trial court's reasoning in awarding plaintiff alimony for a duration of two years. Further, we note that the trial court made other findings of fact that could also support its decision to award alimony for only two years, including finding of fact eight ("Plaintiff/Mother was a spendthrift who consistently and regularly lived above the family's means."), and fifteen ("Plaintiff/Mother has not participated in this litigation in good faith. Her actions have resulted in the depletion of her own savings and share of the marital estate. She has contributed to her own poor economic circumstances. Additionally, she has not been diligent about finding a job or contributing [to] the family's overall economics."). Accordingly, plaintiff's argument is overruled.

II.

[2] Plaintiff next argues the trial court erred in considering plaintiff's marital misconduct in calculating its award of alimony. We disagree.

As discussed above in *Issue I*, pursuant to N.C. Gen. Stat. § 50-16.3A(b), the trial court must, in deciding whether to award alimony, consider sixteen statutory factors including marital misconduct. Where the trial court determines that "the dependent spouse has engaged in uncondoned 'illicit sexual behavior' during the marriage and prior to the date of separation, the trial court cannot award alimony[.]" *Romulus v. Romulus*, 215 N.C. App. 495, 522, 715 S.E.2d 308, 325 (2011) (citing N.C.G.S. § 50-16.3A(a) (barring an award of alimony to a dependent

spouse where that spouse engaged in illicit sexual behavior during the marriage)).

Here, both parties acknowledged that plaintiff had had an affair beginning in 2006 while married to defendant, and that rather than pursue a divorce, defendant and plaintiff underwent marriage counseling beginning in 2009. The parties remained married until plaintiff separated from defendant in December 2011. We disagree with plaintiff's contention that the trial court could not consider plaintiff's marital misconduct in determining her award of alimony for, although N.C.G.S. § 50-16.3A(a) clearly bars alimony for a dependent spouse who has engaged in uncondoned marital misconduct, here defendant condoned plaintiff's actions and sought to salvage his marriage. Indeed, the trial court noted in its first finding of fact concerning marital misconduct that defendant "did condone the illicit sexual misconduct of [plaintiff] so the behavior cannot act as a bar to alimony[,]" and ultimately awarded plaintiff alimony for two years. Further, there is nothing in N.C.G.S. § 50-16.3A(b) to indicate that the trial court cannot consider a spouse's condoned marital misconduct in calculating its award of alimony to the dependent spouse. Rather, N.C.G.S. § 50-16.3A(b) indicates that the trial court can consider acts of condoned marital misconduct as part of its determination of an award of alimony. *See* N.C.G.S. § 50-16.3A(b)(1) (noting that the trial court can consider instances of marital misconduct by either or both spouses as one of the sixteen statutory factors relevant to whether alimony should be awarded). Therefore, plaintiff's contention that the trial court could not consider plaintiff's condoned acts of marital misconduct in its decision to award alimony, albeit for only a two-year period, to plaintiff is without merit.

III.

[3] Finally, plaintiff contends the trial court erred in failing to award plaintiff attorneys' fees. We disagree.

"[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 361 (2013), *review denied*, 2014 N.C. LEXIS 46 (Jan. 23, 2014), *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014).

North Carolina General Statutes, section 50-16.4, states that:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post[-]separation support pursuant to G.S. 50-16.2A, the court *may*, upon

> application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4 (2013) (emphasis added).

Plaintiff argues that the trial court erred in denying her claim for attorneys' fees because the trial court's findings of fact contained elsewhere in the order indicated that plaintiff was a dependent spouse who was currently unemployed and lacked the financial means to cover the costs of litigation and, therefore, plaintiff was entitled to an award of attorneys' fees.

Here, the trial court made the following findings of fact regarding both parties' claims for attorneys' fees:

> 44. Plaintiff/Mother asserted a claim for attorney's fees with respect to her claim for child custody and child support and her claim for post-separation support and alimony.
>
> 45. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for child custody and child support because she is not an interested party acting in good faith with insufficient means to defray the costs and expenses of suit as required by statute.
>
> 46. Specifically, the Court finds that Plaintiff/Mother has acted contrary to the custody terms outlined in the Interim Order since it was entered and she has continually acted with a conscious disregard to and in defiance of Defendant/Father's rights with regard to the children.
>
> 47. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for post-separation support and alimony because Defendant/Father has paid his spousal support voluntarily, acted in good faith at all times with this process, and that as a result of the equitable distribution Plaintiff/Mother has sufficient means to defray the costs and expenses associated with her claims for spousal support.
>
> 48. Defendant/Father made a request that the Court award him attorney's fees associated with his claim for child custody.

> 49. Despite the ultimate resolution by consent, the issue of child custody, both temporary and permanent was a very contentious issue and required a significant amount of legal resources to address by both parties. Specifically, the children are estranged from their father due to no fault of their father. Neither the court-appointed therapist nor the involvement of the Council for Children's Rights ("CFCR") could repair the relationship. All reasonable efforts were made in this regard by everyone but Plaintiff/Mother. Plaintiff/Mother, both intentionally and unintentionally, supported the continued estrangement between the children and their father. Defendant/Father's request for attorney's fees as related to child custody was made as a result of how much time, attention and cost had to be devoted to the issue of child custody, either because of or in spite of Plaintiff/Mother.
>
> 50. While the Court finds that Defendant/Father was an interested party acting in good faith, the Court cannot find that Defendant/Father has insufficient means with which to defray the costs and expenses of suit.

Plaintiff's argument that the trial court erred in denying her claim for attorneys' fees is without merit, since under N.C.G.S. § 50-16.4, the trial court's decision to award attorneys' fees is clearly discretionary rather than mandatory. *See id.* Moreover, the trial court made specific findings of fact that plaintiff was not entitled to attorneys' fees because plaintiff failed to act in good faith during the litigation. As such, the trial court acted within its discretion when it denied plaintiff's claim for attorneys' fees. Plaintiff's argument is, therefore, overruled.

Affirmed.

Judges ELMORE and ERVIN concur.

[238 N.C. App. 246 (2014)]

FRANCES L. FELTMAN, Plaintiff
v.
CITY OF WILSON, a North Carolina Municipal Corporation; GRANT GOINGS, in his official Capacity as City Manager of City of Wilson and in his individual capacity; HARRY TYSON, in his individual capacity as Deputy City Manager of City of Wilson and in his individual capacity; AGNES SPEIGHT, in her official capacity as Assistant City Manager of City of Wilson and in her individual capacity; DATHAN SHOWS, in his official capacity as Assistant City Manager of City of Wilson and in his individual capacity; and, SUZANNE ALLEN, in her individual capacity; Defendants

No. COA14-585

Filed 31 December 2014

1. Appeal and Error—interlocutory orders—jurisdictional issue—final judgment and certification

Whether an appealed order is interlocutory presents a jurisdictional issue; here the Court of Appeals had jurisdiction because the trial court judgment was final on two of plaintiff's claims and the trial court certified that there was no just reason for delay.

2. Constitutional Law—freedom of speech—freedom of assembly—motion to dismiss—no heightened requirement

The trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss two constitutional claims arising from her employment termination. The trial court's order had the effect of imposing a heightened pleading requirement for freedom of speech or freedom of assembly claims under the North Carolina Constitution that is not recognized by North Carolina courts and is inconsistent with notice pleading.

3. Pleadings—failure to state a claim—weight of evidence—inappropriate argument

The trial court erred by granting defendants' motion Rule 12(b)(6) to dismiss an action arising from things plaintiff said and her employment termination on the theory that she did not adequately plead causation. The detailed fact-based arguments defendants made in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation.

Appeal by plaintiff from order entered 14 January 2014 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 21 October 2014.

The Leon Law Firm, P.C., by Mary-Ann Leon, for plaintiff-appellant.

Cauley Pridgen, P.A., by James P. Cauley, III and Timothy P. Carraway, for defendants-appellees.

DAVIS, Judge.

Frances L. Feltman ("Plaintiff") appeals from the trial court's order granting the motion to dismiss of Defendants City of Wilson ("the City"), Grant Goings, Harry Tyson ("Tyson"), Agnes Speight ("Speight"), Dathan Shows, and Suzanne Allen ("Allen") (collectively "Defendants") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure as to two of the claims for relief asserted by Plaintiff. On appeal, Plaintiff contends that the trial court failed to apply the proper standard of review under Rule 12(b)(6) in granting Defendants' motion. After careful review, we reverse the trial court's order and remand for further proceedings.

Factual Background

We have summarized the pertinent facts below using Plaintiff's own statements from her amended complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *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.").

Plaintiff was employed as a Benefits Administrator with the City's Human Resources and Risk Services Department. Throughout her tenure as an employee, Plaintiff met and often exceeded the job-related expectations of her employer. In 2009, Allen became Plaintiff's supervisor. In December 2011, Plaintiff and several other employees became aware that Allen was improperly assigning certain City employees to babysit her children at her home during their regular working hours for the City. In late 2011, Plaintiff also learned that Allen had terminated another employee, Shannon Davis, while Davis was on leave pursuant to the Family Medical Leave Act, and had hired a personal friend of Allen's to replace Davis.

Plaintiff informed Tyson, the Deputy City Manager, about Allen's actions. Tyson investigated Plaintiff's allegations along with Speight, the Assistant City Manager, and determined that Plaintiff's accusations against Allen were false.

Plaintiff then procured and presented to "city administrators" date-stamped photographs of an automobile belonging to one of her fellow

employees, Bonnie Fulgham ("Fulgham"), parked in front of Allen's house at a time of day when Fulgham's attendance records indicated she was at work for the City. At some point thereafter, Allen learned that Plaintiff — along with another employee, Jessica Cervantes — had been responsible for reporting Allen's improper actions.

Allen then began a "campaign of retaliation" against Plaintiff. Specifically, Allen (1) isolated Plaintiff from employee meetings in the department; (2) generally refused to speak with Plaintiff; (3) told other employees that she was determined to get rid of employees that she described as "old school," making specific reference to Plaintiff; and (4) applied different standards to Plaintiff than those used for other similarly situated employees concerning absences from work for medical appointments.

Plaintiff complained about Allen's treatment of her to other City officials and, in response, Speight assigned Fulgham to be Plaintiff's immediate supervisor. Plaintiff soon discovered, however, that Allen was, in fact, continuing to supervise Plaintiff's job performance and had directed Fulgham to demand that Plaintiff record every action she took during the day, which other similarly situated employees were not required to do.

In May 2012, Plaintiff voiced her concerns regarding Allen to "other citizens of the City[.]" Plaintiff also participated in writing and transmitting a letter concerning Allen's improper conduct to the mayor, the members of the city council, and to candidates seeking elected office within the City. Shortly thereafter, Allen's employment with the City was terminated.

After Allen's termination, Speight became the head of Plaintiff's department and subjected Plaintiff's work to increased scrutiny. Plaintiff was prohibited from opening any mail that was directed to her or her office, her computer files were searched, records of all telephone calls made from her office were reviewed, her personnel file was scrutinized, and she was never permitted to be alone in the office. In addition, at a meeting of department employees, Speight stated that "some people will be here to work as a team and some of you will not." Speight looked directly at Plaintiff when she stated the words "some of you will not."

Approximately three weeks later, Plaintiff was terminated from her employment with the City as part of an alleged reduction in force, which Plaintiff asserts was a pretext designed to prevent her from appealing her termination through the City's grievance procedure. Plaintiff was told that her job was being eliminated and that reemployment with the City

was not an option for her. However, almost immediately after her departure, her former job duties were assumed by one new employee and one existing employee. Also, a new full-time employee was later hired for a newly created position that was substantially the same as Plaintiff's former position. Plaintiff's attempts to obtain alternative employment with the City have been unsuccessful, and the City has hired less qualified candidates than Plaintiff for positions to which she has applied.

On 3 September 2013, Plaintiff filed a complaint against Defendants in Wilson County Superior Court and subsequently filed an amended complaint. In her amended complaint, Plaintiff asserted claims for (1) violation of her right to freedom of speech under the North Carolina Constitution; (2) violation of her right to assemble under the North Carolina Constitution; (3) civil conspiracy; and (4) wrongful discharge in violation of North Carolina public policy. On 15 October 2013, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6).

On 6 January 2014, the motion to dismiss was heard by the Honorable Quentin T. Sumner in Wilson County Superior Court. On 14 January 2014, Judge Sumner entered an order granting the motion as to Plaintiff's first and second causes of action alleging violations of her constitutional right to freedom of speech and freedom of assembly.[1] Plaintiff filed a notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we note that the present appeal is interlocutory. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, internal quotation marks, and brackets omitted). "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." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

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1. While Defendants' motion to dismiss appears to have been intended to encompass all of the claims asserted by Plaintiff, the trial court's order does not specifically mention any of Plaintiff's remaining claims and apparently treated the motion as a partial motion to dismiss that was addressed solely to Plaintiff's first and second claims for relief.

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, __ N.C. App. __, __, 745 S.E.2d 69, 72 (2013). The prohibition against appeals from interlocutory orders "prevents 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." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C .Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted). Rule 54(b) of the North Carolina Rules of Civil Procedure provides that

> [w]hen more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C.R. Civ. P. 54(b).

In the present case, the trial court's order contains the following certification:

> Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the Court finds that there is no just reason for delay of entry as to the final Judgment as to Plaintiff's First and Second Claims for Relief and therefore enters FINAL JUDGMENT as to Plaintiff's First and Second Claims for Relief.

Based on this certification and the fact that the trial court's order serves as an adjudication of two of the claims asserted in the amended complaint, we are satisfied that we possess jurisdiction over the present

appeal. *See Raybon v. Kidd*, 147 N.C. App. 509, 511, 555 S.E.2d 656, 658 (2001) ("The trial court in the instant case entered a final judgment on fewer than all of the claims and certified [the case for immediate appeal under Rule 54(b)]. . . . We may therefore properly review the instant case on its merits.").

II. Motion to Dismiss

[2] Plaintiff's sole argument on appeal is that the trial court erred in granting Defendants' motion to dismiss.

> The standard of review of an order granting a Rule 12(b)(6) motion 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. On appeal, 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.

Gilmore v. Gilmore, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (internal citations, quotation marks, and brackets omitted).

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. The function of a motion to dismiss is to test the law of a claim, not the facts which support it. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Warren v. New Hanover Cty. Bd. of Educ.*, 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991) (internal citations, quotation marks, and ellipses omitted).

In its order, the trial court stated the basis for its ruling:

> As to Plaintiff's First and Second Claims for Relief, the Court specifically determines that Plaintiff's Complaint and Amended Complaint have failed to affirmatively plead the requisite "but for" standard necessary to state a claim for violation of Plaintiff's constitutional rights and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

In her appeal, Plaintiff argues that the trial court's order is inconsistent with the concept of notice pleading embodied in Rule 8(a) of the North Carolina Rules of Civil Procedure, which requires only that a pleading contain "[a] short and plain statement of the claim sufficiently

particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C.R. Civ. P. 8(a)(1).

> By enacting section 1A–1, Rule 8(a), our General Assembly adopted the concept of notice pleading. Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim.

Wake Cty. v. Hotels.com, L.P., __ N.C. App. __, __, 762 S.E.2d 477, 486 (2014) (internal citations and quotation marks omitted).

It is well settled that "one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision." *Bigelow v. Town of Chapel Hill*, __ N.C. App. __, __, 745 S.E.2d 316, 326 (citation omitted), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 543 (2013). With regard to Plaintiff's first claim for relief, we have held that

> [t]o establish a cause of action for wrongful discharge or demotion in violation of [her] right to freedom of speech, [a] plaintiff must forecast sufficient evidence that the speech complained of qualified as protected speech or activity[2] and that such protected speech or activity was the motivating or but for cause for [her] discharge or

2. In the public employment context, "speech is constitutionally protected only if it relates to matters of public concern and if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren*, 104 N.C. App. at 526, 410 S.E.2d at 234 (citation, internal quotation marks, and brackets omitted). In the present case, Defendants do not argue that the speech at issue failed to involve a matter of public concern. Instead, Defendants limit their argument to the contention that "[Plaintiff's] Complaint fails to set forth facts sufficient to establish 'but for' causation between her alleged 'speech' and 'assembly' and the adverse employment action." Therefore, we do not address the issue of whether the speech at issue in this case related to matters of public concern.

> demotion. The resolution of these two critical issues is a matter of law and not of fact.

Swain v. Elfland, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (internal citations, quotation marks, and brackets omitted), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001).

Plaintiff's second claim for relief was based on Article I, section 12 of the North Carolina Constitution, which states, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. The right to freedom of assembly is similar to the right to freedom of association embodied within our federal Constitution. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011) (noting that free speech and assembly provisions of North Carolina Constitution protect associational rights). The United States Court of Appeals for the Fourth Circuit has discussed the link between freedom of speech and freedom of association.

> [Plaintiff's] freedom of association claim parallels his free speech claim. Indeed, we have recognized the right to associate in order to express one's views is inseparable from the right to speak freely. . . . An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Edwards v. City of Goldsboro, 178 F.3d 231, 249 (4th Cir. 1999).

Defendants concede in their brief that they "do not dispute that the Complaint alleged facts sufficient to put Defendants on notice that Plaintiff was advancing constitutional claims of violation of freedom of speech and violation of right of assembly[.]" They likewise concede that "Plaintiff is correct that she was not required to use 'magic words' such as 'but for' in setting forth her claims for relief[.]"

We rejected in an analogous context the notion that any such "magic language" was necessary in order to adequately plead causation. In

Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997), the plaintiff, a nurse anesthetist, brought an action against Duke University Hospital and several of her supervisors based on her allegations that she was discharged for refusing to testify falsely or incompletely in a malpractice lawsuit. The trial court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) based, in part, on their argument that the plaintiff had failed to allege that her damages would not have occurred "but for" their actions and that her complaint was therefore fatally defective. *Id.* at 346, 328 S.E.2d at 829.

We reversed that portion of the trial court's ruling, holding that our caselaw contained

> no mandate for the use of the magic words "but for[]" . . . . Rather, we read those cases to say that the complaint . . . must clearly allege that the actions of the defendant were the cause of the plaintiff's damages . . . [Our case-law] requires only that the [defendant's] act *caused* the plaintiff actual damages. . . . While the words "but for" are in wide usage and undoubtedly meet the requirements for sufficiently pleading this cause of action, they are not the exclusive means of doing so. Plaintiff's complaint clearly alleges that [defendants] maliciously undertook to have her discharged from her job because she would not be intimidated into testifying favorably to them . . . and leaves no ground for supposing that she was fired for any other reason. If plaintiff can prove her allegations the defendants should not be allowed to escape liability because plaintiff's attorneys did not say "but for." To hold otherwise would be to return to the type of hypertechnical pleading that our Rules of Civil Procedure, G.S. 1A–1, and Rule 1 *et seq.* replaced.

Id. at 346-47, 328 S.E.2d at 829 (internal citations and quotation mark omitted). The same reasoning applies here.

In *Warren*, the plaintiff was a teacher who alleged, in part, that he was denied a promotion based on a violation of his constitutional right to free speech after he publicized the results of a survey conducted by the North Carolina Association of Educators to the Board of Education. *Warren*, 104 N.C. App. at 525, 410 S.E.2d at 234. The defendants filed a motion to dismiss under Rule 12(b)(6), and the trial court granted the motion. *Id.*

On appeal, we recognized that in order to establish the causation element of his free speech claim, the plaintiff was required to show that the speech he engaged in "was the 'motivating' or 'but for' cause" of the adverse employment action he suffered. *Id.* (citation omitted). We noted that in his complaint the plaintiff had alleged that before he disclosed the results of the survey he had consistently received positive evaluations, the school principal had warned him not to give his report to the Board of Education, and the plaintiff was shortly thereafter given a substandard evaluation preventing him from receiving a promotion. *Id.* at 527, 410 S.E.2d at 235. Therefore, we held that "[t]aking plaintiff's allegations as true, we conclude that the complaint was sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss." *Id.*

In the present case, Plaintiff's amended complaint included the following allegations that, as in *Warren*, were sufficient to satisfy the pleading requirements regarding the causation elements of her constitutional claims:

> 1. . . . Because Plaintiff spoke out against [unlawful] practices, she was terminated from her employment position[.]
>
> . . . .
>
> 35. Plaintiff's protected speech was a substantial factor in Defendants' decision to take adverse action against her.
>
> . . . .
>
> 39. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 14 of the North Carolina Constitution.
>
> . . . .
>
> 45. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 12 of the North Carolina Constitution.

We cannot agree with Defendants that Plaintiff's allegations were insufficient to adequately plead freedom of speech or freedom of assembly claims under the North Carolina Constitution so as to survive Defendants' motion to dismiss. The trial court's order had the effect of imposing a heightened pleading requirement as to these claims that is not recognized by North Carolina courts and is inconsistent with the concept of notice pleading as provided for in our Rules of Civil Procedure. The trial court therefore erred in granting Defendants' motion on the

theory that she did not adequately plead the causation element of her constitutional claims.

[3] Finally, Defendants also assert that their motion to dismiss was properly granted because Plaintiff did not

> conclusively establish that *despite* [her] efforts to maintain anonymity [while engaging in the speech described in her amended complaint], the defendant[s] nevertheless knew that the plaintiff was the author of said speech. To fail to establish that connection is to fail to establish the necessary causal connection between the speech and the alleged retaliation.

Defendants' argument reflects a misunderstanding both of notice pleading and the appropriate standard of review applicable to a motion to dismiss pursuant to Rule 12(b)(6). In order to overcome such a motion, a plaintiff is not required to "conclusively establish" *any* factual issue in the case. Rather, the only question properly before a court reviewing a Rule 12(b)(6) motion 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, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007).

The detailed fact-based arguments Defendants make in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation. For purposes of Defendants' motion to dismiss, all that matters is whether Plaintiff has adequately pled claims for violation of the freedom of speech and freedom of assembly provisions of the North Carolina Constitution based on the doctrine of notice pleading as set out in Rule 8(a)(1). Based on our review of the amended complaint, we are satisfied that Plaintiff's allegations in support of these claims were legally sufficient. Thus, because this case is before us on appeal from a ruling on a Rule 12(b)(6) motion, our inquiry ends there. As such, the trial court's order must be reversed.

Conclusion

For the reasons stated above, the order of the trial court is reversed, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.

THOMAS E. FERGUSON, Plaintiff
v.
WENDY R. FERGUSON, Defendant

No. COA14-355

Filed 31 December 2014

1. Child Custody and Support—support modification—reasonable needs of children—relative ability to pay—additional findings of fact required

The trial court erred in a child support modification case by failing to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support. The trial court's order was reversed and remanded for additional findings of fact to address the parties' request for modification of the existing child support arrangement and the validity of defendant's request for a deviation from the child support guidelines.

2. Child Custody and Support—support modification—private school education—extraordinary expenses

The trial court erred in a child support modification case by failing to make adequate findings of fact in support of its determination that the cost of the children's private school education constituted an extraordinary expense. The trial court's order was reversed and remanded for entry of a new order containing sufficient findings of fact addressing the issue of defendant's ability to pay.

3. Jurisdiction—child support modification—amended withholding order—appeal already perfected

The trial court lacked jurisdiction in a child support modification case to enter an amended withholding order in light of the fact that defendant had noted, and subsequently perfected, an appeal from the 29 October 2013 order.

Judge BELL concurring in part and dissenting in part.

Appeal by defendant from orders entered 29 October 2013 and 9 December 2013 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 8 September 2014.

Hamilton Moon Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for Plaintiff (no brief).

The Law Offices of Kenneth T. Davies, by Kenneth T. Davies and Alyssa V. Andrew, for Defendant.

ERVIN, Judge.

Defendant Wendy R. Ferguson appeals from an order denying her motion to deviate from the child support guidelines and ordering Defendant to pay Plaintiff Thomas E. Ferguson child support in the amount of $919 per month, to make payments intended to reduce a child support-related arrearage in the amount of $191.43 per month, and to pay Plaintiff's attorney's fees and from an amended order requiring income withholding in connection with her child support and arrearage obligation.[1] On appeal, Defendant argues that the trial court erred by refusing to deviate from the child support guidelines, by including private school tuition costs as an extraordinary expense in calculating Defendant's child support obligation, and by entering the amended withholding order after an appeal had been noted from the trial court's child support order. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's child support and amended income withholding orders should be reversed and vacated, respectively, and that this case should be remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant were married on 20 August 1994, separated on 28 October 2003, and divorced on 6 April 2005. The parties are the parents of two minor children, Carrie and Brian.[2] On 7 January 2005, Judge Ben S. Thalheimer entered a consent judgment addressing equitable distribution, child custody, child support, and visitation issues that provided, in pertinent part, that Plaintiff would have primary physical custody of the children; that Defendant would have visitation with the children at designated times; that Defendant would pay the tuition and daycare expenses associated with the children's attendance at Northside

1. Although the $191.43 monthly arrearage amount to be paid by Defendant was determined in Finding of Fact No. 23 of the 29 October 2013 order and properly reflected in the 9 December 2013 wage withholding order, decretal paragraph No. 2 of the 29 October 2013 order reflects the monthly arrearage payment to be $100.00, an apparent typographical error that the trial court should address on remand.

2. "Carrie" and "Brian" are pseudonyms used for ease of reading and to protect the children's privacy.

Christian Academy; and that Plaintiff would pay the children's health-care and all other expenses.

On 11 January 2008, Defendant filed a motion seeking to have the existing custody and support arrangements modified on the grounds that there had been substantial and material changes in circumstances affecting the welfare of the children, including a reduction in the amount of time that Defendant had been able to spend with the children and changes in the expenses that needed to be incurred on behalf of the children. On 28 January 2009, Plaintiff filed a response to Defendant's motion in which he denied the material allegations of Defendant's motion and sought the entry of an order providing for a modification of the existing child support arrangement. On 17 September 2009, the trial court entered an order awarding Plaintiff primary physical custody of the children, establishing a schedule pursuant to which Defendant was entitled to visitation with the children, and indicating that a separate order modifying the existing child support arrangements would be entered.

On 27 October 2010, Defendant filed a motion seeking to obtain the entry of a child support order that deviated from the child support guidelines. At a hearing held on 25 April 2012 and 6 June 2012, Defendant presented evidence regarding her net monthly income, shared family expenses, debts, and other monthly expenses affecting herself and the children and asserted that her father sometimes helped her make her mortgage payments when she needed financial assistance. In addition, Plaintiff presented evidence regarding his monthly income, shared family expenses, the cost of the children's attendance at Northside Christian Academy, and other monthly expenses for the children, including amounts associated with the purchase of food and the cost of recreational activities.

On 29 October 2013, the trial court entered an order denying Defendant's motion to deviate from the child support guidelines, ordering Defendant to pay child support in the amount of $919 per month, requiring Defendant to pay a $15,314 child support-related arrearage at the rate of $191.43 per month, compelling Defendant to pay Plaintiff's attorney's fees, and imposing a wage withholding requirement to ensure the making of the required support and arrearage reduction payments. On 15 November 2013, Defendant noted an appeal from the 29 October 2013 order to this Court. On 9 December 2013, the trial court entered an amended wage withholding order. On 19 December 2013, Defendant noted an appeal from the 9 December 2013 order to this Court.

II. Substantive Legal Analysis

A. Motion to Deviate from Child Support Guidelines

[1] In her first challenge to the trial court's order, Defendant contends that the trial court erred by refusing to deviate from the child support guidelines in calculating the amount of child support that she owed Plaintiff. More specifically, Defendant asserts that the trial court erred by failing to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support. Defendant's argument has merit.

1. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Similarly, "[a] trial court's deviation from the [child support] [g]uidelines is reviewed under an abuse of discretion standard." *Beamer v. Beamer*, 169 N.C. App. 594, 597, 610 S.E.2d 220, 223 (2005). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Ludlam v. Miller*, __ N.C. App. __, __, 739 S.E.2d 555, 558 (2013) (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* (quotations and citations omitted).

2. Sufficiency of the Trial Court's Findings

"Child support is to be set in such amount 'as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties.'" *Buncombe Cnty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000) (quoting N.C. Gen. Stat. § 50-13.4(c)). "Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Id.*

"If the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of

each parent to [pay or] provide support.' " *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). "However, upon a party's request that the trial court deviate from the Guidelines . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." *Id.* at 297, 524 S.E.2d at 581; *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993) (stating that "[t]he second paragraph of N.C. [Gen. Stat. §] 50–13.4(c) provides that[,] when a request to deviate is made and such evidence is taken, the court should hear the evidence and 'find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support' "). In other words, "evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." *Brooker v. Brooker*, 133 N.C. App. 285, 291, 515 S.E.2d 234, 239 (1999) (quoting *Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985)). In the course of making the required findings, "the trial court must consider 'the reasonable needs of the child for health, education, and maintenance, having due 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.' " *Beamer*, 169 N.C. App. at 598, 610 S.E.2d at 224 (quoting *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 645, 507 S.E.2d 591, 594 (1998)). "These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685 (quoting *Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914). As a result, given that Defendant requested the trial court to deviate from the child support guidelines, the trial court was required to "hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." *Biggs*, 136 N.C. App. at 297, 524 S.E.2d at 581.

The trial court's order contained the following findings of fact, among others:

> 16. The Court finds that [Plaintiff] is employed full-time with the Mecklenburg County Police Department and part-time as head of security for Northside Christian Church. Throughout the time period in question, [Plaintiff] has enjoyed earnings from sporadic contract jobs.
>
> 17. The Court finds that [Defendant] is employed full-time with the Charlotte- Mecklenburg County School system.

Throughout the time period in question[,] [Defendant] has enjoyed earnings from sporadic summer jobs and tutoring.

. . . .

19. The Court heard evidence regarding the reasonable needs of the children for support and the relative ability of each parent to provide support based upon [Defendant's] request to deviate from the North Carolina Child Support Guidelines.

20. The Court finds by the greater weight of the evidence that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support and there should be no deviation.

21. Specifically, the Court finds that any inability of [Defendant] to balance a reasonable monthly budget (sufficient to meet the children's reasonable expenses) is as a result of [Defendant's] own actions, her refusal to obtain summer employment, or to work on alternate weeks, and her choices with regard to incurring debt. The Court finds she is intentionally underemployed and depressing her income as a result.

22. [In this finding of fact, the trial court provided a chart reflecting the parties' actual monthly incomes, Plaintiff's payments of the children's health insurance premiums, Plaintiff's work-related child care costs, and "extraordinary expenses" from 2008 to 2012.]

23. The total amount that [Defendant] owes is $2,600.00 in child support arrears and $600.00 in attorneys' fees per the Contempt Order plus . . . $11,814 . . . =$15,314. There are 80 months until the youngest child turns 18 so [Defendant] will repay these arrears in the amount of $191.43 per month until the full amount is paid. This amount shall be paid by wage withholding.

24. The amount of child support which [Defendant] will owe beginning September 1, 2013 and continuing until the earlier of the date that child support is modified or terminated by a court of law is Nine Hundred Nineteen Dollars and no/100 ($919) per month. This amount shall be paid by

> automatic wage withholding. Until the wage withholding process is activated [Defendant] shall pay the child support amount directly to [Plaintiff].

A careful examination of these findings establishes that the trial court failed to make specific findings regarding the relative ability of each parent to provide support as required by N.C. Gen. Stat. § 50–13.4(c).[3] Aside from the parties' monthly incomes from 2008 to 2012, the amount of which is set forth in the chart contained within Finding of Fact. No. 22, we are unable to determine from an examination of the trial court's findings whether the trial court gave any consideration to the relative ability of each parent to provide support. In addition, there is no indication that the trial court considered "the accustomed standard of the living of the child[ren] and the parties" as required by N.C. Gen. Stat. § 50-13.4(c). *Spicer*, 168 N.C. App. at 294, 607 S.E.2d at 686 (stating that, "[w]ithout findings regarding the child's or parties' accustomed standard of living and the reasonableness of the expenses in light of that standard of living, we cannot determine whether the trial court considered the standard of living factor and whether the trial court's finding of reasonable needs . . . is supported by the evidence"). As a result, given the absence of findings of fact concerning the reasonable needs of the children and the relative ability of each party to pay child support, we have no way to evaluate the correctness of the trial court's determination "that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support" so that there should be "no deviation" from the Guidelines.

At the hearing before the trial court, Plaintiff and Defendant presented extensive evidence concerning the cost of caring for the children, including the amounts deemed appropriate for the children's healthcare, maintenance, education, food, and recreational activities. In addition, both parties introduced evidence concerning their incomes and expenses and Defendant described the amount of the debts that she

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3. Although our dissenting colleague has concluded that "the trial court's findings demonstrate that the court determined the presumptive amount of child support, heard evidence regarding the children's needs and the ability of the parents to provide support, including the cost of the extraordinary expense, and determined that the presumptive Guidelines provided reasonable support for the children," we do not believe, for the reasons outlined in the text of this opinion, that a trial court is entitled to simply state, without further explanation or the making of specific findings concerning the level of income reasonably available to each party and the amount of expenses that must reasonably be incurred for the benefit of the children, that an application of the guidelines results in the establishment of an appropriate amount of child support in a case in which a party has requested the trial court to deviate from the guidelines.

owed. "It is not enough[, however,] that there [is] evidence in the record sufficient to support findings which *could have been made*"; instead, "[t]he trial court must itself determine what pertinent facts are actually established by the evidence before it[.]" *Beamer*, 169 N.C. App. at 599, 610 S.E.2d at 224 (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)) (emphasis in original). In other words, the fact that the record contains evidence from which the necessary findings could have been made does not have the effect of absolving the trial court from the obligation to actually make the required findings concerning the needs of the children and the parties' relative abilities to pay in a case in which a deviation from the guidelines has been requested. As a result, given that a trial court's failure to make findings of fact addressing the relative ability of the parents to provide support and the expenses that are needed to meet the children's needs requires a reviewing court to remand the relevant case to the trial court for the entry of a new order containing additional findings of fact, *Brooker*, 133 N.C. App. at 291, 515 S.E.2d at 239, we hold that the trial court's order must be reversed and this case must be remanded to the Mecklenburg County District Court for the entry of a new order addressing the parties' request for a modification of the existing child support arrangement and the validity of Defendant's request for a deviation from the child support guidelines that contains adequate findings of fact concerning reasonable needs of the children and the parties' relative ability to pay support.[4]

B. Extraordinary Expenses

[2] Secondly, Defendant contends that the trial court erred by concluding that the cost of the children's attendance at a private school constituted an extraordinary expense and by requiring Defendant to pay the cost of their attendance at a specific private school. More specifically, Defendant argues that the trial court erred by failing to make adequate findings of fact in support of its determination that the cost of the children's private school education constitutes an extraordinary expense and abused its discretion by requiring Defendant to pay the cost of their attendance at the Northside Christian Academy based on the religious benefits of the education that the children would receive at that educational institution. Once again, we conclude that Defendant's argument has merit.

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4. As part of this process, the trial court is, of course, entitled to reconsider and make appropriate findings of fact and conclusions of law concerning the extent, if any, to which Defendant has inappropriately depressed her income in an attempt to reduce her child support payment obligation.

1. Standard of Review

"The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion." *Doan v. Doan*, 156 N.C. App. 570, 574, 577 S.E.2d 146, 149 (2003) (citing *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581). "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). As a result, we will review the trial court's determination that the cost of the children's private school constituted an extraordinary expense and should be included in calculating Defendant's child support obligation under the guidelines utilizing an abuse of discretion standard of review.

2. Validity of Court's Exgtraordinary Expense Decision

According to the child support guidelines, the trial court "may make adjustments for extraordinary expenses and order payments for such term and in such manner as the [c]ourt deems necessary." *Mackins v. Mackins*, 114 N.C. App. 538, 548, 442 S.E.2d 352, 358, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). The "extraordinary expenses [contemplated by the child support guidelines] include . . . [a]ny expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child(ren)," *Mackins*, 114 N.C. App. at 549, 442 S.E.2d at 359, with a trial court having the authority to "add [these expenses] to the basic child support obligation and order [them to be] paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." *Ludlam*, __ N.C. App. at __, 739 S.E.2d at 563. However, "incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines," so that, "absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses. *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82. As a result of the fact that Defendant requested a deviation from the child support guidelines, however, the trial court was obligated to make such findings regarding the extraordinary expense request at issue here.

In determining that the cost of the children's private school education constituted an appropriate extraordinary expense, the trial court found that:

> 18. The Court finds that the cost for the children to attend Northside Christian Academy is an extraordinary expense to be considered when applying the North Carolina Child Support Guidelines. Specifically[,] the Court finds, that such expenses are justified because the children have grown up with Northside Christian Academy, it is where the entirety of their educational experience has occurred. The Court finds that this private school can supply something that public school cannot. Public schools cannot provide God. That is what the children have grown up with. God is a part of their lessons.

Although Finding of Fact No. 18 describes in detail the reasoning process underlying the trial court's determination that the cost of the children's attendance at Northside Christian Academy constituted an appropriate extraordinary expense for purposes of calculating the amount of child support that Defendant owed under the guidelines, the trial court, despite the existence of a request for a deviation from the guidelines, did not make any findings addressing the issue of the parties' relative abilities to pay the cost of the children's attendance at Northside Christian Academy, particularly given the fact that Defendant presented evidence tending to show that she lacked the ability to pay the cost of the children's matriculation at that institution. In the absence of sufficient factual findings addressing the issue of Defendant's ability to pay for the children's education at Northside Christian Academy, we are unable to determine whether the trial court abused its discretion by requiring Defendant to pay for the cost of the children's private school education.[5] As a result, the trial court's order must be reversed and this case must be remanded to the trial court for the entry of a new order that contains sufficient findings of fact addressing the issue of Defendant's ability to pay the cost of the children's education at Northside Christian Academy.[6]

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5. As should be obvious, the trial court would have been under no obligation to make findings of fact concerning Defendant's ability to pay the educational expenses discussed in the text of this opinion in the event that Defendant had not requested a deviation from the child support guidelines. *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82.

6. In light of our determination that the trial court's order must be reversed and that this case must be remanded to the trial court for the making of findings relating to Defendant's ability to pay the extraordinary expense of the children's private school tuition, we need not address and should not be understood to have commented upon the merits of Defendant's remaining challenges to the trial court's decision to require Defendant to pay the cost of privately educating the children at Northside Christian Academy.

C. Jurisdiction to Enter Amended Withholding Order

[3] Finally, Defendant argues that the trial court lacked the authority to enter the amended withholding order. More specifically, Defendant argues that the trial court lacked jurisdiction to enter the amended withholding order in light of the fact that Defendant had noted, and subsequently perfected, an appeal from the 29 October 2013 order. Once again, we conclude that Defendant's argument has merit.

1. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

2. Trial Court's Jurisdiction

According to well-established North Carolina law, "once an appeal is perfected, the lower court is divested of jurisdiction." *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993); N.C. Gen. Stat. § 1–294. "An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011).

As the record clearly reflects, Defendant noted an appeal from the 29 October 2013 order on 15 November 2013 and perfected her appeal by filing a record on appeal on 28 March 2014. For that reason, the trial court lost jurisdiction over this case as of 15 November 2013. Thus, given that the amended withholding order was entered after the date upon which Defendant noted her appeal from the 29 October 2013 order, the amended withholding order is "void for lack of jurisdiction." *Romulus*, 216 N.C. App. at 33, 715 S.E.2d at 892. As a result, the amended withholding order must be vacated.[7]

7. As an aside, we note that N.C. Gen. Stat. § 50–13.4(f)(9) authorizes the enforcement of a child support obligation through the use of the contempt power during the course of the appellate process. However, as the record clearly reflects, the entry of the amended withholding order did not constitute an exercise of the trial court's contempt power.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenges to the trial court's orders have merit. As a result, the trial court's child support order should be, and hereby is, reversed; the trial court's amended withholding order should be, and hereby is, vacated; and this case should be, and hereby is, remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge McCULLOUGH concurs.

BELL, Judge, concurring in part, dissenting in part.

Although I agree with my colleagues that the trial court lacked the authority to enter the amended withholding order, I respectfully dissent from the majority's position that the trial court failed to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support or the cost of private school tuition as an extraordinary expense.

As noted by the majority, here, the trial court made findings regarding the parties' incomes and payments made by Plaintiff for health insurance, work-related child care, and extraordinary expenses. It then made the following relevant findings of fact:

> 19. The Court heard evidence regarding the reasonable needs of the children for support and the relative ability of each parent to provide support based upon Defendant/Mother's request to deviate from the North Carolina Child Support Guidelines.
>
> 20. The Court finds by the greater weight of the evidence that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support and there should be no deviation.
>
> 21. Specifically, the Court finds that any inability of Defendant/Mother to balance a reasonable monthly budget (sufficient to meet the children's reasonable expenses) is as a result of Defendant/Mother's own actions, her refusal to obtain summer employment, or to work on

> alternate weeks, and her choices with regard to incurring debt. The Court finds she is intentionally underemployed and depressing her income as a result.

Further, the trial court's order includes as Finding of Fact number 22 a detailed spreadsheet reflecting the parties' respective incomes, the costs of health insurance and childcare expenses, and the extraordinary expense.

I would conclude that the trial court's findings demonstrate that the court determined the presumptive amount of child support, heard evidence regarding the children's needs and the ability of the parents to provide support, including the cost of the extraordinary expense, and determined that the presumptive Guidelines provided reasonable support for the children. The findings noted above relate to the ability of each parent to provide support. I believe these findings of fact adequately satisfy N.C. Gen. Stat. § 50-13.4(c) and support the trial court's decision not to deviate from the Guidelines.

Further, "[c]hild support set in accordance with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 222-23 (2005) (citation and internal quotation marks omitted). Because the trial court applied the presumptive guidelines in calculating Defendant's child support obligation, its "determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, *i.e.* only if manifestly unsupported by reason." *Row v. Row*, 185 N.C. App. 450, 461, 650 S.E.2d 1, 8 (2007) (citation and internal quotation marks omitted). After thoroughly reviewing the record, I cannot conclude that the trial court's decision not to deviate from the Guidelines was manifestly unreasonable.

Accordingly, because the record does not support a conclusion that the trial court's adherence to the presumptive guidelines was "so arbitrary that it could not have been the result of a reasoned decision," *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002), I respectfully dissent. I would affirm the trial court's order denying Defendant's request for a deviation from the Child Support Guidelines and including the private school tuition as an extraordinary expense.

SARAH A. FOREHAND, Plaintiff
v.
JASON A. FOREHAND, Defendant

No. COA14-772

Filed 31 December 2014

1. Domestic Violence—protective order—subjective fear—exchange of drug test results

The trial court did not err by renewing plaintiff's domestic violence protective order. Although defendant disputed that he was a danger to plaintiff, plaintiff's testimony was adequate to support a finding that she was in subjective fear of defendant and, as to the finding that there was a "poor exchange" of the drug test results, there was also competent evidence to support the finding.

2. Domestic Violence—protective order—renewal—facts reused

The trial court did not err by concluding that good cause existed to renew a domestic violence prevention order (DVPO) where the order renewing the DVPO rested, in large part, on acts by defendant that served as the basis for the original DVPO. There is nothing in N.C.G.S. § 50B-3 or North Carolina case law prohibiting the renewal of a DVPO based on acts that happened in the past that served as the basis for issuance of the original DVPO.

3. Appeal and Error—unpublished opinion—persuasive authority—cited in published opinion

Even though unpublished opinions from the Court of Appeals do not constitute controlling legal authority, an unpublished case held that prior acts may provide support for and be incorporated by reference into orders renewing DVPOs. That reasoning was found to be persuasive here and was applied to the facts of this case.

Appeal by defendant from order entered 3 February 2014 by Judge Anna Worley in Wake County District Court. Heard in the Court of Appeals 17 November 2014.

No brief filed on behalf of plaintiff-appellee.

The Law Corner, by Betsy Gold, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jason Forehand appeals the order renewing plaintiff Sarah Forehand's domestic violence protective order. On appeal, defendant challenges several findings of fact and ultimate conclusion of law that there was "good cause" to renew the domestic violence protective order ("DVPO").

After careful review, we affirm the order.

Background

On 8 October 2012, plaintiff filed a complaint and motion for a DVPO against defendant, her husband. The parties have three minor children born of the marriage. In the complaint and motion, plaintiff alleged that defendant attempted to cause or intentionally caused her and her children bodily injury and placed them in fear of imminent serious bodily injury. Specifically, plaintiff stated that, on 5 October 2012, defendant stole the family dog from the family residence with the children watching. Plaintiff additionally claimed that defendant put her and their newborn child in danger when she tried to open the car door to get the dog out. During defendant's hospitalization for a suicide attempt on 26 September 2012 and while plaintiff was ten months pregnant, defendant allegedly told her: "Bitch, I want to smash your teeth in and slam you to the floor you dirty cunt." Based on this threat, plaintiff claimed that she went into early labor. In the complaint, plaintiff also asserted that her children were at substantial risk of physical or emotional injury based on defendant's issues with substance abuse. Specifically, plaintiff stated that defendant was addicted to heroin and prescription drugs and has overdosed several times. Finally, plaintiff claimed that defendant had made threats to commit suicide and had been institutionalized for attempted suicide on two occasions. Based on these allegations, the trial court granted plaintiff an *ex parte* DVPO that same day.

On 15 October 2012, a hearing was held to determine whether plaintiff was entitled to a one-year DVPO. At the hearing, the parties consented to a continuance based on defendant's claim that he was entering a 90-day inpatient treatment facility for heroin abuse. The trial court continued the existing *ex parte* DVPO until 25 January 2013. At the next hearing, on 19 February 2013, the trial court granted plaintiff a one-year DVPO (the "2013 DVPO"); however, a copy of it is not included in the record on appeal.

On 14 January 2014, plaintiff filed a motion to renew the DVPO. She claimed that defendant had sent her "harassing emails, using vulgar words, to describe [her]" and was using drugs again. Furthermore, citing his "hateful attitude," plaintiff alleged that she is "fearful of physical harm."

The matter came on for hearing on 4 February 2014. At the hearing, plaintiff testified that defendant was supposed to submit to monthly drug screenings as required by the temporary custody order entered in their Chapter 50 domestic action. She claimed that defendant has failed to provide her with copies of the screenings; however, she did admit into evidence a copy of one screening from 5 November 2013 where defendant tested positive for cocaine. Plaintiff also admitted into evidence two emails from defendant. The first was dated 20 December 2013 and was in reference to the visitation schedule for the children's Christmas holiday. In it, plaintiff stated that she did not want the children to have an overnight visit with defendant; instead, she wanted them to have a supervised Christmas Eve visit with defendant at his parents' house. After telling plaintiff he had to work Christmas Eve, defendant called plaintiff a "stupid cunt[.]" In another email from January 2014 to his attorney, which he copied to plaintiff, defendant called plaintiff a "conniving bitch" and said that no one "wants her form of 'Christian love.' " As a result of these emails, plaintiff contended that

> I have no track record of anything except for his attitude toward me still being hateful and negative. That's the only thing that I have seen consistent in the past year and a half. That's the only thing is his hatred and his anger and resentment and his vulgarity towards me, his lack of respect for me. So again, yes, I am fearful of him. I am fearful of being put in the same room with him without a DVPO in place. He's unpredictable. He's scary. He hates me. He is angry towards me. And all of this that they just tried to present is escalating the situation.

At the hearing, defendant also testified and claimed that the labs conducting the drug tests do not email the results; however, he stated that he has signed a release which would allow plaintiff to obtain the results from the lab directly. He did not deny sending the emails and calling plaintiff vulgar names, but he claimed that he did not express hatred or threaten her in any way. He also claimed that he is not a violent person and does not pose a danger to anybody.

The trial court, after noting that "[t]he burden is relatively low at a [DVPO] renewal hearing[,]" found that defendant continued to send vulgar and angry emails to plaintiff, plaintiff "continues to be in fear" of defendant, and "there has been a poor exchange of the drug tests." Furthermore, the trial court made "additional findings" based on defendant's past behavior. Specifically, the trial court found that defendant had: attempted to cause and intentionally caused bodily injury to

plaintiff, placed plaintiff in fear of serious bodily injury, threatened plaintiff during his hospitalization, made threats to seriously injure plaintiff, made threats to commit suicide, been hospitalized for several suicide attempts, and "has had issues with drug use." Based on these findings, the trial court renewed the DVPO until 1 June 2015. Defendant appeals.

Standard of Review

"When the trial court sits without a jury [regarding a DVPO], 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." *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009).

Arguments

[1] Initially, defendant argues that there was insufficient evidence to support the trial court's findings of fact that plaintiff continues to be in fear of defendant and that there had been a "poor exchange" of the monthly drug test results. We disagree.

"Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, ___ N.C. App. ___, ___, 757 S.E.2d 494, 499 (2014). Here, there was competent evidence to support the trial court's finding that plaintiff was in subjective fear of defendant. She specifically claimed that she was "fearful of being put in the same room with [defendant] without a DVPO in place." She also stated that:

> The restraining order has protected me in the way I need. . . . But if it were to be lifted–again, I am fearful of him, and I know that if it were to be lifted, he would be at my doorstep tonight. And I fear for the safe-my safety, my physical safety, as well as, you know, potential, you know, harm to the children, what might be done in their presence and that-that type of thing.

Although defendant disputed that he was a danger to plaintiff, plaintiff's testimony was adequate to support a finding that she was in subjective fear of defendant.

Furthermore, as to the finding that there was a "poor exchange" of the drug test results, there was also competent evidence to support this finding. Plaintiff claimed that she had not seen any of his drug test results except for one illegible result and the positive one from November 2013. Moreover, defendant did not deny that he had failed to

provide the results, claiming that "[t]here's nothing that [he] [could] give [plaintiff] that has the drug screen results on them." However, defendant failed to provide any proof of his negative tests even though he knew that the issue of his drug tests would be raised at the hearing and despite the fact that he claimed to have provided those results to his own attorney in their child custody proceedings. Consequently, the finding that there was a "poor exchange" of the drug test results is supported by competent evidence.

[2][3] Next, defendant argues that the trial court erred in concluding that "good cause" existed to renew the DVPO. We also disagree.

Section 50B-3(b) provides, in pertinent part, that:

> The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order[.] . . . The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

N.C. Gen. Stat. § 50B-3(b) (2013). As noted, the statute does not require a criminal act or even an act of domestic violence to renew a DVPO. *Id.*; N.C. Gen. Stat. § 50B-1(a) (2013). Instead, the trial court must find "good cause" to renew the DVPO. N.C. Gen. Stat. § 50B-3(b).

Here, the trial court found that "good cause" existed to renew the DVPO based on: (1) defendant's emails with "vulgar and angry language"; (2) the fact that "plaintiff continues to be in fear of the [defendant] due to his angry attitude—particularly surrounding custody issues"; (3) the "poor exchange" of the drug test results required in their Chapter 50 action which has "heighten[ed] plaintiff's anxiety and fear"; (4) defendant's past attempts to cause bodily injury to plaintiff in September 2012; (5) defendant's past conduct that placed plaintiff in fear of imminent serious bodily injury; (6) the threats defendant made while he was hospitalized at WakeMed hospital in September 2012; (7) defendant's past threats to commit suicide and commitments based on his attempts to commit suicide; and (8) defendant's past issues with drug use. Although the order renewing the DVPO rests, in large part, on defendant's acts from 2012 that served as the basis for the original 2013 DVPO, there is nothing in section 50B-3 nor in our caselaw prohibiting the trial court from basing its decision whether to renew a DVPO on acts that happened in the past which served as the basis for issuance of the original

DVPO. In fact, this Court, in an unpublished case, held that prior acts may provide support for and be "incorporated by reference" into orders renewing DVPOs. *Basden v. Basden*, COA01-1430, 2002 WL 31687267, at *4 (Dec. 3, 2002) (unpublished). Even though unpublished opinions from this Court do not constitute controlling legal authority, N.C.R. App. P. 30(e)(3) (2013), we find its reasoning persuasive and apply it to the facts of the present case. Thus, in totality, based on defendant's past conduct in addition to plaintiff's continued fear of defendant, defendant's use of angry language in emails, and the "poor exchange" of the drug tests results, we are unable to say that the trial court's conclusion that "good cause" existed to renew the DVPO constituted error.

Conclusion

The trial court's reliance on those past acts in addition to other findings were sufficient for plaintiff to meet her burden. Therefore, we affirm the order renewing the DVPO.

AFFIRMED.

Chief Judge McGEE and Judge BELL concur.

LARA GERHAUSER (formerly VAN BOURGONDIEN), Plaintiff
v.
MARTIN R. VAN BOURGONDIEN, Defendant

No. COA14-349

Filed 31 December 2014

Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—significant connection jurisdiction—jurisdiction by necessity

The trial court did not have subject matter jurisdiction in a child custody modification case under the Uniform Child Custody Jurisdiction and Enforcement Act in N.C.G.S. § 50A-201(a). Neither the parties nor the children had resided in North Carolina for several years. Further, both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012, and thus, North Carolina could not exercise jurisdiction by necessity under subdivision (4). The orders entered on 13 June 2013, 28 June 2013, and 3 December 2013 were vacated.

Judge BRYANT dissenting.

Appeal by plaintiff from orders entered 13 June 2013, 28 June 2013, and 3 December 2013 by Judge James P. Hill in District Court, Moore County. Heard in the Court of Appeals 9 September 2014.

Wyrick Robbins Yates & Ponton LLP by Tobias S. Hampson and K. Edward Greene, for plaintiff-appellant.

Doster, Post, Silverman, Foushee, Post & Patton, P.A. by Jonathan Silverman, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from three orders entered by the trial court, the first two modifying custody of the parties' two minor children, and the third addressing post-trial motions filed by plaintiff. For the reasons below, the trial court did not have modification jurisdiction under N.C. Gen. Stat. § 50A-201(a) (2013). Accordingly, we vacate the trial court's orders entered on 13 June 2013, 28 June 2013, and 3 December 2013.

I. Background

The parties were married in 1998 and later that year, Mary[1] was born. The next year they had a son, Daniel. During the marriage, the parties and children lived in Moore County, North Carolina. In 2002, the parties separated, and on 23 September 2002, plaintiff filed a complaint in Moore County seeking custody of the children as well as other claims that are not relevant to this appeal. Defendant counterclaimed for custody also. On or about 16 January 2003, the Moore County District Court entered a consent order that granted joint custody of the children to both parties, with primary physical custody to plaintiff; this order also resolved the other pending claims between the parties.

On 9 July 2003, plaintiff was remarried to Charles Gerhauser. On 27 September 2004, defendant filed a motion for temporary custody or, in the alternative, modification of the prior custody order. In this motion, defendant alleged that plaintiff had remarried to Mr. Gerhauser and that due to his military service, plaintiff was planning to move to either Hawaii or California. Defendant sought to prevent plaintiff from removing the children from North Carolina. Plaintiff, Mr. Gerhauser, and the

1. We have used pseudonyms for the minor children.

children moved to Hawaii on or about 30 October 2004. After a series of motions and temporary orders addressing plaintiff's move to Hawaii and other issues not relevant to this appeal, on 6 December 2004, the Moore County trial court entered a consent order addressing plaintiff's move to Hawaii with the minor children that modified the visitation schedule to provide for longer visits with defendant during holidays and spring and summer school breaks.

In 2005, defendant remarried, to Karen. On 10 August 2009, defendant and Karen moved to Palm Harbor, Florida. On 30 October 2009, plaintiff filed a motion to modify custody, alleging that she and the children had moved "back to the continental United States[,]"[2] that defendant had moved to Florida, and that defendant had failed to pay for or provide transportation for visitation when he was supposed to do so, resulting in missed visits, and requested that defendant be ordered to pay for all transportation and that his visits be "decreased to a number that he will actually use." On 18 December 2009, defendant also filed a motion to modify custody, alleging that he lived in Palm Harbor, Florida and that plaintiff lived in Lehi, Utah. He also alleged that plaintiff had interfered with his visitation and communication with the children and that the children wanted to reside with him.

On 18 August 2010, the Moore County District Court entered a consent Memorandum of Judgment that was incorporated into a formal consent order entered on 27 September 2010. This consent order modified the visitation schedule. The trial court found that "[d]efendant now resides in Florida" and that "[p]laintiff and the minor children now reside in Lehi, Utah and have for several years." The order granted the parties joint legal custody, with plaintiff having primary physical custody and defendant secondary physical custody. The order set out a schedule with long visitation periods during summer breaks and school holidays and included provisions regarding payment for the children's travel expenses for visitation.

In December 2011, Mr. Gerhauser moved to Germany pursuant to a military deployment due to his service in the Utah Army National Guard as a liaison officer to the Special Operations Command in Stuttgart, Germany. On or about 28 February 2012, plaintiff moved to Germany to join him, taking the minor children of the parties as well as the four

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2. Plaintiff did not allege where she lived at the time, nor does our record include an Affidavit of Status of Minor Children stating where the children were residing at the time or when they began to reside there. According to a 27 September 2010 order, they were living in Lehi, Utah and had been there "for several years."

children born to their marriage. Plaintiff did not tell defendant about the move to Germany until she was already there.

On 27 March 2012, defendant filed a motion for contempt, to modify visitation and custody, and for payment for travel expenses, alleging that he had received an email from plaintiff after her move to Germany and that she had not discussed the move with him nor did she provide an address to contact the children until 8 March 2012. Based on defendant's motion, the trial court entered an order to appear and show cause that required plaintiff to appear with the minor children on 21 May 2012 in Moore County District Court. In response, plaintiff filed a motion to dismiss, for judgment on the pleadings, for sanctions, and to modify child support. She alleged that her move to Germany did not cause any need for a change to visitation and that she could not take the children out of school to come to court on 21 May 2012. She also alleged that defendant's motion to modify was frivolous and requested that "[s]anctions be imposed against [d]efendant and his [a]ttorney."

On 25 June 2012, defendant filed an amended motion to modify custody and for contempt. He alleged that North Carolina continued to have "exclusive jurisdiction over the issue of child custody" pursuant to N.C. Gen. Stat. § 50A-202 (2011). He also made allegations regarding plaintiff's move to Germany without informing him in advance, her failure to inform him regarding the children's address, healthcare providers, or any details of Mr. Gerhauser's assignment in Germany with the United States Army and that she had alienated the children from defendant in various ways and interfered with his communication with them.

On 13 August 2012, the hearing upon plaintiff's and defendant's pending motions began; it resumed on 25 October 2012, and counsel made closing arguments on 1 November 2012. The trial court took the case under advisement and entered a "Memorandum of Decision" on 13 June 2013, which was incorporated into a formal order entered on 28 June 2013.[3] In the order, although neither party had raised any question regarding the trial court's jurisdiction over the custody matter, the trial court recognized the issue presented by the fact that neither the parties nor the children had resided in North Carolina for several years. The trial court therefore included various findings of fact and

3. There is no substantive difference between the "Memorandum of Decision" filed on 13 June 2013 and the formal order filed on 28 June 2013, so we will refer to the 28 June 2013 Order in this opinion and for purposes of our discussion treat it as the only order addressing the modification of custody.

conclusions of law regarding jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). The trial court found that Utah had been the children's home state as of 28 February 2012, but as of the date of commencement, they had moved to Germany and their absence from Utah was not a temporary absence. The trial court ultimately determined that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)." The trial court granted to defendant primary legal and physical custody of the children, subject to visitation with plaintiff.

On 24 June 2013, plaintiff filed a motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2013), alleging several grounds for new trial. She also filed two affidavits that included detailed allegations regarding various irregularities that she claimed impaired her ability to present her evidence at trial as well as factual allegations disputing various findings of fact. She also averred various changes in the circumstances of the children during the time between the trial and the trial court's entry of the order, alleging that many of the circumstances upon which the trial court had based the change of custody had changed because the family had moved to a new residence in Germany. On 11 July 2013, plaintiff filed an additional motion, for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (2013), for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (2013), and a motion for stay. This motion included allegations regarding the nine-month delay between the trial and the entry of the judgment and changes in circumstances during that time and, for the first time, directly raised the issue of the trial court's jurisdiction to modify custody under the UCCJEA. Plaintiff alleged that

> North Carolina does not have jurisdiction of this matter under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as codified in North Carolina at N.C.G.S. § 50A-101 et seq. Specifically, the state of Utah has continuing exclusive jurisdiction over this matter in that Utah is the home state of the children on the date of the commencement of the proceeding and had been for the 6 months before the commencement of the proceeding and any absence from the State of Utah is and was temporary and did not deprive Utah of jurisdiction. This Court specifically found Utah was the residence of Plaintiff and where the children resided. This Court erroneously

> determined the children and Plaintiff were not "temporarily absent" due to Plaintiff's husband's military deployment to Germany, which is governed by a Status of Forces Agreement with Germany (which places significant restrictions on Plaintiff's presence and ability to remain, work and reside in Germany), on the basis there was no specific date certain for a return to the United States. However, this fact itself assumes the deployment is and was temporary—and certainly was so at the time of the commencement of this modification action which occurred weeks after Plaintiff's relocation to be with her deployed husband and that Plaintiff had no intent or expectation to remain permanently in Germany, even if there is no specifically set date for return. Therefore, Utah held exclusive, continuing jurisdiction over this matter. Consequently, the custody modification ordered by this Court is void for lack of subject matter jurisdiction.

On 9 September 2013, the trial court heard plaintiff's post-trial motions, and on 3 December 2013, the trial court entered a single-spaced, 23-page order denying plaintiff's motions. The trial court had the benefit of a trial transcript when considering plaintiff's motions and addressed each of plaintiff's claims of irregularity in detail, rejecting each one. The trial court also concluded that it had jurisdiction under the UCCJEA, although for a different reason than stated in the 28 June 2013 Order. But for purposes of this appeal, the relevant issue is the trial court's subject matter jurisdiction under the UCCJEA, and we will confine our analysis of the orders to that issue, as addressed in detail below. On 27 December 2013, plaintiff filed notice of appeal from the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order.

II. Appellate Jurisdiction

Plaintiff has filed notice of appeal from three orders: the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order. The 13 June 2013 Memorandum of Decision appears to be a transcription of the trial court's oral findings, conclusions of law, and decretal provisions, which were then repeated nearly verbatim in the formal order entered on 28 June 2013. As it was written, signed by the trial court, and filed with the Moore County Clerk of Court on 13 June 2013, it would appear that entry of the order actually occurred on 13 June 2013. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2013) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Plaintiff timely filed her Rule 59 motion for

new trial on Monday, 24 June 2013.[4] Plaintiff's time to appeal from the 13 June 2013 Order as well as the 28 June 2013 Order was tolled by the Rule 59 motion. *See Wolgin v. Wolgin*, 217 N.C. App. 278, 281, 719 S.E.2d 196, 198-99 (2011). Because plaintiff filed her motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on 24 June 2013, the time for appeal from both of the June 2013 orders was tolled pending disposition of the motion; we need not be concerned about which order—13 June or 28 June—is the modification order, for purposes of this appeal. The notice of appeal was timely filed after disposition of the Rule 59 motion and we have jurisdiction to address the appeal on the merits.

III. Trial Court Jurisdiction under the UCCJEA

Plaintiff argues first that the "Trial Court Erred in Determining North Carolina has Jurisdiction under the UCCJEA in its Initial Custody Order" and next that the "Trial Court Erred in its Order on Plaintiff's Post-Trial Motions by Making a 'Clerical' Correction which altered the entire basis of Jurisdiction under the UCCJEA." In our review of the trial court's denial of plaintiff's Rule 59 motions as to "lack of subject matter jurisdiction," the lower court's findings of fact are binding on this Court when supported by competent evidence; we review its conclusions of law *de novo*. *Hammond v. Hammond*, 209 N.C. App. 616, 631, 708 S.E.2d 74, 84 (2011); *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583, *disc. rev. denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

> Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to

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4. A motion under Rule 59 must be served no later than 10 days after entry of the order. *Id.* § 1A-1, Rule 59(b). Under N.C. Gen. Stat. § 1A-1, Rule 6(a),

> [i]n computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

Id. § 1A-1, Rule 6(a) (2013). Our record does not reveal when the 13 June Memorandum of Decision was actually served upon the parties, but we need not be concerned about that date since the motion was timely based on the date of entry.

> object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment. Arguments regarding subject matter jurisdiction may even be raised for the first time before this Court.

In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and quotation marks omitted).

Plaintiff's second argument is that the trial court referred to its change in the basis for jurisdiction under the UCCJEA in the 3 December 2013 Order as a correction of a "clerical error," but it is actually a substantive change and thus not a proper ground for modification of the 28 June 2013 Order. We need not address this second argument in detail. The trial court did not merely cite an incorrect subsection of N.C. Gen. Stat. § 50A-201 in the 28 June 2013 Order; the trial court quoted large portions of the statute in detail and made findings of fact and conclusions of law based upon the provisions of N.C. Gen. Stat. § 50A-201(a)(2), concluding that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)."

In the 3 December Order, the trial court made additional findings of fact addressing the jurisdictional issue, again quoted relevant statutory provisions, and reached a different conclusion of law, after having the benefit of the parties' post-trial affidavits and arguments regarding jurisdiction. In that order, the trial court concluded that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(4)." Considering each order as a whole, the change from the 28 June 2013 Order is clearly substantive and well beyond a "clerical" correction under N.C. Gen. Stat. § 1A-1, Rule 60. It is true that the effect of the order was unchanged, as the decretal provisions did not change. But the trial court did not merely make a typographical error when referring to 50A-201(a)(2) instead of 50A-201(a)(4).

> The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984);

> *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E.2d 715 (1975). We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

Hinson v. Hinson, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986).

But ultimately, whether the trial court should or should not have made any changes to the original order as to jurisdiction, our inquiry is still the same: we must review *de novo* whether there was any ground for the exercise of subject matter jurisdiction under the UCCJEA, whether under N.C. Gen. Stat. § 50A-201(a)(2) as stated by the 28 June 2013 Order, N.C. Gen. Stat. § 50A-201(a)(4) as stated by the 3 December Order, or some other basis. *See Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) ("Because the trial court's sole basis for exercising subject matter jurisdiction is erroneous, we may review the record to determine if subject matter jurisdiction exists in this case."); *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000) ("[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.").

In her briefs before this Court, plaintiff argues that the trial court erred in concluding that it had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) because Utah was the children's "home state" on 27 March 2012, the date of commencement of this modification proceeding.[5] Defendant responds that the trial court properly concluded under N.C. Gen. Stat. § 50A-201(a)(4) that "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *See* N.C. Gen. Stat. § 50A-201(a)(4). For the reasons discussed below, we believe there is a third way.

A. Initial Child Custody Jurisdiction

i. Statutory Framework

N.C. Gen. Stat. § 50A-202 sets out when North Carolina has "[e]xclusive, continuing jurisdiction" over a custody proceeding:

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5. We are addressing only the 2013 orders in this opinion because we are limited to reviewing the orders on appeal, but it would appear that the same analysis would apply to the trial court's 2010 order based on the facts of the case. Although we are vacating only the 2013 orders on appeal, it would appear that the last order that the trial court had jurisdiction to enter was the December 2004 consent order addressing plaintiff's move to Hawaii.

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

Id. § 50A-202.

Here, it is undisputed that the children and their parents, the parties, did not reside in North Carolina as of the date of commencement. Thus, under N.C. Gen. Stat. § 50A-202(b), North Carolina may have jurisdiction to modify custody only if "it has jurisdiction to make an initial determination under G.S. 50A-201." *See id.* § 50A-202(b).

N.C. Gen. Stat. § 50A-201 sets forth four grounds for the court to exercise "[i]nitial child-custody jurisdiction":

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the

> child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).
>
> (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

Id. § 50A-201(a), (b).

It is undisputed that North Carolina was not the "home state" of the children on the date of commencement and was not the "home state" within six months prior to the commencement, nor did any parent remain in North Carolina, so North Carolina cannot exercise jurisdiction under (a)(1). *See id.* § 50A-201(a)(1).

Additionally, no other state has been asked to exercise jurisdiction. Plaintiff asserts that Utah was the "home state" and argues in her reply brief that "there is no record Utah has declined to exercise jurisdiction under section 50A-201(a)(3)." We do not read this statement as a double-negative assertion that Utah *has* been requested to exercise or *has exercised* jurisdiction over this custody proceeding. Despite a full custody trial, post-trial motions and affidavits filed over several months, and hearings on post-trial motions addressing the issue of jurisdiction, the record does not reflect, and neither party has informed the court, that either party ever asked any other state's court to exercise jurisdiction over this custody proceeding, and a state could not decline to exercise

jurisdiction if no one filed a custody proceeding in that state. In addition, we note N.C. Gen. Stat. § 50A-209(a) requires that

> each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:
>
> (1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any;
>
> (2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, the pleading or affidavit shall identify the court, the case number, and the nature of the proceeding; and
>
> (3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

Id. § 50A-209(a) (2013). "The purpose of requiring that this information be filed under oath is to assist the court in deciding if it can assume jurisdiction." *Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991). In addition, after the initial pleading, the parties have an affirmative and continuing obligation "to inform the court of any proceeding in this or any other state that could affect the current proceeding." N.C. Gen. Stat. § 50A-209(d). Neither party informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.*

ii. Home State Jurisdiction

Since subsection (a)(1) is not applicable, we must consider the grounds that the trial court considered in its orders. Under N.C. Gen. Stat. § 50A-201(a)(2), we must consider whether "[a] court of another state does not have jurisdiction under subdivision (1)." *Id.* § 50A-201(a)(2).

Subdivision (1), as noted above, is "home state" jurisdiction. *Id.* § 50A-201(a)(1). Plaintiff contends that on the date of commencement, Utah was the children's "home state."

For purposes of our review in this appeal, the relevant date is the date of commencement of this custody modification proceeding. *See id.* Under N.C. Gen. Stat. § 50A-102(5), "commencement" refers to "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5) (2013). Under N.C. Gen. Stat. § 50A-102(4), a "child-custody proceeding" is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." *Id.* § 50A-102(4). Thus, the date of commencement of this proceeding was 27 March 2012, when defendant filed his first motion requesting modification of custody and visitation based upon plaintiff's relocation to Germany. On that date, the trial court found, and neither party challenges, that plaintiff and the children lived in Aichelbergneg, Germany. Defendant lived in Dunedin, Florida at the time. In the 28 June 2013 Order, the trial court made the following additional findings regarding whether Utah was the "home state" of the children:

> 30. At time of entry of "Consent Order for Modification of Child Custody, and Visitation," on September 27, 2010, [Mary] and [Daniel] resided in the primary physical custody of [plaintiff in Lehi], Utah. Said minor Children continued to reside . . . primarily at same location until on or about February 28, 2012, when they moved, with [plaintiff], to Aichelbergneg, Germany, where they remain living at close of this Hearing . . . with [Mr. Gerhauser at] Kelly Barracks Military Base in Germany, none of these individuals having subsequently returned to live in Utah.
>
> . . .
>
> 31. At time of entry of "Consent Order for Modification of Child Custody, and Visitation, on September 27, 2010, [defendant] resided in the State of Florida, where he has since continued to reside and where he resided on date of filing of "Motion to Show Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on March 27, 2012.
>
> . . .
>
> 39. [Mary] and [Daniel] did not live in Utah with [plaintiff] for six consecutive months immediately preceding commencement of the child custody proceeding now before the Court. Said minor Children left Utah and moved with

> [plaintiff] to live in Germany on or about 02/28/12, some 26 or more days[6] before commencement of the child custody proceeding now before the Court; therefore, Utah was not then the "home state" for the said minor Children. As of or on or about February 28, 2012, Utah was the "home state" for [Mary] and [Daniel], as they had been living there with [plaintiff] for six consecutive months immediately preceding that date, which was within the six months immediately preceding commencement of the child custody proceeding now before the Court; however, [Mary] and [Daniel] became absent from Utah as of on or about February 28, 2012, and [plaintiff] became absent from Utah with them at the same time, leaving no parent or person acting as a parent remaining living in Utah. [Mary], [Daniel] and [plaintiff] left Utah on or about February 28, 2012, knowing not when they would return, precluding characterization of their absence as "temporary." See: N.C.G.S. 50A-102(7). No other state would qualify as "home state" for [Mary] or [Daniel] and/or have jurisdiction, pursuant to N.C.G.S. 50A-201(a)(1), as of filing of the "Motion in the Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on 3/27/12. This Court therefore has jurisdiction to modify the "Consent Order for Modification of Child Custody and Visitation" of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2).

Plaintiff argues that the trial court erred in its conclusion that Utah had lost its home state status because plaintiff and the children had moved to Germany prior to the date of commencement of the proceeding. Plaintiff does not challenge the sufficiency of the evidence to support the trial court's findings of fact but contends that the trial court erred in concluding that her absence from Utah was not temporary.

The first inquiry as to jurisdiction under the UCCJEA is always the determination of the child's "home state," if any. *Id.* § 50A-201(a)(1). N.C. Gen. Stat. § 50A-102(7) defines "home state" as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody

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6. 27 March 2012 was actually 28 days after 28 February 2012.

> proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7). We must then consider whether the trial court properly determined that plaintiff's absence from Utah was not a "temporary absence."

Our courts have adopted a "totality of the circumstances approach" to the issue of temporary absence. *See Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004).

> Under the UCCJEA, the "home state" definition permits a court to include a temporary absence of a parent or child from the state within the six months before the filing of the custody action as time residing in North Carolina. N.C. Gen. Stat. § 50A–102(7). This Court has held that the proper method for determining whether an absence from the state is a temporary absence is by assessing the totality of the circumstances. *Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004). In *Chick*, we noted the totality of the circumstances test encompasses the length of the absence and the intent of the parties. *Id.* at 450, 596 S.E.2d at 308. The test also permits greater flexibility than other tests by allowing for the "consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise." *Id.*

Hammond, 209 N.C. App. at 633, 708 S.E.2d at 85.

Plaintiff's argument that the trial court erred in finding that her absence from Utah was not a temporary absence is much like the argument of the mother in *Chick*, who contended that "the parties' intent at the time of the move should determine whether the absence is a temporary absence for purposes of home state determinations." *See Chick*, 164 N.C. App. at 449, 596 S.E.2d at 308. Plaintiff argues that she believed that the move to Germany was temporary, and that her husband's orders for deployment at that time only ran to 30 September 2012. Although plaintiff's intent may be a relevant factor, it is by no means controlling. Here, the trial court made additional findings of fact in the 3 December 2013 Order addressing in greater detail the reasons for its conclusion that the absence was not temporary:

> 25. In the underlying case at bar, the Court determines it appropriate to make additional Findings of Fact, from

a review of the evidence previously received during the trial of this child custody case, along with one (1) additional finding from the Plaintiff's circumstances at [the] time [of] this Hearing, in re-examining this issue, pursuant to Plaintiff's Motions, and determining that Plaintiff and the Parties' minor Children's flight from the State of Utah, effective February 28, 2012, does not constitute a period of temporary absence, pursuant to N.C.G.S. 50A-102(7):

A. Plaintiff's Husband, Mr. Gerhauser[,] was not an active duty member of the United States Military. Mr. Gerhauser sought appointment by the United States Military to a full-time support position, which resulted in his receipt of original "unaccompanied" orders to station in Germany.

B. Plaintiff and her Husband, Mr. Gerhauser[,] expended substantial effort to have Mr. Gerhauser's "unaccompanied" order[s] changed to "accompanied" orders, authorizing Mr. Gerhauser to be accompanied by Plaintiff and these Parties' minor Children in Germany.

C. Defendant's Exhibit 1 in the underlying trial of this Matter, subject of these Motions, "Gerhauser Base Order, HEADQUARTERS UTAH NATIONAL GUARD, Office of the Adjutant General," stated, in pertinent parts, "(o) Dependent travel and shipment of household goods and personal baggage of authorized in IAW-JFTR" and further, that Mr. Gerhauser, Plaintiff's Husband was "ordered to Active Duty . . . for the period of time shown plus allowable travel time" to Kelly Barracks in Germany, with the period of time shown being from December 02, 2011 through September 30, 2012.

D. When Plaintiff and the Parties' minor Children departed from Utah, they had no idea when they would return.

E. Plaintiff and Mr. Gerhauser moved their entire Family, including the Parties' minor Children from Utah to Germany.

F. Plaintiff and Mr. Gerhauser went to the extent of having their vehicles shipped from Utah to Germany with them.

> F. [(sic)] Plaintiff and Mr. Gerhauser went to the effort and extent of renting out their residence which they occupied and in which they and the Parties' minor Children lived in the State of Utah, evidencing that they had no intent of returning anytime in the near future or that they even knew when they might return.
>
> G. At the time of the presentation of the Parties['] closing arguments in the underlying trial, November 01, 2012, Plaintiff and Mr. Gerhauser, along with the Parties' minor Children[,] had resided in Germany for eight (8) months.
>
> H. At the time of the Hearing on these Motions, Plaintiff and Mr. Gerhauser had resided in Germany for a period of eighteen (18) months, Mr. Gerhauser having voluntarily extended his and his Family's stay in Germany, still with no return date in sight.

In addition to these findings, in the 28 June 2013 Order, the trial court considered the motives and circumstances of plaintiff's move to Germany and her failure to inform defendant in advance of the impending move:

> 92. [Plaintiff] failed to inform [defendant] that [plaintiff] was moving [Mary] and [Daniel] out of the United States to Germany before doing so because [plaintiff] did not want [defendant] to have [an] opportunity to file an action in court to allow the Court to determine whether such a move was in the said minor Children's best interests. [Plaintiff]'s actions were in disrespect of the Court's continuing responsibility to appropriately determine the best interests of [Mary] and [Daniel].
>
> . . .
>
> 98. [Plaintiff] knew as early as during the Summer of 2011, and shared with [Mary] and [Daniel], that they would be moving overseas with [Mr. Gerhauser] and their half-siblings.
>
> 99. [Mr. Gerhauser] received military orders to move to Germany on or about November 29, 2011. [Mr. Gerhauser] immediately shared this information with [plaintiff]. [Plaintiff] knew that she intended to move

> [Mary] and [Daniel] to Germany some 88-days prior to their actual move to Germany.
>
> 100. [Plaintiff] told her Mother, Mary Scribner, [Mary] and [Daniel]'s maternal Grandmother[,] that [plaintiff] and [Mary] and [Daniel] were moving to Germany on or about January 12, 2012, some 46-days prior to [plaintiff] actually taking [Mary] and [Daniel] to Germany.
>
> 101. Though they were told by [plaintiff] that they were preparing to move to Germany, [plaintiff] instructed [Mary] and [Daniel] to not inform [defendant] of their impending move.

In considering the totality of the circumstances, the trial court properly considered Mr. Gerhauser's voluntarily seeking deployment to Germany, making extra efforts to get "accompanied" orders so the entire family could come, and plaintiff's concealment of the move until it was accomplished. Plaintiff stresses that when she first moved, the length of the deployment was only until 30 September 2012 and contends that the Court should not consider anything that happened after that date. It is true that the determination must be made as of the date of commencement, but the trial court should not ignore a party's actions taken after the relevant date in evaluating the party's credibility and intentions. The trial court properly concluded that plaintiff's actions after the move bolstered its determination that the move was not temporary. *See id.* at 449, 596 S.E.2d at 308 (adopting "totality of the circumstances" approach to issue of temporary absence).

Plaintiff argues that

> a rule in which when a military family is deployed overseas it [(sic)] automatically removes "home state" jurisdiction from the state in which they resided, simply because the family did not know when the deployment would end would be very unjust and subject military families to forum shopping from aggrieved former spouses in child custody matters. At a minimum, the fact [that] a military family is deployed overseas not knowing when they will return should not *preclude* a trial court from considering the absence temporary based on the totality of the circumstances—which, in this case, demonstrate the Gerhausers did intend to return to their home in Utah, where [plaintiff] remained a citizen and resident as found by the trial court.

We do not agree with plaintiff that the trial court considered the military deployment as "automatically" removing Utah's home state jurisdiction, nor do we endorse such a rule. The trial court considered many factors in making this determination. We also do not endorse a rule that a military deployment, even if the initial orders provide for a limited time period, is always a temporary absence.A military deployment is just one of the circumstances that a trial court may consider in determining whether an absence from a state is temporary.[7] And as noted above, although the determination is made based upon the circumstances on the date of commencement, the court need not ignore what happened afterwards, as this evidence may or may not tend to support the moving parent's claims. For example, in *Lemley v. Miller*, the court considered what happened after the initial military deployment to support its determination that the parent's relocation was a temporary absence:

> Important to our determination that the child's residency in Germany was a temporary absence is that, immediately before the family left for Germany, Lemley and the child resided in Harker Heights for one and one-half years. Additionally, when returning to the United States from Germany, Lemley and the child came back directly to Harker Heights where they continue to reside. Based upon the facts of this case, no other state but Texas had even the opportunity to become the child's home state.

932 S.W.2d at 287.

Here, Mr. Gerhauser actively sought "accompanied" status so that his family could come to Germany and then sought to stay in Germany after the initial assignment; his extended assignment was not forced upon him in disregard to his wishes or plans. In addition, even after defendant filed the motion to modify, plaintiff still did not inform defendant of her husband's new orders extending his assignment in Germany for a year, through September 2013, until she was "asked on the stand in open Court, under oath, in [the] hearing, on October 26, 2012." Mr.

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7. As few North Carolina cases have addressed this issue, we have also reviewed cases of other states applying this same provision of the UCCJEA or its predecessor, the Uniform Child Custody Jurisdiction Act ("UCCJA"). Some courts have considered a military deployment as not a "temporary absence." *See, e.g.*, *Carter v. Carter*, 758 N.W.2d 1, 9 (Neb. 2008); *Consford v. Consford*, 711 N.Y.S.2d 199, 205 (N.Y. App. Div. 2000); *L.H. v. Youth Welfare Office*, 568 N.Y.S.2d 852, 856 (N.Y. Fam. Ct. 1991). Others have considered military deployment as a "temporary absence." *See, e.g.*, *Lemley v. Miller*, 932 S.W.2d 284, 287 (Tex. App. 1996) (per curiam). But in all of these cases, the courts considered various other circumstances of the parties and children in addition to the deployment to make the determination.

Gerhauser and plaintiff had their vehicles shipped to Germany, and they relocated six children, at least three of whom were of school age, in the middle of a school year. These actions indicate that he and plaintiff intended to stay in Germany for an extended and indefinite period of time, with, as the trial court found, "no return date in sight" even as of the last hearing. Thus, on *de novo* review, we agree that plaintiff's absence from Utah on the date of commencement was not a "temporary absence" and Utah was no longer the "home state" of the minor children. Although Utah had been the "home state" within six months prior to the commencement of the proceeding, no parent continued to live in Utah, so Utah did not have "home state" jurisdiction. *See* N.C. Gen. Stat. § 50A-201(a)(1).

Although the parties have not made any argument regarding the possibility that another state may have jurisdiction under N.C. Gen. Stat. § 50A-201, we note that the findings of fact do raise questions of whether either Florida or Germany may have jurisdiction. Pursuant to N.C. Gen. Stat. § 50A-105(a), "[a] court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2 [of the UCCJEA]." *Id.* § 50A-105(a) (2013). N.C. Gen. Stat. § 50A-201 and 202 are included in Part 2 of the UCCJEA, so we must treat Germany no differently than Utah, Florida, or North Carolina. *See id.*

The children lived in Germany on the date of commencement, but they had been there for only approximately 28 days and not "six consecutive months immediately before commencement," so Germany was not the "home state" of the children on the date of commencement. *See id.* § 50A-102(7). The children had visited defendant in Florida prior to the date of commencement, but they had not lived there for "six consecutive months immediately before the commencement." *See id.* The children had no "home state" on the date of commencement, so we must proceed to consider significant connection jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2).

iii. Significant Connection Jurisdiction

If there is no home state, N.C. Gen. Stat. § 50A-201(a)(2) then directs that "a court of this State has jurisdiction to make an initial child-custody determination" where

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; *and*

> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships.

Id. § 50A-201(a)(2) (emphasis added).

This jurisdiction is normally referred to as "significant connection" jurisdiction. We generally determine jurisdiction by examining the facts existing at the time of the commencement of the proceeding. *See Carolina Marina & Yacht Club, LLC v. New Hanover Cnty. Bd. Of Comm'rs*, 207 N.C. App. 250, 252, 699 S.E.2d 646, 648 (2010), *disc. rev. denied*, ___ N.C. ___, 706 S.E.2d 253 (2011). Neither plaintiff nor defendant argued that any state has "significant connection" jurisdiction in this case when the jurisdiction issue was addressed upon the post-trial motions.[8] In the 28 June 2013 Order, the trial court relied on (a)(2) in finding that North Carolina had significant connection jurisdiction. The trial court found that "[t]he [p]arties have voluntarily litigated all matters regarding custody and support of [Mary] and [Daniel] in this [c]ause, and neither [p]arty objects to this Court continuing to exercise jurisdiction to decide this [c]ause." This custody case did have a long history of litigation in Moore County and neither party had objected to jurisdiction, but since jurisdiction cannot be conferred by consent, this finding does not support a conclusion of jurisdiction under (a)(2). *See Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 ("Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel."). In the 3 December 2013 Order, the trial court instead relied on (a)(4), sometimes called jurisdiction by necessity or default jurisdiction, after concluding that no state would have jurisdiction under (a)(1), (a)(2), or (a)(3). *See* N.C. Gen. Stat. § 50A-201(a)(4).

As mentioned above, the record raises other issues regarding significant connection jurisdiction that have not been argued by the parties. It is understandable that each party had his or her own reasons for not wanting to make an argument as to whether "any other state" might have

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8. Plaintiff's brief before this Court does at least acknowledge this alternative:

> Even assuming arguendo Utah did not have home state jurisdiction, there are at least two states on this record which would have "significant connection" jurisdiction under subsection (a)(2): Utah and, to a lesser degree, Florida. This is because each parent had substantial connections to Utah or Florida, respectively. Moreover, as the children had primarily been living, schooled, and engaged in social and other activities as well as personal relationships in Utah for the several years preceding this action, such evidence would clearly be located there.

significant connection jurisdiction, where there are four potential states to consider under the facts of this case. This custody case has been long, hard-fought, and expensive, both financially and emotionally, to all involved. Perhaps it was cheaper and easier for the parties to continue litigating their case in North Carolina, where it had been since 2002, than to start over with new litigation in another state. But the policy and intent behind the UCCJEA and the Parental Kidnapping Prevention Act ("PKPA") is to ensure that custody orders are enforceable in any state because the issuing court has exercised jurisdiction in accord with the UCCJEA and PKPA. This jurisdictional rule must be enforced in all cases. *See Williams v. Williams*, 110 N.C. App. 406, 409, 430 S.E.2d 277, 280 (1993) ("To determine jurisdiction of child custody issues, the trial court must follow the mandates of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (1989), and North Carolina's Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1–50A-25 (1989)."). Although differing in some respects, the provisions of the PKPA and UCCJEA are substantially similar. The PKPA provides in pertinent part:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g) (2012); *see also* N.C. Gen. Stat. § 50A-106 (2013).

On *de novo* review of jurisdiction under the UCCJEA, we must now consider what the parties did not: whether any other state, here Florida, Utah, or Germany, would have had significant connection jurisdiction on 27 March 2012, the date of commencement of this proceeding. Fortunately, the trial court made extensive and detailed findings of fact in both orders, none of which are challenged by the parties, so we have adequate factual findings upon which to make legal conclusions of significant connection jurisdiction in this case.

1. North Carolina

Defendant argues that if North Carolina did not have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) as found in the trial court's last order, it has jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2) as found in the first order. Defendant contends that

> [t]his matter has been litigated by the parties in Moore County, North Carolina since September[] 2002—twelve

> years. Because the matter of child custody has been litigated in this state for over a decade, the amount of historical evidence pertaining to the welfare of the children is substantial enough to make this State the proper jurisdiction under "significant connection" jurisdiction.

Defendant cites no authority to support the proposition that the history of the litigation itself can be the "significant connection" and "substantial evidence" that would confer jurisdiction. In fact, N.C. Gen. Stat. § 50A-207 supports our conclusion that these factors alone cannot confer jurisdiction. S*ee* N.C. Gen. Stat. § 50A-207 (2013). Under N.C. Gen. Stat. § 50A-207(b), when a court "*which has jurisdiction* under this Article" is considering declining jurisdiction because it is an inconvenient forum, the court may consider several factors, including "(5) [a]ny agreement of the parties as to which state should assume jurisdiction . . . and (8) [t]he familiarity of the court of each state with the facts and issues in the pending litigation." *Id.* § 50A-207(a), (b) (emphasis added). But the court must first have jurisdiction, as determined under N.C. Gen. Stat. § 50A-201(a)[9], before it may consider these factors, and it may consider them only as part of a determination of whether the court should decline to exercise its jurisdiction, where another state would also have jurisdiction.

As noted briefly above, we conclude that North Carolina did not have significant connection jurisdiction. Neither parent lived in North Carolina; plaintiff and the children moved away in 2004, more than seven years before the date of commencement of this proceeding. The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of "significant connection" required by N.C. Gen. Stat. § 50A-201(a)(2). It is true that there was "substantial evidence" available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children's "care, protection, training, and personal relationships." *Id.* § 50A-201(a)(2). But N.C. Gen. Stat. § 50A-201(a)(2) requires both a "significant connection" and "substantial evidence," so North Carolina does not have "significant connection" jurisdiction. *See id.*

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9. N.C. Gen. Stat. § 50A-201(b) provides that "[s]ubsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State." *Id.* § 50A-201(b).

2. Utah

Plaintiff argues that Utah would have significant connection jurisdiction. Under the orders, Utah is the most obvious candidate state for significant connection jurisdiction. Even though no parent continued to live in Utah on the date of commencement, plaintiff and the children had only been away from Utah for approximately 28 days, after having lived there for about five and a half years. The trial court found that "[p]laintiff . . . remains a citizen of the United States and a resident of the State of Utah, but currently resides in or about Aichelbergneg, Germany." Plaintiff and her husband still own the home in which the children lived, which they rented out when they moved to Germany. As the children lived in Utah, attended school, received medical care, and generally carried on their lives in Utah for five and a half years, they still had "significant connections" to Utah only 28 days after leaving. There was also "substantial evidence" available in Utah regarding the children's "care, protection, training, and personal relationships" as they had been living there for five and a half years. *See id.* Thus, Utah would have had "significant connection" jurisdiction on 27 March 2012. *See id.*

3. Germany

The trial court also made extensive findings of fact about Germany. On the date of commencement, the children had lived there approximately 28 days. They had just begun the process of getting settled in Germany when defendant filed his motion. The trial court found that "[w]hen [plaintiff] arrived in Germany with all 6 minor [c]hildren, [plaintiff] did not know where they would be staying. They stayed in a hotel on base at Kelley Barracks Military Base for about a week after their arrival in Germany." At that time, the children had not developed a "significant connection" to Germany, nor would there have been time for "substantial evidence" regarding the children's "care, protection, training, and personal relationships" to develop. *See id.* Germany did not have "significant connection" jurisdiction on 27 March 2012. *See id.*

4. Florida

Plaintiff's brief also recognizes the possibility that Florida could have significant connection jurisdiction, and we agree that it does. Although the children had not lived in the primary physical custody of defendant as of the date of commencement, defendant shared joint legal custody of the children since the first custody order, and since defendant's move to Florida in 2009, the children had spent extended times in Florida during summers and holidays. In addition, they have a half-brother and stepsiblings in Florida. The trial court made extensive findings of fact about

defendant's home and family in Florida, including his wife Karen and the children's relationships with their step-family. The trial court made findings about the children's housing, activities, relationships, and household duties while in Florida. From these findings, it is clear that the children had developed relationships with their brother, step-siblings, and others in Florida long before 2012, based upon their time visiting there. There was also "substantial evidence" available in Florida, based on these relationships and activities. *See id.* Thus, Florida also had "significant connection" jurisdiction as of 27 March 2012. *See id.*

We have also considered whether N.C. Gen. Stat. § 50A-201(a)(2) requires us to decide which of the two states, Utah or Florida, had more significant contacts and substantial evidence, and we have found no authority directly on point, either in North Carolina or elsewhere. Reading the statute as a whole, N.C. Gen. Stat. § 50A-201(a)(4) requires us to determine only whether a "court of any other state" would have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1), (2), or (3). *Id.* § 50A-201(a)(4). If so, "this state" does not have jurisdiction. *Id.* In this particular situation, we do not believe it is necessary or appropriate for us to consider which of the two states had the *most* "significant connections" and "substantial evidence" in March 2012. It is sufficient for us to determine that either of them could have exercised significant connection jurisdiction, consistent with the mandates of the UCCJEA and PKPA. Even if we were to address which state had the most "significant connections," our ruling would have no effect on how this case may proceed after this appeal, since that will depend upon the home state and other relevant circumstances of the children and parties on the "date of commencement[,]" when a new motion or proceeding regarding custody is filed. *See id.* § 50A-201(a)(1).

iv. More Appropriate Forum Jurisdiction

N.C. Gen. Stat. § 50A-201(a)(3) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208." *Id.* § 50A-201(a)(3). As noted above, Utah and Florida had significant connection jurisdiction as of the date of commencement, so they are courts having jurisdiction under (a)(2). As also discussed above, no party has informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.* § 50A-209(d). Neither Utah nor Florida has declined to exercise

jurisdiction for any reason, including under N.C. Gen. Stat. § 50A-207 or N.C. Gen. Stat. § 50A-208. Thus, North Carolina could not exercise jurisdiction under section 50A-201(a)(3). See id. § 50A-201(a)(3).

v. Jurisdiction by Necessity

N.C. Gen. Stat. § 50A-201(a)(4) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *Id.* § 50A-201(a)(4). We have determined that both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012. Since another state would have jurisdiction under the criteria of (a)(2), North Carolina cannot exercise jurisdiction by necessity under subdivision (4). *See id.* The trial court erred in concluding that no other state would have had jurisdiction under subdivisions (1), (2), or (3); thus, the trial court erred in exercising jurisdiction under (a)(4). *See id.*

IV. Conclusion

Because the trial court did not have subject matter jurisdiction under N.C. Gen. Stat. § 50A-201(a), we vacate the orders entered on 13 June 2013, 28 June 2013, and 3 December 2013. Because all three orders must be vacated, we need not consider plaintiff's arguments regarding the trial court's modification of primary custody or the delay in entry of the custody modification order.

VACATED.

Chief Judge McGEE concurs.

BRYANT, Judge, dissenting.

Because I do not believe the trial court's findings of fact lead unavoidably to the conclusion that jurisdiction in this forum is extinguished, I respectfully dissent.

Even if the parties lack a significant connection to North Carolina, a North Carolina court may exercise jurisdiction provided courts of the alternative forums decline to exercise such. *See* N.C.G.S. § 50A-201(a)(3) (A court of this State has jurisdiction to make a child-custody determination if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the

child . . . ."). No court in an alternative forum has been presented with the question of assuming jurisdiction.

Moreover, I do not believe the jurisdictional framework of the UCCJEA, as codified in our General Statutes, compels that this forum relinquish jurisdiction over a current child custody matter when no other forum has assumed jurisdiction. As noted by the majority at the time the custody action was revived in 2012, the minor children had no home state, and the record reflects no acknowledgment by the parties or a court of an alternative forum as to an intent to exercise jurisdiction. Vacating the trial court's order absent an acknowledgement that jurisdiction would be exercised by another forum is not a relinquishment of jurisdiction; it is an extinguishment. *See* N.C.G.S. § 50A-202 (Official Comment) ("[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction. . . . [T]he State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207."); *see also In re Baby Boy Scearce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (1986) ("Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined." (citations omitted)).

For this reason, I would reverse the trial court's order and remand it for a determination of what forum will exercise jurisdiction. *See* N.C.G.S. § 50A-110(a) ("Communication between courts") ("A court of this State may communicate with a court in another state concerning a proceeding arising under [the UCCJEA as codified in General Statutes, Chapter 50A, Article 2].").

Also, I write separately to note the majority's analysis concluding that North Carolina, as a forum, lacks jurisdiction over this child custody matter is precariously perched on the following observation and extrapolation: "The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of 'significant connection' required by N.C. Gen. Stat. § 50A-201(a)(2)."[1]

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1. The majority acknowledges that "there was substantial evidence available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children's care, protection, training, and personal relationships." (citation and quotations omitted).

This conclusion is influenced by an analysis of factors listed in section 50A-207.1 authorizing a court to decline the exercise of jurisdiction where this forum is determined to be inconvenient. While I acknowledge there is little guidance directly addressing the question of when a history of litigation, standing alone, can connote a significant connection to a forum, I am not persuaded that the history of litigation as evidenced here is irrelevant to that consideration.

The custody litigation commenced in Moore County in 2002 and was revived in 2004, 2009, and 2010, prior to the current action filed in 2012. While plaintiff and the minor children moved from North Carolina in 2004 and defendant moved from North Carolina in 2009, both parties participated in current proceedings before the Moore County District Court and failed to raise the issue of jurisdiction or the possibility of alternative forums prior to the trial court's 28 June 2013 order declaring the exercise of jurisdiction proper in North Carolina. It would appear that while jurisdiction cannot be conferred by the consent of the parties, the impropriety of North Carolina's exercise of jurisdiction was not immediately obvious. Whether it is of legal significance may be debatable but, it is apparent the parties felt a connection to this State that was not insignificant.

IN THE MATTER OF A.R. AND C.R.

No. COA14-732

Filed 31 December 2014

1. Appeal and Error—order ceasing reunification efforts—appeal untimely

In an appeal of the trial court's order ceasing reunification efforts between respondent mother and her children, respondent's appeal was untimely and therefore dismissed. Although the 180-day period in N.C.G.S. 7B-1001(a)(5)(b) delayed the date from which notice of appeal could be taken, respondent waited more than ten months from the entry of the order to file her notice of appeal, exceeding the 210-day time limit.

2. Child Abuse, Dependency, and Neglect—guardian ad litem—appointed in assistance-only capacity—no abuse of discretion

In an appeal of the trial court's order awarding guardianship of respondent mother's children to paternal relatives, the trial court

did not abuse its discretion by appointing her a guardian ad litem (GAL) in an assistance-only capacity. The fact that respondent suffered epileptic seizures and that the father exercised strong influence over her did not render her incompetent. The GAL testified that respondent was smart, reasonable, and understood the proceedings, and respondent testified that she had graduated from high school, paid her bills, managed her daily affairs, and was capable of making her own decisions.

Appeal by respondent-mother from orders entered 14 June 2013 and 2 June 2014 by Judge Ali B. Paksoy in Cleveland County District Court. Heard in the Court of Appeals 2 December 2014.

Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.

Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals from the trial court's orders which ceased reunification efforts with respondent and her minor children "Ariel" and "Cristina[1]" (collectively "the children") and awarded guardianship of the children to paternal relatives in Arizona. We dismiss in part and affirm in part.

I. Background

On 21 May 2012, the Cleveland County Department of Social Services ("DSS") filed petitions alleging that the children were neglected, based upon respondent and her husband's (collectively "the parents") failure to properly treat Ariel's seizure disorder and Cristina's asthma. After a hearing, the trial court entered an order which adjudicated the children as neglected on 5 December 2012. The trial court placed the children in the physical and legal custody of DSS and ordered the parents to obtain psychological evaluations and follow any treatment recommendations which resulted. The parents were granted visitation, with respondent

1. Pseudonyms are used to protect the identity of the minor children.

receiving an extra hour of visitation per week outside the presence of the children's father.

At a subsequent hearing, the trial court appointed a guardian *ad litem* ("GAL") to assist respondent. On 19 February 2013, the trial court entered an order appointing respondent-mother a GAL in an assistance-only capacity.

Respondents failed to obtain their required psychological evaluations. As a result, on 14 June 2013, the trial court entered an order which ceased reunification efforts, suspended the parents' visitation, changed the children's permanent plan to guardianship, and placed the children with paternal relatives in Arizona. Both parents filed a notice of their intent to appeal the trial court's order. DSS did not initiate any proceedings to terminate respondent's parental rights in the 180 days after the entry of the order ceasing reunification efforts. Respondent entered formal notice of appeal of that order on 21 April 2014.

On 2 June 2014, the trial court entered an order awarding permanent guardianship to the paternal relatives in Arizona. Respondent appeals. The father did not appeal this order.

II. Appellate Jurisdiction

[1] As an initial matter, we note that respondent did not file a notice of appeal from the trial court's 14 June 2013 order ceasing reunification efforts until 21 April 2014, more than ten months after the order was entered. Pursuant to N.C. Gen. Stat. § 7B-1001(b), "[n]otice of appeal and notice to preserve the right to appeal shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2013). However, under N.C. Gen. Stat. § 7B-1001(a)(5), a parent who has properly preserved the right to appeal an order which ceases reunification "shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order." N.C. Gen. Stat. § 7B-1001(a)(5)(b) (2013). Thus, for a respondent-parent who has preserved their right to appeal the order ceasing reunification efforts, the statute renders the order unappealable for a period of 180 days, if no termination of parental rights ("TPR") petition or motion is filed. *See In re D.K.H.*, 184 N.C. App. 289, 645 S.E.2d 888 (2007) (dismissing an appeal of an order ceasing reunification efforts filed less than 180 days after the entry of the order when no TPR petition had been filed). After 180 days have passed without the filing of a TPR petition or motion, the respondent-parent may proceed with their appeal.

Respondent contends that once 180 days have passed, a parent has the right to appeal the order at essentially any time, so long as the trial court "continues to review the matter." In support of her contention, respondent notes that N.C. Gen. Stat. § 7B-1001(a)(5) "contains no affirmative language covering a deadline date in which to appeal such orders when there is no subsequent [TPR] action." However, respondent's interpretation of N.C. Gen. Stat. § 7B-1001(a)(5) is illogical when that subsection is considered *in pari materia* with the remainder of the statute.

N.C. Gen. Stat. § 7B-1001(a) (1) – (6) lists the six types of juvenile orders which are appealable. N.C. Gen. Stat. § 7B-1001(b) then establishes that notice of appeal "shall be made within 30 days after entry and service of" these orders included in subsection (a). In light of the 30-day time limitation to appeal that unquestionably applies to the other orders listed in N.C. Gen. Stat. § 7B-1001(a), we conclude that the 180-day period in N.C. Gen. Stat. § 7B-1001(a)(5)(b) operates solely to delay the date from which notice of appeal may be taken. Once the 180 days after the entry of the order ceasing reunification efforts has elapsed, the respondent-parent that has properly preserved their right to appeal the order becomes subject to the 30-day limitation in N.C. Gen. Stat. § 7B-1001(b).

In the instant case, the trial court's order ceasing reunification efforts with respondent was entered on 14 June 2013. Respondent timely filed her notice of intent to appeal that order. However, respondent did not file her notice of appeal until 21 April 2014. This date was unquestionably more than the 210 days after the entry of the order ceasing reunification efforts, and as a result, respondent's appeal of that order was untimely and must be dismissed.

However, respondent has also filed a petition for writ of *certiorari* seeking our review of the trial court's 14 June 2013 order which ceased reunification efforts. In our discretion, we deny respondent's petition because the only argument respondent makes on appeal does not relate directly to this order. Thus, our appellate review in the instant case is limited to respondent's appeal from the trial court's 2 June 2014 order which awarded permanent guardianship to paternal relatives in Arizona, from which respondent timely appealed.

III. Guardian *ad Litem*

[2] Respondent argues that the trial court erred by appointing her a GAL in an assistance-only capacity, rather than a substitution capacity. We disagree.

At the time the trial court appointed a GAL for respondent, the appointment was governed by N.C. Gen. Stat. § 7B-1101.1(c) (2011), which stated:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

This statute permitted the trial court to "appoint a GAL upon finding a 'reasonable basis' for believing that the parent *either* (1) is incompetent, or (2) has diminished capacity and cannot adequately act in his or her own interest. Any appointment of a GAL is required to be in accordance with Rule 17 of the Rules of Civil Procedure." *In re P.D.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 157 (2012) (internal quotations and citation omitted). In *P.D.R.*, this Court established that a GAL appointed under this statute would serve different roles, depending upon the reason for the appointment:

> [T]he role of the GAL should be determined based on whether the trial court determines that the parent is incompetent or whether the trial court determines that the parent has diminished capacity and cannot adequately act in his or her own interest. Rule 17(e), which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent — the role of the GAL should be one of substitution. On the other hand, if the parent has diminished capacity, N.C. Gen. Stat. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance.

Id. at ___, 737 S.E.2d at 158. "If the court chooses to exercise its discretion to appoint a GAL under N.C. Gen. Stat. § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the GAL should play, whether one of substitution or assistance." *Id.* at ___, 737 S.E.2d at 159.

In the instant case, the court appointed respondent a GAL that would serve in an assistance-only capacity. Respondent contends that the trial court's conclusion was erroneous because the evidence before the court demonstrated that respondent was incompetent. Respondent is mistaken.

An incompetent adult is defined as one who "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2013). Respondent contends that there was evidence before the trial court that she suffered from epileptic seizures and that the children's father exercised such a strong influence over her that she was rendered incompetent.

However, at the hearing in which the trial court considered the propriety of appointing a GAL, the proposed GAL specifically testified that respondent was reasonable, smart, and understood the proceedings. She further testified that she could possibly assist respondent if respondent was making poor decisions that were influenced by the children's father. Also at the hearing, respondent told the trial court that she graduated from high school, paid her bills, managed her daily affairs, and was capable of making her own decisions. Based upon this evidence, we conclude that the trial court did not abuse its discretion by appointing a GAL for respondent in an assistance-only capacity. This argument is overruled.

IV. Conclusion

After 180 days had elapsed from the entry of the trial court's order ceasing reunification efforts with respondent, respondent had 30 days to enter her notice of appeal from that order and failed to do so. As a result, we dismiss respondent's appeal from the trial court's 14 June 2013 order. The trial court did not abuse its discretion by appointing a GAL for respondent to serve in an assistance-only capacity. Consequently, we affirm the trial court's 2 June 2014 order which awarded permanent guardianship to paternal relatives in Arizona.

Dismissed in part and affirmed in part.

Judges STROUD and McCULLOUGH concur.

IN RE ADOPTION OF ROBINSON

[238 N.C. App. 308 (2014)]

GARRY MARTINOUS ROBINSON and ANITA JO ROBINSON, Petitioners, FOR THE ADOPTION OF B.J.R., A Minor Child

WILLIAM PHELAN PATE, Plaintiff
v.
SHAUNASIE UNIQUE PERKINS, GARRY MARTINOUS ROBINSON, and ANITA JO ROBINSON, Defendants

No. COA14-327

Filed 31 December 2014

1. Adoption—child born out of wedlock—failure of father to meet statutory support requirements—father's consent not required

The trial court did not err by concluding that the consent of plaintiff father was not required under N.C.G.S. § 48-3-601 for the adoption of his daughter, who was born out of wedlock. Plaintiff failed to meet the support requirements of N.C.G.S. § 48-3-601 because his parents provided for his needs and he had at least $1,000 in his bank account that he was free to spend, yet he did not provide any monetary or tangible support to the mother or child before the filing of the adoption petition.

2. Adoption—child born out of wedlock—father's consent not required—as-applied constitutional challenge—insufficient actions after birth to develop relationship with child

The trial court did not violate plaintiff father's substantive due process rights under the state and federal constitutions by determining that his consent was not required for the adoption of his daughter, who was born out of wedlock. Although many of plaintiff's actions before the birth of his daughter were consistent with the desire to develop a relationship with her, his actions after the birth of the child were insufficient. Because plaintiff failed to take the opportunity to develop a relationship with his child, his parental rights under the Constitution were not "full blown," and Chapter 48 of the General Statutes was not unconstitutional as applied to him.

Appeal by Plaintiff from an order entered 26 August 2013 by Judge Anna F. Foster in Lincoln County District Court. Heard in the Court of Appeals 10 September 2014.

Crowe & Davis, P.A., by H. Kent Crowe, for the Plaintiff-Appellant, William Phelan Pate.

Thomas B. Kakassy, for the Third-Party Defendant-Appellees, Garry Martinous Robinson and Anita Jo Robinson.

DILLON, Judge.

William Phelan Pate ("Plaintiff") appeals from an order adjudicating that his consent to his daughter's adoption was not required. For the reasons stated below, we affirm.

I. Background

Plaintiff and Shaunasie Unique Perkins ("Ms. Perkins") dated for about seven months from late 2011 to mid-2012, while both were attending high school and into the summer. The two engaged in sexual intercourse on a number of occasions. At some point during their relationship, Ms. Perkins became pregnant. She informed Plaintiff of her pregnancy.

In August of 2012, their relationship began to deteriorate when Ms. Perkins moved away to attend college and Plaintiff remained in high school.

On 7 January 2013, Ms. Perkins gave birth to a baby girl without informing Plaintiff. She authorized a direct discharge of the child to Garry and Anita Robinson, the prospective adoptive parents, and signed a consent form. The Robinsons took the child home with them the following day.

On 13 January 2013, after discovering that Ms. Perkins had given birth, Plaintiff filed an action for child custody, child support and genetic testing.

On 13 February 2013, the Robinsons filed a petition for adoption. On 21 February 2013, Plaintiff filed an objection to the adoption, contending that as the biological father his consent was required.

On 7 June 2013, the trial court entered an order for genetic testing. In early July of 2013, Plaintiff learned that the results from the testing proved him to be the father of the child.

On 26 August 2013, the trial court entered an order denying Plaintiff's motion to dismiss the adoption proceeding, concluding that Plaintiff's consent was not required. Plaintiff timely appealed from this order.

II. Jurisdiction

An order determining that a putative father's consent to an adoption is unnecessary is immediately appealable because a father's right to make decisions concerning the care, custody, and control of his children is fundamental, and the denial of his right to consent to an adoption deprives him of this fundamental right. *In re Schuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 459-60 (2004). Accordingly, we proceed to address the merits of Plaintiff's arguments.

III. Analysis

Plaintiff makes two arguments on appeal: He contends that his consent is required to allow the adoption of his child by the Robinsons to proceed pursuant to the General Statutes and, alternatively, pursuant to the State and federal Constitutions. We address each argument in turn.

A. Statutory Requirements

[1] "The adoption of children is purely a statutory procedure and the only procedure for the adoption of minors is that prescribed by G.S. Chapter 48." *In re Daughtridge*, 25 N.C. App. 141, 145, 212 S.E.2d 519, 521 (1975) (internal marks omitted). Our Supreme Court has explained that by enacting Chapter 48,

> the General Assembly recognized the public interest in establish[ing] a clear judicial process for adoptions, . . . promot[ing] the integrity and finality of adoptions, [and] structur[ing] services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

In re Anderson, 360 N.C. 271, 275-76, 624 S.E.2d 626, 628-29 (2006) (internal marks and citations omitted).

Chapter 48 designates the class of unwed putative fathers whose consent to an adoption is required under the statutory scheme. In relevant part, Chapter 48 provides that an adoption petition may not be granted without the consent of any man who – prior to the earlier of the filing of the adoption petition or the date of hearing under N.C. Gen. Stat. § 48-3-601 – has done three things: (1) acknowledge paternity; (2) communicate or attempt to communicate with the mother regularly; ***and*** (3) make reasonable and consistent support payments within his financial means for the mother or child or both. N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2013); *In re Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001).

In the present case, the trial court, relying on our Supreme Court's opinion in *Byrd*, ruled that Plaintiff failed to meet the third prong under this portion of the statute, concluding that Plaintiff "failed to satisfy the support requirement found in N.C. [Gen. Stat.] § 48-3-601(2)(b)(4)(II)" prior to the filing of the adoption petition, which occurred on 13 February 2013. Specifically, the district court found as follows: Plaintiff lived with his parents and worked part-time between February and August of 2012. He had a joint checking account with his father where he deposited the money he earned, and this account always had at least $1,000.00 on deposit. His basic needs were provided for by his parents, so the money in the bank account was his to spend. Though he spent money on dates with Ms. Perkins and did *offer* on occasion to provide financial resources to her, he never *actually* provided money or any other tangible support. Likewise, he never offered any support to the Robinsons for the child prior to the filing of the adoption petition. Finally, though the trial court found that Plaintiff purchased two packages of infant diapers after the child's birth, the court also found that these packages were never delivered to the Robinsons. Plaintiff fails to challenge any of these findings. Thus, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991).

We conclude that the trial court's findings support its conclusion that Plaintiff did not provide "reasonable and consistent" payments of support commensurate with his ability to provide such payments. As our Supreme Court has held, the statute requires "actual, real and tangible support, and that attempts or offers of support do not suffice." *Byrd*, 354 N.C. at 196, 552 S.E.2d at 148. Accordingly, this portion of Respondent's argument is overruled.

B. Constitutional Protections

[2] Plaintiff next contends that his substantive due process rights supplied by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution were violated by the district court's determination that his consent to adoption was not required and that Chapter 48 is therefore unconstitutional as applied to him. Again, we disagree.

At the outset, we note that whether Plaintiff's child might be better off with the Robinsons than with Plaintiff is irrelevant to the core constitutional question in this case. *Cf. Adoptive Couple v. Baby Girl*, ___ U.S. ___, ___, 133 S. Ct. 2552, 2572, 186 L. Ed.2d 729, 752 (2013) (Scalia, J., dissenting) ("We do not inquire whether leaving a child with his parents

is 'in the best interest of the child.' . . . [P]arents have their rights, no less than children do."). As our Supreme Court has explained,

> [a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). The issue presented by this case is whether Plaintiff, as an unwed biological father, enjoys that constitutionally paramount status.

At common law, a child born out of wedlock "was said to be a *filius nullius*, the child of nobody." *State v. Robinson*, 245 N.C. 10, 13, 95 S.E.2d 126, 128 (1956). An unwed father had no legal *obligation* to support the child or its mother, *see State v. Tickle*, 238 N.C. 206, 209, 77 S.E.2d 632, 634 (1953); however, his *right* to the care, custody, and control of that illegitimate child was generally subjugated to the mother's paramount right. *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965).

Today, the state of the law is considerably different. *See, e.g.*, *Rosero v. Blake*, 357 N.C. 193, 199, 581 S.E.2d 41, 45 (2003). Unwed fathers and mothers are no longer on unequal footing with respect to their parental rights and obligations. *See id.* at 199-204, 581 S.E.2d 45-48. Both parents owe their children a duty of support, and the law protects their rights because it presumes that they will fulfill their obligations. *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961).

The United States Supreme Court, however, has held that not all biological fathers are entitled to the same substantive due process protections. *Lehr v. Robertson*, 463 U.S. 248, 263-64, 103 S. Ct. 2985, 2994-95, 77 L. Ed.2d 614, 627-28 (1983). "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260, 103 S. Ct. at 2992, 77 L. Ed.2d at 626. The *Lehr* Court was careful to distinguish the interest of fathers in *developed* parent-child relationships from the merely "inchoate" interest of fathers in *potential* parent-child relationships. The *Lehr* Court described the inchoate interest of a biological father who did not have a developed relationship with his child as follows:

> The significance of the biological connection is that it *offers the natural father an opportunity* that no other

> male possesses to develop a relationship with his offspring. *If he grasps that opportunity* and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 103 S. Ct. at 2993-94, 77 L. Ed.2d at 627 (emphasis added). The *Lehr* Court recognized that the inchoate interest of an unwed father to have an opportunity to develop a relationship with his child is entitled to some level of protection under the federal Constitution. *See id.* at 249-50, 103 S. Ct. at 2987, 77 L. Ed.2d at 619 (phrasing the question as "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child").

The *Lehr* case involved a putative father who did not have actual notice of the birth of the child or of the child's adoption. The *Lehr* Court concluded that "statutes that establish classes of biological fathers entitled to notice nevertheless may fail constitutional scrutiny (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are beyond the control of an interested putative father." *In re S.D.W.*, ___ N.C. ___, ___, 758 S.E.2d 374, 380 (2014) (citing *Lehr*, 463 U.S. at 263-64, 103 S. Ct. at 2994, 77 L. Ed.2d at 628) (emphasis added).

Our Supreme Court dealt with the notice requirements under Chapter 48 this past summer in a case involving a biological father who only became aware of the existence of his child after the mother had given birth and had placed the child with adoptive parents. *See In re S.D.W.*, ___ N.C. ___, 758 S.E.2d 374 (2014). The Court ultimately held that Chapter 48 was not unconstitutional as applied to him. *Id.* at ___, 758 S.E.2d at 381. The Court reasoned that the biological father's passivity in the face of a possibility of pregnancy constituted a failure to grasp the opportunity to develop a parent-child relationship, and concluded that proceeding with the adoption without his consent did not violate his due process rights. *Id.* Specifically, the Court noted that the biological father was well aware that a pregnancy might result from his intimate relationship with the mother and that the child had been in the care of adoptive parents for over five months when the father finally began taking steps to assert his parental rights to the child. *Id.* at ___, 758 S.E.2d at 375-76. Further, the Court observed that the biological father exhibited "only incuriosity and disinterest" rather than taking the affirmative steps

necessary to establish himself as a responsible father. *Id.* at ___, 758 S.E.2d at 380-81.

In the present case, Plaintiff does not argue that he did not have notice. However, like the biological fathers in *Lehr* and *S.D.W.*, Plaintiff had not developed an enduring relationship with his child such that his rights under the federal Constitution had sprung "full blown," in the words of the *Lehr* Court. Nevertheless, as the biological father of Ms. Perkins' child, he still had a constitutionally protected, inchoate interest in having an "opportunity [to develop a relationship with his child] *and* accept[] some measure of responsibility for the child's future[.]" *Lehr*, 463 U.S. at 262, 103 S. Ct. 2993, 77 L. Ed.2d at 627. Our Supreme Court in *S.D.W.*, in quoting this portion of *Lehr*, described this inchoate interest of an uninvolved biological father as a "liberty interest in developing a relationship with [his] child[.]" ___ N.C. at ___, 758 S.E.2d at 381.

Plaintiff argues that Chapter 48 is unconstitutional as applied to him because the statutory scheme did not afford him an opportunity to develop a relationship with his child. Specifically, he argues that the requirement under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) that a putative father provide *actual* support excludes those fathers, such as him, who *attempt* to provide support but are prevented from doing so under circumstances that are beyond their control. We agree that a conclusion by a court that the consent of a biological father to the adoption of his child is not required under Chapter 48 due solely to circumstances beyond his control *where he has otherwise grasped the opportunity and accepted some measure of responsibility for his child* would result in the statute being unconstitutional as applied to him.

Here, though, we conclude that Chapter 48, as applied in this case to Plaintiff, is not unconstitutional. We recognize the efforts of Plaintiff and note that many of his actions – especially those taken prior to the child's birth - were consistent with his desire to "develop a relationship with [his] child." *S.D.W.*, *supra*. Specifically, the trial court found that Plaintiff, a seventeen-year-old high school student, offered to marry Ms. Perkins while they were dating; that he and his mother offered money to Ms. Perkins during the pregnancy; that he hired an attorney shortly before the child's birth when it was obvious that Ms. Perkins was going to put the child up for adoption; that he contacted Ms. Perkins on a number of occasions during the pregnancy; that he openly acknowledged that the child was his; that at around the time of Ms. Perkins' due date, he and his mother called a number of hospitals to ascertain where

the child was being birthed when Ms. Perkins had not notified him that she was in labor or where she anticipated delivering the child; and that within a week of the child's birth, he filed an action for genetic testing and child custody.

However, the trial court found that Plaintiff made very few efforts *after* the birth of his child to develop a parent-child relationship. For instance, the trial court found that the Robinsons gave Plaintiff *the opportunity* to visit the baby, which he took advantage of on only one occasion - in late January, a few weeks after the birth. The trial court found that he made no further attempt to meet with his child or provide support for her during February, March, April, May, or June. Thus, during the child's first six months of life, besides filing papers with the court, Plaintiff largely remained "passive" in developing a relationship with his child, where his efforts consisted of a single visit in January and a single purchase of diapers, which he never delivered. *See generally S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 381 (emphasizing the unwed father's passivity towards his child during the relevant times). While filing court papers may be part of that which is involved in grasping the opportunity to develop a parent-child relationship in certain situations, we conclude that in this case Plaintiff failed to take many of the essential steps within his control to develop this relationship with his child. *See id.* (noting that the unwed father in that case failed to "grasp [the] opportunity" to take "the steps that would establish him as a responsible father"). Accordingly, we hold that Plaintiff "does not fall within the class of protected fathers who may claim a liberty interest in developing a relationship with a child, and thus he was not deprived of due process."[1] *Id.*

Plaintiff points to the trial court's finding that he did provide $100.00 to the Robinsons; however, the trial court found that this support was provided six months after the child was born, upon learning conclusively from the results of the court-ordered genetic test that he was the child's biological father. Furthermore, awaiting the test results did not excuse Plaintiff from failing to take certain steps – such as visiting the child and offering support for her care – that were available to him to develop a relationship during this time. Specifically, as was held in *Lehr* and *S.D.W.*, due process rights under the federal Constitution only

1. Plaintiff has not put forth any argument that the Law of the Land Clause under the North Carolina Constitution and the Due Process Clause under the federal Constitution are to be construed differently; and, therefore, we do not distinguish between them here. *See S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 378.

spring when one has grasped his opportunity to develop a relationship with his child.[2]

IV. Conclusion

We do not believe that Plaintiff sufficiently grasped the opportunity that was available to him to develop a relationship with his child such that the constitutionally protected paramount rights of parentage sprung fully from his inchoate interest in an opportunity to develop those rights. Accordingly, we believe that the district court did not err in adjudicating that Plaintiff's consent to the adoption of his biological daughter was not required.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

IN THE MATTER OF BABY BOY

No. COA14-647

Filed 31 December 2014

1. Appeal and Error—mootness—termination of parental rights—prior adoption determination

Respondent's appeal from an order terminating her parental rights was not moot where an appellate ruling finalized a prior adoption proceeding of the child, so that the termination of parental rights had no practical effect on the outcome. However, the termination order may have an effect in the future as to any other children plaintiff had or may have.

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2. By our opinion, we do not intend to create a bright-line test as to what one must do to "grasp the opportunity" sufficient to cause full-blown constitutional rights to spring from a putative father's inchoate interest. This determination must be made on a case-by-case basis as each case is fact-specific. Different putative fathers have different opportunities. However, we also do not intend our opinion to be construed to require a putative father who is awaiting the results of genetic testing to sign an affidavit of parentage or take other actions which would impose upon him an affirmative duty to care for the child even if the genetic testing results subsequently show that he is, in fact, not the biological father.

2. Jurisdiction—termination of parental rights—adoption appeal pending

The trial court was not deprived of jurisdiction to terminate parental rights during the pendency of an adoption appeal by N.C.G.S. § 7B-1003. The plain language of the statute limits the trial court's jurisdiction while an appeal of an order entered under the juvenile code is pending, but the statute does not refer to appeals of orders outside the juvenile code.

3. Jurisdiction—standing—termination of parental rights—petition to adopt

Petitioners' standing to file a petition for termination of parental rights was established by their petition to adopt the child in question.

Appeal by respondent from order entered 14 April 2014 by Judge Margaret Eagles in Wake County District Court. Heard in the Court of Appeals 25 November 2014.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cheri C. Patrick, for petitioners-appellees adoptive parents.

Cranfill Sumner & Hartzog LLP, by Michelle D. Connell, for respondent-appellant biological mother.

DILLON, Judge.

Respondent appeals from an order terminating her parental rights to Baby Boy Clark[1]. For the following reasons, we affirm.

I. Background

Respondent gave birth to Baby Boy Clark in April 2012. Respondent and the father signed relinquishment forms and surrendered legal custody of Baby Boy Clark to an adoption agency. On 23 April 2012, the adoption agency transferred physical custody of Baby Boy Clark to appellee parents ("petitioners") who filed a petition to adopt him that same day with the Wake County Clerk of Superior Court (12 SP 1911). *See In re Adoption of "Baby Boy"*, ___ N.C. App. ___, 757 S.E.2d 343, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2014).

1. A pseudonym.

In June 2012, respondent filed a motion to dismiss the adoption petition and to declare her relinquishment void, alleging that her relinquishment did not comply with statutory requirements. *Id.* at ___, 757 S.E.2d at 345-46. By order filed 15 February 2013, the district court declared respondent's signed relinquishment was not valid because it did "not conform to the mandatory statutory requirements of a relinquishment set out in N.C.G.S. 48-3-702 and [was] void to operate as a relinquishment." *Id.* at ___, 757 S.E.2d at 346. Petitioners and the adoption agency appealed to this Court. *Id.*

While the appeal from the trial court's 15 February 2013 order regarding respondent's relinquishment was pending in this Court, petitioners, on 27 February 2013, filed a petition to terminate the parental rights of respondent and the father in Wake County District Court (13 JT 69). Respondent's motions to stay the termination proceedings were denied and a hearing was held in February 2014.

By order entered 14 April 2014, the trial court concluded grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) (2013) (failure to pay child support towards the care of the children) and determined that termination of her parental rights was in the best interests of Baby Boy Clark.[2]

The next day, on 15 April 2014, this Court filed its opinion in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343, reversing the district court's order. This Court held that respondent's "relinquishment is valid and conforms to the mandatory statutory requirements as set out in N.C. Gen. Stat. § 48-3-702." *Id.* at ___, 757 S.E.2d at 351. Our Supreme Court denied respondent's petition for discretionary review (157P-14-1). From the order terminating her parental rights, respondent appeals. Given the prior rulings and procedure of this case, we first address the issue of whether respondent's appeal is moot.

II. Mootness

[1] This Court has held in other types of cases, in which an order has expired by the time of consideration on appeal, that if the order may cause a party to "suffer collateral legal consequences" in the future, the appeal still has "legal significance and is not moot." *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 914 (2001). Thus, even though our ruling in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343 finalized the adoption of Baby Boy Clark, so that this

2. The trial court also terminated the father's parental rights.

termination of rights proceeding could have no practical effect upon the outcome as to his parentage, this appeal is not moot. Specifically, the termination order may have an effect on respondent's parental rights in the future as to any other children she has or may have. N.C. Gen. Stat. § 7B-1111(a)(9) states that one ground for termination of parental rights is whether "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." Respondent's appeal is not moot, and we will therefore consider her arguments.

III. Analysis

Respondent does not challenge any of the findings of fact and conclusions of law with regard to grounds for termination, nor does she challenge the best interest determination. Rather, respondent challenges the trial court's subject matter jurisdiction to terminate her parental rights where: (1) the appeal in the adoption case was pending, and (2) the petitioners did not have standing to file the termination petition.

A. Subject matter jurisdiction

[2] "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). According to the Juvenile Code, our district courts have "exclusive original jurisdiction" to hear and determine proceedings to terminate parental rights. *See* N.C. Gen. Stat. § 7B-200(a)(4) and § 7B-1101 (2013). Whether a court possesses jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

Citing N.C. Gen. Stat. § 7B-1003, respondent argues the trial court was precluded from hearing the termination proceeding because the adoption case was pending appeal in this Court. We disagree.

Generally, N.C. Gen. Stat. § 1-294 operates to stay further proceedings in the trial court upon perfection of an appeal. N.C. Gen. Stat. § 1-294 (2013). "When a specific statute addresses jurisdiction during an appeal, however, that statute controls over the general rule." *In M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012). Pursuant to the Juvenile Code, jurisdiction by the trial court while an appeal is pending is governed by N.C. Gen. Stat. § 7B-1003, which provides:

> (a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.
>
> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.
>
> (c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered. . . .

N.C. Gen. Stat. § 7B-1003 (emphasis added). Article 11 of Chapter 7B of the General Statutes governs termination of parental rights. *See*, *e.g.*, N.C. Gen. Stat. Ch. 7B, Art. 11 (2013).

This statute does not deprive the trial court of jurisdiction to terminate parental rights during the pendency of the adoption appeal. Rather, the plain language of the statute limits the trial court's jurisdiction while an appeal of an order entered under the Juvenile Code is pending in

the appellate court. Nowhere in the statute does it reference appeals of orders outside of the Juvenile Code, Chapter 7B of the North Carolina General Statutes. Section 7B-1003 does not apply to petitioners' appeal of the adoption order, which originated as an adoption petition filed under Chapter 48. The order appealed from in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343, was entered under Chapter 48 which governs adoption, not under Chapter 7B. The district court's ruling regarding respondent's relinquishment restored parental rights to respondent pursuant to Chapter 48, pending appeal, and petitioners sought to terminate those rights pursuant to Chapter 7B based on respondent's actions in not providing support for Baby Boy Clark, while appeal was pending. The appeal of an order entered under Chapter 48, which is outside of the Chapter 7B Juvenile Code, did not preclude the district court's jurisdiction to terminate respondent's parental rights.

Further, respondent's reliance on *In re M.I.W.*, in which our Supreme Court interprets Section 7B-1003, is misplaced. In *M.I.W.*, our Supreme Court applied section 7B-1003 to determine whether the district court had jurisdiction to conduct a termination proceeding while an appeal was pending of a permanency planning disposition order entered in the same case. *M.I.W.*, 365 N.C. at 375-76, 722 S.E. at 470. In holding that the trial court had jurisdiction because section 7B-1003 only barred the trial court from exercising jurisdiction or holding hearings before the appellate court's mandate issued, the *M.I.W.* Court recognized that its "holding is limited to matters arising under the Juvenile Code." *Id.* at 378, 722 S.E.2d at 472.

Contrary to respondent's assertion, the present case is distinguishable from *M.I.W.* Here, the district court's order appealed from in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343 originated in district court as an adoption petition filed under Chapter 48, as stated above. In contrast, the order appealed from in *M.I.W.*, involved a disposition order entered under Chapter 7B. Accordingly, the trial court properly entered its termination order while the adoption appeal was pending in the appellate court.

B. Standing

[3] As part of her argument that the trial court did not have authority to preside over the termination hearing, respondent contends petitioners did not have standing to file the juvenile petition.

"Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the

merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (citation, brackets, and quotation marks omitted). Standing to file a petition to terminate parental rights is conferred by statute:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . .
>
> (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

N.C. Gen. Stat. § 7B-1103(a) (2013). Here, there is no question that petitioners filed a petition to adopt Baby Boy Clark. This establishes petitioners' standing to file a petition for termination of respondent's and the father's parental rights.

In sum, because petitioners had standing to file their petition to terminate parental rights and the trial court had jurisdiction over the termination of parental rights matter, the trial court's order terminating respondent's parental rights to Baby Boy Clark is affirmed.

AFFIRMED.

Judge STROUD and Judge DIETZ concur.

IN THE MATTER OF DAVID PAUL HALL

No. COA14-435

Filed 31 December 2014

1. Sexual Offenders—sex offender registration—denial of request to terminate

The trial court did not err by relying on the federal sex offender registration statute to deny petitioner's request to terminate his sex offender registration. Since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A was retroactively applicable to petitioner.

2. Constitutional Law—ex post facto laws—sex offender registration statutes does not violate

The trial court's application of the sex offender registration statute to support its denial of petitioner's petition did not constitute an ex post facto violation. The imposition of lifetime sex offender registration programs does not constitute an ex post facto violation.

3. Appeal and Error—preservation of issues—constitutional issue—failure to argue at trial

Although petitioner contended that the denial of his petition did not violate his substantive due process rights, this argument was waived because petitioner failed to raise it at trial. Even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 et seq. do not amount to a violation of due process.

Appeal by petitioner from order entered 30 September 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Glenn Gerding and Anne M. Hayes for petitioner.

BRYANT, Judge.

Where the language of N.C. Gen. Stat. § 14-208.12A shows a clear intent by our legislature to incorporate the requirements of the federal sex offender registration statutes, SORNA, into our State's statutory provisions governing the sex offender registration process, and to retroactively apply those provisions to sex offenders currently on the registry, we affirm the trial court's order doing so. It is well-established by our Courts that the application of N.C. Gen. Stat. § 14-208.5 *et seq.* which governs the sex offender registration process does not violate our prohibition against *ex post facto* laws. Where petitioner fails to raise a constitutional argument before the trial court, that argument is deemed waived on appeal.

On 18 January 1982, petitioner David Paul Hall pled guilty to first-degree rape and second-degree kidnapping and was sentenced to life in prison. After serving over twenty years, petitioner was released on

parole in April 2003 and properly registered himself as a sex offender in Mecklenburg County.

On 3 May 2013, petitioner filed a petition in Mecklenburg County Superior Court seeking termination of his sex offender registration. After a hearing on 23 September 2013, the trial court entered an order on 30 September denying the petition. Petitioner appeals.

Petitioner raises three issues on appeal: (I) whether the trial court erred in relying on the federal SORNA statute to deny his petition to terminate his sex offender registration; (II) whether the trial court's application of SORNA to support denying the petition constituted an *ex post facto* violation; and (III) whether the denial of the petition violated petitioner's substantive due process rights.

I.

[1] Petitioner contends the trial court erred in relying on the federal SORNA statute to justify the denial of his petition for termination of his sex offender registration. Specifically, petitioner contends such reliance on SORNA was erroneous because N.C. Gen. Stat. § 14-208.12A was not meant to be applied retroactively. We disagree.

> Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*. . . .
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.
>
> The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari*

> *materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

In re Borden, 216 N.C. App. 579, 581, 718 S.E.2d 683, 685 (2011) (citations and quotations omitted).

North Carolina General Statutes, section 14-208.12A, provides that

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article. . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) *The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State*, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a), (a1) (2013) (emphasis added).

SORNA,[1] 42 U.S.C.S. § 16911 *et seq.*, the Sex Offender Registration and Notification Act, establishes federal standards for sex offender registration and sets up guidelines for state sex offender registration programs. The federal standards are implemented and applied pursuant

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1. SORNA was initially known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"). 42 U.S.C. § 14071 (1997). Upon its repeal in 2006, the Jacob Wetterling Act was replaced by the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"). 42 U.S.C. § 16901 (2006). The Adam Walsh Act covers substantially the same material as previously covered by the Jacob Wetterling Act; it further details and updates the registration requirements for sex offenders. *See id.; see also In re McClain*, ___ N.C. App. ___, ___, 741 S.E.2d 893, 895, *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013) (discussing the evolution of the federal SORNA statute).

to the provisions of N.C. Gen. Stat. § 14-208.5 *et seq.*, which set forth North Carolina's sex offender registration program. *See* N.C. Gen. Stat. § 14-208.7(a) (2013) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.").

SORNA utilizes three tiers. Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is "adjudicated delinquent [as a juvenile] for the offense" may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

Here, petitioner pled guilty to first-degree rape in which a knife was used to threaten the victim; petitioner was not adjudicated delinquent for this offense. Therefore, based on the application of SORNA standards, petitioner is a tier III sex offender subject to lifetime registration. *Compare id.* § 16911(4) ("The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and [] is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 USCS §§ 2241 and 2242])[.]"), and 18 U.S.C.S. § 2241(a) (2013) (defining "aggravated sexual abuse" as "[w]hoever . . . knowingly causes another person to engage in a sexual act -- (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."), *with* first-degree rape as defined by N.C. Gen. Stat. § 14-27.2(a)(2) (2013) ("A person is guilty of rape in the first degree if the person engages in vaginal intercourse [] [w]ith another person by force and against the will of the other person, and [] [e]mploys or displays a dangerous or deadly weapon[.]").

Petitioner argues that because N.C.G.S. § 14-208.12A, as amended in 2001, did not apply retroactively to petitioner's sex offender registration requirements, the 2006 amendment of this statute cannot be applied retroactively either. N.C.G.S. § 14-208.12A(a) (2001) stated that: "The requirement that a person register under this Part automatically terminates 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article." In 2006, N.C.G.S. § 14-208.12A(a) was amended, and subsection (a1) added, to provide that:

> *(a) A person required to register under this Part may petition the superior court in the district where the person resides to terminate the registration requirement 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article.*
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(emphasis added).

Petitioner's argument that the 2006 amendment is not applicable to his petition to terminate his sex offender registration lacks merit, since N.C.G.S. § 14-208.12A (2006) is clearly retroactively applicable to petitioner. Petitioner was released from prison in April 2003, at which time petitioner registered with the Mecklenburg County Sheriff's Office as a sex offender. As such, petitioner was not eligible to petition the Mecklenburg County Superior Court for termination of his sex offender registration until ten years later, in April 2013.

This Court has addressed a similar retroactivity argument in *In re Hamilton*. In *In re Hamilton*, the petitioner argued that the requirements governing the termination of sex offender registration pursuant to N.C.G.S. § 14-208.12A were not intended to be retroactively applied. We disagreed, finding that:

> The implementing language of [N.C.G.S. § 14-208.12A] states that it became effective 1 December 2006, and further specifies that it "is applicable to persons for whom the period of registration would terminate on or after [the effective] date." Petitioner's period of registration was not scheduled to terminate until 2011, and thus, section 14-208.12A plainly and explicitly applies to Petitioner. Further, while Petitioner contends the 2006 amendment to section 14-208.7, deleting the automatic termination language and adding language that the registration requirement last for "at least ten years" is ambiguous, we are not persuaded. The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14-208.7 *in pari materia* with section 14-208.12A, *we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1 December 2006*. To do otherwise would render the implementing language of section 14-208.12A superfluous and frustrate the General Assembly's intent in enacting and amending the registration scheme.

In re Hamilton, 220 N.C. App. 350, 355-56, 725 S.E.2d 393, 397 (2012) (emphasis added). Therefore, since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A is retroactively applicable to petitioner. *See id.; see also In re McClain*, ___ N.C. App. at ___, 741 S.E.2d at 896 (affirming the trial court's incorporation of SORNA in N.C.G.S. § 14-208.12A), *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (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)). Accordingly, petitioner's argument is overruled.

II.

[2] Petitioner next contends the retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. The State, in contrast, contends petitioner has not properly preserved this argument for appellate review. Specifically, the State argues that petitioner's *ex post facto* argument was not properly preserved for review because this argument was not ruled upon by the trial court.

Constitutional issues which are not raised and passed upon at trial cannot be reviewed for the first time on appeal. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citations omitted). Here, the record indicates that petitioner raised an argument during the petition hearing concerning whether the trial court's retroactive application of SORNA constituted an *ex post facto* violation. In addition, petitioner sent a memorandum addressing his *ex post facto* argument to the trial court after the hearing but before the trial court entered its order denying the petition. Although the trial court did not make any findings of fact or conclusions of law regarding petitioner's *ex post facto* argument in its order denying the petition, we disagree with the State's contention that this issue has not been properly preserved for review. Rather, based on the record, which clearly indicates that petitioner presented his *ex post facto* argument to the trial court and the trial court's own statement that it would "take the time to read through the materials" provided to it by both petitioner and the State, it would appear that by entering an order denying the petition, the trial court implicitly rejected petitioner's *ex post facto* argument.[2] As such, we address petitioner's *ex post facto* argument.

The enactment of *ex post facto* laws is prohibited by both the United States and the North Carolina Constitutions. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law

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2. We note that the better practice would have been for the trial court to have ruled explicitly upon petitioner's *ex post facto* argument, either in a separate order or by including additional findings of fact and conclusions of law in the order. However, since the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument, we will review petitioner's contentions on appeal.

impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation because this application has a "clearly punitive effect".

> An ex post facto analysis begins with determining whether the express or implicit intention of the legislature was to impose punishment, and if so, that ends the inquiry. If the intention was to enact a civil, regulatory scheme, then by referring to the factors enunciated in *Kennedy v. Mendoza-Martinez* for guidance, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's civil intent.

Bowditch, 364 N.C. at 341-42, 700 S.E.2d at 6 (citations and quotations omitted).

In examining the legislative intent behind our sex offender registry statutes, it is well established that N.C.G.S. § 14-208.12A creates a "non-punitive civil regulatory scheme." *See State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (noting that "the sex offender registration requirement provided in Article 27A was a non-punitive civil regulatory scheme." (citing *State v. White*, 162 N.C. App. 183, 193, 590 S.E.2d 448,

455 (2004)). Nevertheless, as we are urged to do so by defendant's vigorous argument, we will "further examine whether the statutory scheme is so punitive . . . as to negate the legislature's civil intent." *Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 (citations and quotations omitted).

In determining whether the effects of a civil statute are truly punitive, this Court applies the factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *White*, 162 N.C. App. at 194, 590 S.E.2d at 455 (citation omitted).

> [T]he most relevant factors for registration laws [have been found] to be whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non[-]punitive purpose; or is excessive with respect to this purpose.

Id. (citation and quotation omitted).

In reviewing whether the requirements of sex offender registration are so punitive as to negate the civil intent behind such registration, our Courts have consistently held that the sex offender registration provisions as set forth in N.C. Gen. Stat. § 14-208.5 *et seq.* (Article 27A) do not amount to *ex post facto* violations. *See* N.C.G.S. § 14-208.5 (2013) (setting forth the purposes behind the sex offender registration requirements); *see also State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004) ("[T]he legislature did not intend that the provisions of Article 27A be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." (citing *White*, 162 N.C. App. at 194-98, 590 S.E.2d at 455-58)).

Petitioner argues that despite our Court's well-established line of decisions holding that sex offender registration does not constitute an *ex post facto* violation, such a view is inapplicable to the instant case since it involves lifetime registration. Petitioner contends lifetime registration, such as that based on SORNA, is so overly punitive as to constitute an *ex post facto* violation. We reject petitioner's contention, since the reasoning in *Bowditch*, upholding lifetime satellite-based monitoring of sex offenders, informs us that the imposition of lifetime sex offender registration programs does not constitute an *ex post facto* violation. *See Bowditch*, 364 N.C. at 342-43, 700 S.E.2d at 6-7 (holding

that satellite-based monitoring ("SBM") of sex offenders does not create an *ex post facto* violation, for "the placement of the SBM program within Article 27A of Chapter 14 of our General Statutes is significant. The SBM program follows immediately after the Article 27A sections comp[ri]sing the Sex Offender Registration Programs [pursuant to] N.C.G.S. §§ 14–208.5 to –208.32 (2009). *Before enactment of the SBM program, the Supreme Court of the United States had determined sex offender registration statutes to be civil regulations, Smith [v. Doe], 538 U.S. [84,] 105–06, 123 S.Ct. 1140 [2003], and North Carolina appellate courts had reached the same conclusion, see State v. Sakobie, 165 N.C. App. 447, 451–52, 598 S.E.2d 615, 617–18 (2004)*. Moreover, the legislature's statement of purpose for Article 27A, found at section 14–208.5, explains that 'the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities.' Understandably, section 14–208.5 explicitly refers to registration, but the SBM program [set forth in §§ 14-208.40–208.45, Part 5 of Article 27A] is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders. The decision to codify the SBM statutory scheme in the same Article and immediately following the registration programs implies a legislative objective to make the SBM program one part of a broader regulatory means of confronting the unique 'threat to public safety posed by the recidivist tendencies of convicted sex offenders.' [*State v.*] *Abshire*, 363 N.C. [322,] 323, 677 S.E.2d [444,] 446." (emphasis added)).

This broader, regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome, but it is not penal or punitive. We note that defendant has argued vigorously for a different result regarding the burden imposed on him by the registration requirements as they currently exist. Without addressing each individual point raised by defendant, we acknowledge these arguments and note that they have been previously addressed and rejected by our Courts. *See State v. Williams*, 207 N.C. App. 499, 505, 700 S.E.2d 774, 777-78 (2010). Moreover, this Court has held that Article 27A of Chapter 14 of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of *ex post facto* laws. *See id.* Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an *ex post facto* law, we are bound to say that petitioner's argument lacks merit. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("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)). Accordingly, petitioner's argument is overruled.

III.

[3] Finally, petitioner argues that the trial court's denial of the petition violated petitioner's substantive due process rights. However, since petitioner did not raise this argument before the trial court, this argument has not been properly preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2014) ("In 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."); *see also Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. Moreover, we note that even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 *et seq.* do not amount to a violation of due process. *See State v. Williams*, ___ N.C. App. ___, ___, 761 S.E.2d 662, 665-68 (2014) (holding that the imposition of lifetime SBM did not violate the defendant's due process); *White*, 162 N.C. App. at 189-90, 590 S.E.2d at 453 ("[T]he notice provisions of the registration act (N.C. Gen. Stat. §§ 14-208.8 [*et seq.*]) remove the statute from due process attacks[.]" (citation omitted)). Accordingly, petitioner's argument is deemed waived. The order of the trial court is, therefore, affirmed.

Affirmed.

Judges ELMORE and ERVIN concur.

[238 N.C. App. 334 (2014)]

IN THE MATTER OF J.K.P.

No. COA14-756

Filed 31 December 2014

1. Constitutional Law—right to counsel—waiver

The trial court did not err in a termination of parental rights case by allowing respondent to waive her right to counsel and proceed pro se. The transcript showed that respondent asked to represent herself and read and signed the waiver of counsel form.

2. Constitutional Law—right to counsel—notice of right

The argument of respondent in a termination of parental rights case that she was never told she had a right to be represented by counsel was rejected. The trial court explained that respondent was represented by court-appointed counsel because she filed an affidavit of indigency and requested a lawyer and that if she chose to represent herself she would waive her right to a lawyer. Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings and was represented by counsel at various points throughout the proceedings, and respondent read and signed the waiver form.

3. Jurisdiction—clerical error—correction after notice of appeal

The trial court had jurisdiction to amend a waiver of counsel form after appeal where the court first checked the not knowing and voluntary box on the waiver form, then amended the form several days later to show that respondent's waiver was knowing and voluntary. The trial court's findings on the form, and its additional contemporaneous statements at that hearing, show that the trial court made an inadvertent clerical mistake by checking the wrong box. Under N.C.G.S. § 1A-1, Rule 60(a), the trial court had jurisdiction to correct that mistake at any time before the record on appeal was docketed in the Court of Appeals.

Appeal by respondent mother from order entered 4 April 2014 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 9 December 2014.

Roger A. Askew for petitioner-appellee Wake County Human Services.

Administrative Office of the Courts Appellate Counsel, Tawanda N. Foster, for guardian ad litem.

Edward Eldred for respondent-appellant mother.

DIETZ, Judge.

Respondent, the mother of J.K.P., appeals from an order terminating her parental rights. She argues that the trial court erred in allowing her to waive her right to counsel and represent herself at the termination hearing. She also contends that the trial court improperly corrected a clerical mistake on the waiver-of-counsel form after entering judgment. We reject Respondent's arguments and affirm.

Facts and Procedural Background

The Wake County Department of Human Services (WCHS) filed a petition on 29 May 2012 alleging that J.K.P. was a neglected juvenile. By order filed 17 August 2012, the trial court adjudicated J.K.P. neglected. Respondent appealed and this Court affirmed the adjudication on 7 May 2013. *In re J.P.*, ___ N.C. App. ___, 741 S.E.2d 928 (2013) (unpublished). WCHS filed a motion to terminate Respondent's parental rights on 18 September 2013.

The trial court held a review and permanency planning hearing on 2 October 2013, at which Respondent indicated she did not wish to have her court-appointed attorney, Mr. Milholland, represent her. The trial court allowed both Respondent's court-appointed attorney and her guardian ad litem to withdraw. Respondent later filed an affidavit of indigency requesting court-appointed counsel, and the trial court appointed Ms. Ferrell to represent Respondent in the termination hearing.

Then, at a January 2014 pre-trial hearing, Respondent informed the trial court that she changed her mind, did not want Ms. Ferrell to represent her, and intended to retain an attorney.

The trial court held the termination hearing on 28 February 2014. Ms. Ferrell advised the court that "[Respondent] has informed me that she wishes to represent herself in this matter." The trial court engaged in a lengthy colloquy with Respondent about her desire to proceed pro se and her understanding of the consequences, and then asked Respondent to read and sign a waiver-of-counsel form. Respondent checked the box indicating that she intended to represent herself and signed her name. On the signed form, the court made written findings of fact to show

that Respondent's waiver was "knowing and voluntary"; however, the court checked the box corresponding with the conclusion of law that "[p]arent's waiver is *not* knowing and voluntary." Respondent proceeded *pro se* at the termination hearing.

By order filed 4 April 2014, the trial court terminated Respondent's parental rights. Respondent timely filed her notice of appeal on 6 May 2014. Three days later, before the record on appeal was docketed with this Court, the trial court signed appellate entries and amended Respondent's waiver form to correct the court's mistaken check mark in the wrong box on the waiver-of-counsel form.

Analysis

I. Request to Relieve Counsel and Proceed *Pro Se*

[1] On appeal, Respondent contends the trial court erred in allowing her to waive her right to counsel and proceed *pro se* at the termination hearing. A parent's right to counsel in a termination of parental rights proceeding is governed by N.C. Gen. Stat. § 7B-1101.1, which provides:

> (a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right.
>
> . . . .
>
> (a1) A parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary.

N.C. Gen. Stat. § 7B-1101.1 (2013).

Here, after the trial court explained the nature of the proceeding and the consequences of waiving the right to counsel, Respondent read and signed a waiver form containing the following language:

> I am the parent of the juvenile named above. I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one. With full knowledge of these rights, I knowingly, willingly, and understandingly choose as follows:
>
> . . . .

> I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do.

Below Respondent's signature on the form, the trial court made specific factual findings supporting its conclusion that Respondent's waiver of counsel was knowing and voluntary. The court found that Respondent understood she was represented by a court-appointed attorney and agreed that her court-appointed attorney "has not been ineffective." The court also found that Respondent knew she "was expected to know the law of [termination of parental rights], rules of evidence, [and] rules of court."

Respondent does not challenge these findings by the trial court, nor does she argue that these findings are insufficient to support the trial court's conclusion that her waiver was knowing and voluntary. Instead, Respondent argues that she never requested to represent herself and that the court never told her she had a right to counsel. We disagree.

First, the transcript unquestionably shows that Respondent asked to represent herself. Before the proceedings began, the trial court engaged in the following lengthy colloquy about Respondent's right to counsel:

> MS. FERRELL: Okay. But I would make my motion to withdraw at this time based on my client's wishes for me to do so, Your Honor.
>
> THE COURT: *And, [Respondent], why is it that you wish to represent yourself?*
>
> [RESPONDENT]: *Because every attorney that you put on my case has given me ineffective assistance of counsel and y'all violating my constitutional rights.*
>
> . . . .
>
> THE COURT: All right. On October the 2nd you said in the underlying case that you did not want a court-appointed attorney. When we – in the underlying case. On the TPR I asked you what you wanted to do about a lawyer and on November the 25th you filed an affidavit of indigency and I appointed Ms. Ferrell to represent you. Is that correct?
>
> [RESPONDENT]: Yes, you did.
>
> THE COURT: Okay. And what is your basis for saying that you have been given ineffective assistance of counsel by Ms. Ferrell?

[RESPONDENT]: I was never given ineffective assistance of counsel by Ms. Ferrell.

THE COURT: You were not.

[RESPONDENT]: I was given –

THE COURT: You were not --

[RESPONDENT]: Right.

THE COURT: -- is that correct?

[RESPONDENT]: I was given ineffective assistance of counsel by Mr. Locke Milholland from the beginning.

THE COURT: And since you have not been given ineffective assistance of counsel by Ms. Ferrell why is it that you wish to waive your right to a lawyer instead of allowing Ms. Ferrell to represent you?

[RESPONDENT]: Because I'm going to wait until I find me the appropriate attorney even if I have to find a way to get me an attorney to come and regard [sic] and research this case and do this case over from the beginning because this whole case like I said in the beginning was fallacious. That whole petition was fallacious.

THE COURT: Well, ma'am, we've moved on from there. We're at the termination of parental rights case today.

[RESPONDENT]: You can do whatever you want. But I'm going to let you know that I'm going to get an attorney to show that you violated my constitutional rights.

THE COURT: And you're more than welcome to do that, [Respondent]. I'm asking you why for purpose of the termination of parental rights case that was filed in September why you are asking that Ms. Ferrell not represent you in this hearing today.

[RESPONDENT]: Because y'all work together.

THE COURT: Because we work together?

[RESPONDENT]: Yes.

THE COURT: Ms. Ferrell is in private practice, she has no association with me, ma'am.

[RESPONDENT]: That's hard to believe.

. . . .

THE COURT: Well, ma'am, let me just tell you what the law says. The law says that these cases are to be heard within 90 days of the filing. We're two months past that. You have a very effective lawyer that's been appointed to represent you. I'm asking why you want to waive your right to counsel.

[RESPONDENT]: Because like I said, I've been violated by this courtroom since the beginning.

THE COURT: Okay.

. . . .

THE COURT: *And why is it that you believe that you should not -- you should represent yourself?*

[RESPONDENT]: *Because I'll make sure what I say is everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom and what was mentioned in that courtroom.*

THE COURT: Okay. And you know that the Court of Appeals had a complete record of everything that was said during your adjudication hearing.

[RESPONDENT]: Uh-huh.

THE COURT: You know that?

[RESPONDENT]: And neither did I get a chance to speak on record because you had Mr. Locke Milholland speaking for me.

THE COURT: Well, I had Mr. Milholland at your request because --

[RESPONDENT]: That was not my request.

THE COURT: Because you filed an affidavit of indigency, ma'am, Mr. Milholland was appointed to represent you. I don't choose the attorney that represents people.

[RESPONDENT]: But you could have chose to get him off my case if I requested for him to be off my case as an attorney.

THE COURT: When you made that motion, ma'am, I did relieve him of that obligation.

[RESPONDENT]: You relieved him at the last moment.

THE COURT: I relieved him at the hearing in which you requested that he not represent you, ma'am, because you signed a waiver of your right to counsel in the underlying case.

[RESPONDENT]: Right.

THE COURT: Do you understand that if you represent yourself at this hearing today that you will be expected to know the law pertaining to termination of parental rights? Do you understand that?

[RESPONDENT]: Uh-huh.

THE COURT: Do you understand that law?

[RESPONDENT]: No.

THE COURT: Do you understand that you would be expected to know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you understand that you would be expected to understand --

[RESPONDENT]: Matter of fact, let me correct that. I understand the law of termination of parental rights.

THE COURT: Okay. And –

[RESPONDENT]: Let me correct that to you.

THE COURT: And do you understand that you would have to know the Rules of Court?

[RESPONDENT]: Yes.

THE COURT: And do you believe you understand those?

[RESPONDENT]: Some of it.

THE COURT: Okay. Do you believe that you are qualified to represent yourself?

[RESPONDENT]: As an attorney, no.

THE COURT: Okay. Do you think you can do a better job than an attorney can?

[RESPONDENT]: No.

THE COURT: *Then why are you choosing to represent yourself?*

[RESPONDENT]: *Because I don't want an attorney on my case that's not going to properly represent me.*

. . . .

THE COURT: *I'm asking you, ma'am, do you understand what you're doing if you waive your right to a lawyer?*

[RESPONDENT]: *Yes.*

THE COURT: And are you sure that you want to represent yourself or do you want Ms. Ferrell to represent you today?

[RESPONDENT]: How can she represent me if she don't [sic] even know what's going on? She understand [sic] some of it, not everything.

. . . .

THE COURT: Ma'am, what are you going to do about a lawyer in this case? Are you going to allow Ms. Ferrell to continue to represent you or are you going to represent yourself?

[RESPONDENT]: I'm fine where I'm at, Your Honor, thank you.

THE COURT: I don't know what that means, ma'am.

[RESPONDENT]: I'm good, I don't need Ms. Ferrell. Thank you.

THE COURT: You do not want Ms. Ferrell to represent you?

[RESPONDENT]: I'm good. Thank you.

THE COURT: Then I need you to step over and see the Clerk, sign a waiver of your right to counsel by marking box number two.

At the beginning of this lengthy colloquy, Respondent's counsel informed the court that Respondent did not want to be represented by counsel. The trial court then asked Respondent repeatedly "why is it that you wish to represent yourself?" Each time, Respondent provided a cogent answer confirming that she wanted to represent herself. As Respondent explained, she intended to hire a lawyer in the future to collaterally attack the constitutionality of the proceedings. Respondent believed that, unlike her appointed counsel, "I'll make sure . . . everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom."

[2] Moreover, Respondent read and signed the waiver of counsel form which expressly states that "I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do." Accordingly, we reject Respondent's argument that she never asked to represent herself.

Respondent next argues that the trial court never told her she had a right to counsel. But during the lengthy colloquy quoted above, the trial court explained that Respondent was represented by court-appointed counsel because she "filed an affidavit of indigency" and requested a lawyer. Indeed, Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings in the trial court and was represented by counsel at various points throughout the proceedings. Moreover, the court told Respondent that if she chose to represent herself "you waive your right to a lawyer." Finally, Respondent read and signed the waiver form which stated that "I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one." Thus, we reject Respondent's argument that she was never told she had a right to be represented by counsel.

In sum, the trial court properly concluded that Respondent knowingly and voluntarily chose to represent herself at trial. However unwise that decision may have been, it "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834 (1975) (internal quotation marks omitted) (discussing the right to self-representation in criminal proceedings).

II. Clerical Error on the Waiver of Counsel Form

[3] Respondent next argues the trial court expressly found that her waiver of counsel was *not* knowing and voluntary because the court checked the "not knowing and voluntary" box on the waiver form. Respondent acknowledges that the trial court amended the form several days after entering judgment to show that Respondent's waiver *was* knowing and voluntary, making the following handwritten change on the form:

> The court ex mero moto amends the clerical error made by the court on 2/28/14[.] The parent's waiver was knowing and voluntary[.] The court marked the incorrect box.

But Respondent argues that the trial court lacked jurisdiction to make this amendment because Respondent already had filed her notice of appeal. We disagree.

Generally, "a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *In re C.N.C.B.*, 197 N.C. App. 553, 555, 678 S.E.2d 240, 241 (2009) (citation and internal quotation marks omitted). But Rule 60(a) of the North Carolina Rules of Civil Procedure permits the trial court to correct "clerical mistakes" in orders and judgments on its own initiative, even after notice of appeal has been filed, so long as the case has not yet been docketed with this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013).

"Clerical mistakes" are typographical errors, mistakes in writing or copying something into the record, or other, similar mistakes that are not changes in the court's reasoning or determination. *See In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006). Importantly, this Court has held that the term "clerical mistakes" includes the "inadvertent checking of boxes on forms." *Id.*

The AOC form used here, entitled "Waiver of Parent's Right to Counsel," contains a "Findings of Fact" section that requires the trial court to make findings of fact demonstrating that the waiver is knowing and voluntary. The section contains six blank lines for the court to make such findings of fact. The form also includes a "Conclusions of Law" section which requires the trial judge to check one of two boxes concluding either: (1) "The parent's waiver is knowing and voluntary," or (2) "The parent's waiver is not knowing and voluntary."

Here, the trial court hand-wrote five sentences in the "Findings of Fact" section of the form and checked the box associated with the conclusion of law that Respondent's waiver "is not knowing and voluntary."

But, as explained above, the handwritten findings of fact support the conclusion that Respondent's waiver of counsel *was* knowing and voluntary. Moreover, the trial court made additional remarks at the conclusion of the hearing that confirm the court intended at the time to check the "is knowing and voluntary" box. The trial court stated:

> I am just going to very briefly state for the record once again that [Respondent] has chosen to represent herself today, that she had an attorney throughout the underlying proceeding. I believe that the first time she may have mentioned she wanted another attorney may have been at a September hearing which we in fact did not have.
>
> She waived her right to an attorney in an underlying proceeding in October. I believe the record would show at the October hearing she represented herself during that hearing. But by that time the Court had already ordered that [sic] the permanent plan for the child to be adoption and we were moving on with that. There have not been any additional review hearings since that time.
>
> At her request in November I did appoint an attorney to represent her for these proceedings and today she has determined that she did not want that person. She didn't want any attorney to represent her.

We hold that the trial court's findings on the form, and its additional, contemporaneous statements at that hearing, show that the trial court made an inadvertent "clerical mistake" by checking the wrong box. Under Rule 60(a), the trial court had jurisdiction to correct that mistake at any time before the record on appeal was docketed in this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a). Because the court corrected this clerical mistake before the appeal was docketed, we reject Respondent's jurisdictional argument.

Conclusion

The trial court's findings support its conclusion that Respondent knowingly and voluntarily waived her right to counsel at the termination proceeding below. Accordingly, we reject Respondent's arguments and affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and DILLON concur.

IN THE MATTER OF L.M.

No. COA14-868

Filed 31 December 2014

1. Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—verification of guardian

The trial court did not err by awarding guardianship of a minor to his foster father because there was evidence that the foster father understood the legal significance of guardianship. The foster father testified regarding the care he had provided to the minor and signed a form acknowledging that he would assume responsibility for him without the assistance of the Department of Social Services.

2. Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—verification of guardian

The trial court erred by awarding guardianship of a minor to his foster mother because there was no evidence that the foster mother understood the legal significance of guardianship. The foster mother did not testify or sign a guardianship form. The order was remanded.

3. Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—best interest of the child

The trial court did not abuse its discretion in determining that guardianship with the foster parents was in the minor's best interest. Even though there was evidence that the mother had made improvements and the minor wanted to return to her, there was evidence supporting the conclusion that the foster parents would provide the best home for him.

Appeal by respondent mother from order filed 20 May 2014 by Judge John B. Carter, Jr., in Robeson County District Court. Heard in the Court of Appeals 2 December 2014.

J. Hal Kinlaw, Jr., for petitioner-appellee Robeson County Department of Social Services.

Ryan McKaig for respondent-appellant mother.

Kilpatrick Townsend & Stockton LLP, by Susan H. Boyles and Elizabeth L. Winters, for guardian ad litem.

McCULLOUGH, Judge.

Respondent mother appeals from an order awarding legal guardianship of her son L.M. ("Lance")[1] to foster parents. We affirm in part and vacate and remand in part.

I. Background

Although the record indicates that Robeson County Department of Social Services ("DSS") has been involved with respondent's family off and on since 1992, Lance's case began on 10 January 2002 when DSS filed a juvenile petition alleging Lance was a neglected juvenile in that he lived in an environment injurious to his welfare. Pending a hearing on the petition, Lance was removed from respondent's home and placed in the nonsecure custody of DSS. Lance was four years old at the time.

Following a 20 February 2002 adjudication and disposition hearing, on 22 March 2002, the trial court filed an order adjudicating Lance a neglected juvenile and awarding custody to DSS, who was to arrange foster care or other placement. The permanent plan for Lance was set for reunification.

At the recommendation of DSS, on 27 May 2004, Lance began a trial placement with respondent. However, on 12 July 2004, DSS filed a juvenile petition alleging Lance was a neglected juvenile based on the suspected abuse of another child in respondent's home. Lance was removed from respondent's home at that time, but was later allowed to return when the trial court dismissed the petition on 28 July 2004.

On 5 September 2008, DSS filed another juvenile petition alleging Lance was a neglected juvenile on the basis that he was living in an unsuitable environment. Lance was again removed from the home and placed with foster parents. Following an adjudication and disposition hearing on 17 December 2008, on 16 January 2009, the trial court filed an order adjudicating Lance neglected and awarding custody of Lance to DSS for foster placement.

On 19 January 2011, the trial court issued a permanency planning review order returning Lance to respondent's home for another trial placement. However, the trial placement was terminated shortly thereafter and Lance was removed from respondent's home and returned to foster placement. Following further proceedings on 18 May 2011, the trial court adjudicated Lance a neglected juvenile and changed

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

the permanent plan from reunification to guardianship. The trial court filed adjudication and disposition orders on 20 July 2011.

On 19 March 2014, the case came on for a permanency planning hearing in Robeson County District Court. Following the hearing, the trial court, the Honorable John B. Carter, Jr., entered an order awarding guardianship of Lance to his foster parents. Respondent appeals from the order awarding guardianship of Lance to his foster parents.

II. Discussion

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 192 (2002)). "If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *Id.* (citing *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)).

[1] In her first argument on appeal, respondent contends the trial court erred in creating a guardianship without a proper verification of the appointed guardians, the foster parents. Specifically, respondent contends the foster parents should have been questioned about their understanding of a guardian's responsibilities and their willingness and ability to fulfill those responsibilities.

The Juvenile Code, Chapter 7B of the North Carolina General Statutes, authorizes the appointment of a guardian for a juvenile "[i]n any case . . . when the court finds it would be in the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-600(a) (2013). Yet, "[i]f the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2013). As respondent acknowledges in her brief, this Court has previously recognized that the Juvenile Code does not "require that the court make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007). It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship. *Id.*

In the present case, testimony at the permanency planning hearing showed that except for a brief trial placement with respondent, Lance,

who was sixteen years old at the time of the hearing, had resided with the foster parents since the age of nine. All accounts seemed to indicate that Lance was doing well in the foster home. The foster father testified he had been working to get Lance off of medication and he had taken Lance on several trips, including an extended trip to Canada. The foster father indicated that those efforts had been successful, as Lance was no longer taking medication, was performing well in school, and was active in church. The foster father further testified that he had encouraged Lance to go into the military and law enforcement; and was actively working with Lance and supporting him financially to reach those goals. The DSS caseworker indicated that the foster father was willing to accept guardianship and when the foster father was directly questioned whether he was willing to continue to provide care to Lance, the foster father replied "I want to take guardianship of him."

Moreover, Lance's foster father, along with the judge presiding over the permanency planning hearing, executed a form on 19 March 2014 which indicates the foster father appeared before the court and "acknowledged to assume the responsibility of [Lance] . . . without the assistance of [DSS.]" In doing so, the foster father acknowledged that DSS was released of all responsibility related to Lance and that he willingly accepted all responsibility of Lance.

We hold that, based upon the consideration of the above evidence, the trial court performed the required verification of the foster father. Thus, respondent's argument as it relates to the foster father is overruled.

[2] Although there was sufficient evidence to verify Lance's foster father as a suitable guardian, we hold there was insufficient evidence that Lance's foster mother understood and accepted the responsibilities of guardianship.

As DSS concedes, the foster mother did not testify and did not sign a guardianship form. Nevertheless, DSS asserts the court's award of guardianship to both foster parents should stand under this Court's decision in *In re J.E.* We disagree. In *In re J.E.*, this Court held the trial court adequately complied with the verification requirement when it received into evidence and considered home studies showing the juveniles' maternal grandparents were aware of and committed to the responsibilities of raising the juveniles. 182 N.C. App. at 617, 643 S.E.2d at 73. Upon review of *In re J.E.*, we find it significant that the home studies before the trial court in *In re J.E.* referred to the "grandparents." *Id.* In the present case, the evidence before the trial court tended to relate to the foster father's role in raising Lance and his desire to continue doing so; there was no

evidence that the foster mother accepted responsibility for Lance. Thus, we hold the trial court did not properly verify the foster mother.

[3] In the second issue on appeal, respondent contends the trial court erred in determining that guardianship with the foster parents was in Lance's best interests.

In response, the guardian ad litem first asserts that respondent cannot challenge the determination that guardianship was in Lance's best interest because she did not challenge trial court's 20 July 2011 disposition order changing the permanent plan for Lance from reunification to guardianship following the termination of Lance's trial placement with respondent. While we acknowledge there may be merit to the guardian ad litem's assertion, for arguments sake, we address respondent's argument and hold the trial court did not err in the best interests determination.

"Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court . . . ." *In re Shu*e, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). The decision of the trial court regarding best interests of a juvenile is within the trial court's discretion and will not be overturned absent an abuse of discretion. *See In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

In this case, respondent points to evidence that she obtained employment, found stable housing, developed a positive relationship with Lance, and that Lance desired to return to her custody; respondent then argues "[i]n light of [her] efforts and improvements and [Lance's] wishes, and in light of the Juvenile Code's preference for reunification with biological relatives, it was error for the trial court to determine that guardianship with foster parents was in the best interest of [Lance]."

While we agree with respondent that the evidence shows she has made progress, the evidence is not conclusive in the trial court's best interests analysis. There is also evidence to support the trial court's findings that Lance has been in the home of the foster parents for an extended period of time, that "[the foster father] has been actively involved in [Lance's] life[,]" "[t]hat the current plan for [Lance] is guardianship with a court approved caretaker[,]" and "[t]hat the return of [Lance] to the home of [respondent] would be contrary to the welfare of [Lance]."

Moreover, it is clear from the transcript of the 19 March 2014 permanency planning hearing that the trial court weighed respondent's

progress in the best interests determination. In announcing its decision in open court, the trial court explained,

> [t]he Court does find that [respondent] has made improvement in her life. [Respondent] does have adequate housing and employment and has personally done well at her individual life, but the Court does find that [respondent] does not adequately appreciate the needs of both children and would not be able to adequately care for them as they attend – as they progress toward adulthood. The Court, therefore, finds that it would be in [Lance's] best interest that guardianship be granted to [the foster father] . . . . The Court will continue supervised visits.

The court then reiterated to Lance,

> I understand that [Lance] would like to return home, but it's clear to the Court that there are certain needs that will not be met in your mother's home and the - not that she doesn't desire to try to meet those needs, but the Court is of the opinion that she's not able to adequately address them, and that failure or inability will prevent . . . you from reaching all the goals that you want to reach in life.

Based on the trial court's findings and the evidence presented, we hold the trial court did not abuse its discretion in determining that guardianship with the foster parents was in Lance's best interest.

III. Conclusion

For the reasons discussed above, we affirm the order of guardianship for the foster father and vacate and remand the order of guardianship for the foster mother.

Affirmed in part, vacated and remanded in part.

Judges CALABRIA and STROUD concur.

GARY W. JACKSON, Plaintiff
v.
CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM; and KEITH A. SMITH, as Senior Vice President and General Counsel of CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM, Defendants

No. COA13-1338

Filed 31 December 2014

Public Records—settlement documents—action initiated by public agency

The trial court erred by dismissing a public records action under N.C.G.S. § 1A-1, Rule 12(b)(6) where the action was brought against Carolinas Health System (CHS), a local unit of government, seeking documents from the settlement of an action involving investments initiated by CHS. Based on the language of N.C.G.S. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that N.C.G.S. § 132-1.3 be construed consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, that statute does not except from the Public Records Act settlement documents in actions instituted by public agencies falling within the Public Records Act.

Appeal by plaintiff from order entered 22 July 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2014.

The Jackson Law Group, PLLC, by Gary W. Jackson, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Adam K. Doerr, for defendant-appellee.

GEER, Judge.

Plaintiff Gary W. Jackson appeals from an order granting defendants' motion to dismiss for failure to state a claim for relief under the North Carolina Public Records Act. Plaintiff argues that the trial court erred in interpreting N.C. Gen. Stat. § 132-1.3 (2013) to exempt from disclosure settlement documents pertaining to litigation

instituted by defendant Carolinas Healthcare System ("CHS") against a financial institution.

It is well established that the purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of "public records" under N.C. Gen. Stat. § 132-1 (2013). Our Supreme Court has held that only specific statutory exceptions exempt documents meeting that definition from disclosure. Because the Public Records Act does not contain a specific statutory exception for settlement documents arising out of litigation instituted by a State agency, we hold that the trial court erred, and we reverse.

Facts

The parties do not dispute that CHS is a local unit of government subject to the Public Records Act. In 2008, CHS filed a lawsuit against Wachovia Bank, allegedly in connection with financial losses suffered through its investment accounts maintained with Wachovia. On or about 5 June 2012, CHS entered into a confidential settlement agreement with Wachovia Bank ("the Wachovia settlement"), and CHS dismissed its suit against Wachovia with prejudice.

On 24 September 2012, plaintiff sent a written request to defendant Keith A. Smith in his capacity as Senior Vice President and General Counsel of CHS seeking production of a copy of the Wachovia settlement. On behalf of CHS, Mr. Smith refused to provide a copy of the document. On 21 November 2012, plaintiff filed a complaint against CHS and Mr. Smith in Mecklenburg County Superior Court requesting relief under N.C. Gen. Stat. § 132-9(a) and seeking to obtain a copy of the Wachovia settlement. CHS and Mr. Smith moved to dismiss plaintiff's action under Rule 12(b)(6) of the Rules of Civil Procedure.

The trial court granted the motion to dismiss as to all parties in an order entered 22 July 2013, construing N.C. Gen. Stat. § 132-1.3 as exempting the Wachovia Settlement from disclosure. Plaintiff timely appealed to this Court.[1]

Discussion

"Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review." *S.N.R. Mgmt. Corp. v. Danube Partners* 141, LLC, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). "Pursuant to the

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1. Plaintiff only appeals with respect to CHS and does not challenge the trial court's dismissal of the action with respect to Mr. Smith.

de novo standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Blow v. DSM Pharmaceuticals, Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (internal quotation marks omitted).

The sole question presented by this appeal is whether settlement documents in actions brought by an entity covered by the Public Records Act constitute "public records" within the meaning of N.C. Gen. Stat. § 132-1(a), which provides that "public record"

> shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

As our Supreme Court has held, "[t]he term 'public records,' as used in N.C.G.S. § 132–1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999).

It is well established that the purpose of the Public Records Act is to "provide[] for liberal access to public records." *Id.* Consistent with that purpose, "in the absence of *clear statutory exemption or exception*, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992) (emphasis added). In other words, "North Carolina's public records act grants public access to documents it defines as 'public records,' absent *a specific statutory exemption.*" *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686 (emphasis added).

Since the Wachovia settlement agreement falls within the definition of "public record" set out in N.C. Gen. Stat. § 132-1, *see News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981) (holding that "the public has the right to know the terms of settlements made by the [Wake County Hospital] System in actions for wrongful terminations of its agreements"), the public is entitled to access to that agreement unless there is a "specific statutory exemption" for settlement agreements in actions instituted by the public agency, *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686.

In claiming that the Wachovia settlement agreement is exempt from the Public Records Act, CHS and the trial court relied solely upon N.C. Gen. Stat. § 132-1.3, which provides:

> (a) Public records, as defined in G.S. 132-1, *shall include* all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, *except in an action for medical malpractice against a hospital facility*. No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.
>
> (b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.
>
> (c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence,

> settlement agreements, consent orders, checks, and bank drafts.

(Emphasis added.)

The plain language of N.C. Gen. Stat. § 132-1.3 contains only two "specific statutory exemption[s]," *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686, to the Public Records Act: (1) settlement documents "in an action for medical malpractice against a hospital facility," and (2) settlement documents in certain actions against state agencies when sealed by a written court order containing specified findings of fact. N.C. Gen. Stat. § 132-1.3. N.C. Gen. Stat. § 132-1.3 contains no specific exception or exemption to the Public Records Act for settlement agreements arising out of litigation commenced by an entity that is subject to the Public Records Act.

Nonetheless, CHS and the trial court concluded that N.C. Gen. Stat. § 132-1.3(a)'s specification that settlement agreements in cases "instituted against" any State agency are public records necessarily means that the General Assembly intended to exclude settlements in cases instituted by a State agency. In other words, according to CHS and the trial court, we should imply an exception to the Public Records Act for settlement agreements in cases brought by a State agency because of the General Assembly's failure to specifically include such settlements in N.C. Gen. Stat. § 132-1.3. This contention -- implying an exemption -- cannot be reconciled with the Supreme Court's mandate that a document is a public record in the absence of a "specific statutory exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686. *See also Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, ___ N.C. App. ___, ___, 754 S.E.2d 223, 229 (holding that ACIS database is a "public record" because "there is no clear statutory exemption or exception applicable to the ACIS database"), *disc. review granted*, ___ N.C. ___, 758 S.E.2d 862 (2014); *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 471, 596 S.E.2d 431, 438 (2004) (holding that "[a]s there is [n]o statute specifically exempt[ing] from public access [under the Public Records Act] materials held by a local government attorney that qualify as work product which would apply to the City Attorney, the City Attorney's documents are not protected from disclosure as work product" (internal quotation marks omitted)).

Indeed, CHS' argument is analogous to the one made in *Poole*: the State defendants contended that the exception in N.C. Gen. Stat. § 132-1.1 for communications from an attorney to a State agency should be expanded to encompass records from a public agency to its attorney.

330 N.C. at 482, 412 S.E.2d at 17. In rejecting this argument, our Supreme Court held: "The Public Records Law provides only one exception to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client relationship. . . . In the context of what such agencies must disclose pursuant to the Public Records Law, the statute itself defines the scope of the privilege. . . . Under this definition only those portions of the Poole Commission meeting minutes revealing written communications from counsel to the Commission are excepted from disclosure under the Public Records Law." *Id.* at 481-83, 412 S.E.2d at 17. Thus, under *Poole*, we are limited to the letter of the statutory exemption, and, in N.C. Gen. Stat. § 132-1.3, the only exceptions are for settlements in medical malpractice cases and for properly sealed settlements.

Even if we were to disregard the unique structure of the Public Records Act and our Supreme Court's holdings interpreting it,[2] CHS' argument is inconsistent with our Supreme Court's construction of comparable language in other statutes. CHS' argument amounts to a contention that *expressio unius est exclusio alterius*: because the legislature expressly included settlement documents from litigation instituted against a State agency as public records, it necessarily excluded from the Public Records Act settlement documents in proceedings instituted by a State agency.

In *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 111, 143 S.E.2d 319, 321 (1965) (quoting N.C. Gen. Stat. § 136-89.59), the Supreme Court addressed whether N.C. Gen. Stat. § 136-89.59 (1963), by providing for the construction of highways " 'embodying safety devices, including' " a list of safety devices, precluded the construction of highways with safety devices not specified in the statute. Our Supreme Court explained that " '[t]his is not a situation which calls for the application of the maxim, *expressio unius est exclusio alterius*.' " 265 N.C. at 120, 143 S.E.2d at 327 (quoting *Guar. Trust Co. of N.Y. v. W.V. Tpk. Comm'n*, 109 F.2d 286, 296 (1952)).

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2. That structure and the well-established law relating to the Public Records Act render immaterial CHS' argument that other statutes unrelated to the Public Records Act reference both proceedings instituted by and pending against a public agency. *See*, *e.g.*, N.C. Gen. Stat. §§ 162A-77.1(4) (2013) (addressing "actions, suits, and proceedings pending against, or having been instituted by," a sewage district); 160A-505(b)(5) (2013) (discussing suits "pending against, or having been instituted by," redevelopment commissions).

Instead, " '[t]he term "includes" is ordinarily a word of enlargement and not of limitation[,]' " and " '[t]he statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' " *Id.* (quoting *People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 639, 268 P.2d 723, 733 (1954)). Applying these principles, the Supreme Court held that " '[c]learly, by use of the word "including" the lawmakers intended merely to list examples of known safety devices, but not to exclude others equally well known.' " *Id.* (quoting *Guar. Trust Co. of N.Y.*, 109 F.2d at 296). *See also Polaroid Corp. v. Offerman*, 349 N.C. 290, 301, 507 S.E.2d 284, 292 (1998) (acknowledging that "the phrase 'shall include' indicates an intent to enlarge the statutory definition, not limit it"), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2014).

Here, under *Pine Island* and *Polaroid Corporation*, the General Assembly, by using the phrase "shall include" in N.C. Gen. Stat. § 132-1.3, used a term of enlargement and not a term of limitation. Consequently, N.C. Gen. Stat. § 132-1.3 acknowledges that settlement documents in actions instituted against a State agency are public records under N.C. Gen. Stat. § 132-1 subject to two specified exceptions. In doing so, the phrase does not indicate that only such settlement documents are public records. To hold otherwise would be contrary to the statutory construction principles set out in *Pine Island* and *Polaroid Corporation*. *See also Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 86 L. Ed. 65, 70, 62 S. Ct. 1, 4, (1941) (noting that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

Nonetheless, in support of its position, CHS points to the legislative history of N.C. Gen. Stat. § 132-1.3, noting that the language exempting settlement documents in medical malpractice actions was not added until the second version of the bill enacting N.C. Gen. Stat. § 132-1.3. *See* S.B. 456, s.1 (1st ed. 1989). CHS contends that the original absence of medical malpractice language indicates that the legislature intended, from the bill's inception, to exempt from public records all settlement documents apart from those in litigation instituted against an agency. Nothing in the original bill is inconsistent with our analysis. Under *Pine Island* and *Polaroid Corporation*, the language of the initial bill simply confirmed that settlements in actions against State agencies are public records with one specific statutory exception: settlement agreements sealed by proper court order. It did not exempt other settlement agreements, and, therefore, the initial bill does not support CHS' position under the principles set out in controlling Supreme Court authority.

Further, N.C. Gen. Stat. § 132-1.3 must be construed consistently with other provisions of the Public Records Act. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (holding that "this Court does not read segments of a statute in isolation"; "[r]ather, we construe statutes *in pari materia*, giving effect, if possible, to every provision"). N.C. Gen. Stat. § 132-1.1(a) (emphasis added) provides an exception to the Public Records Act for communications by an attorney with a public agency "concerning any claim *against or on behalf of* the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, *settlement* or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected." However, "such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body." *Id.*

If we upheld CHS' and the trial court's construction of N.C. Gen. Stat. § 132-1.3, then settlement documents in actions instituted by a public agency would not be public records, but all "communications and copies thereof" from the agency's attorney relating to that settlement would become public record in three years. We do not believe that the General Assembly intended to allow the public to have access to attorney communications regarding settlements – which would include, for example, letters attaching settlement agreement drafts -- but to deny access to the actual finalized settlement documents.

It is also a well-established principle of statutory construction that " 'statutes *in pari materia* must be read in context with each other.' " *Wake Cnty. Hosp. System, Inc.*, 55 N.C. App. at 7, 284 S.E.2d at 546 (quoting *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). " '*In pari materia*' is defined as '[u]pon the same matter or subject.' " *Id.* at 7-8, 284 S.E.2d at 546 (quoting *Black's Law Dictionary* 898 (4th ed. 1968)). Here, N.C. Gen. Stat. § 143-318.11 (2013) -- part of the Open Meetings Law -- addresses the same matter or subject as N.C. Gen. Stat. § 132-1.3: the public's access to the terms of any settlement.

N.C. Gen. Stat. § 143-318.11(a)(3) allows a public body subject to the Open Meetings Law to meet in closed session with an attorney and "preserve the attorney-client privilege between the attorney and the public body," including meetings to discuss the settlement of "a claim" or "judicial action" without limitation as to whether the claim or action was instituted by or pending against the public body. However,

> [i]f the public body has approved or considered a settlement, *other than a malpractice settlement by or on behalf of a hospital*, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

Id. (emphasis added). N.C. Gen. Stat. § 143-318.10(e) (2013) in turn provides that the minutes "shall be public records within the meaning of the Public Records Law," although "minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection *so long as public inspection would frustrate the purpose of a closed session*." (Emphasis added.)

Thus, the Open Meetings Law provides that "the terms of that settlement," N.C. Gen. Stat. § 143-318.11(3), shall become a public record at some point -- unless the settlement involves a malpractice settlement by or on behalf of a hospital. CHS' construction would lead to the anomalous result that settlement terms would be public under N.C. Gen. Stat. § 143-318.11, but not public under N.C. Gen. Stat. § 132-1.3. However, our construction of N.C. Gen. Stat. § 132-1.3 -- excepting from the Public Records Act only settlement documents in an action for medical malpractice against a hospital facility and in certain actions against state agencies when sealed by a proper court order -- is consistent with the plain language of N.C. Gen. Stat. § 143-318.11.

Finally, the General Assembly's recent enactment of N.C. Gen. Stat. § 114-2.4A, enacted on 2 August 2014, provides further evidence of the legislature's intent that settlement documents in actions instituted by a State agency are public records under the Public Records Act. "Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990).

N.C. Gen. Stat. § 114-2.4A provides the following in pertinent part:

> (a) Definition. -- For purposes of this section, the term "settlement" means an agreement entered into by the State or a State agency, with or without a court's participation, that ends (i) a dispute, lawsuit, or part of the dispute or lawsuit or (ii) the involvement of the State or State agency in the dispute, lawsuit, or part of the dispute or lawsuit. This term includes settlement agreements,

> stipulation agreements, consent judgments, and consent decrees.
>
> . . . .
>
> (g) Required Submission. -- In addition to any other report or filing that may be required by law, and unless the settlement is sealed pursuant to a written order of the court in accordance with G.S. 132-1.3 or federal law, *the Attorney General's Office shall submit a copy to the Legislative Library of any settlement or other final order or judgment of the court in which the State or a State agency receives funds in excess of seventy-five thousand dollars ($75,000)*. The submission required by this subsection shall be made within 60 days of the date (i) the settlement is entered into or (ii) the final order or judgment of the court is entered. *Any information deemed confidential by State or federal law shall be redacted from the copy of the settlement or other final order or judgment of the court prior to submitting it to the Legislative Library.*

(Emphasis added.) In short, N.C. Gen. Stat. § 114-2.4A requires that settlement agreements in which a State agency receives in excess of $75,000.00 will be available to the public at the Legislative Library with the sole exceptions being settlement agreements sealed under N.C. Gen. Stat. § 132-1.3 and "confidential" material redacted from the agreement.[3]

Obviously, the vast majority of settlement agreements involving payments to the State agency will be in actions instituted by the State agency. The fact that N.C. Gen. Stat. § 114-2.4A requires that a copy of such settlement agreements be available at the Legislative Library is inconsistent with any reading of N.C. Gen. Stat. § 132-1.3 that settlement documents in actions instituted by a State agency are not public records.

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3. The General Assembly frequently requires the filing of documents in the Legislative Library in addition to other offices, ensuring public access. *See, e.g.*, N.C. Gen. Stat. § 120C-220 (2013) (requiring Secretary of State to furnish State Legislative Library with list of all persons who have registered as lobbyists and whom they represent); N.C. Gen. Stat. § 143-47.7 (2013) (requiring appointing authority to file written notice of appointment with Governor, Secretary of State, Legislative Library, State Library, State Ethics Commission, and State Controller); N.C. Gen. Stat. § 160A-111 (2013) ("The city clerk shall file a certified true copy of any charter amendment adopted under this Part with the Secretary of State, and the Legislative Library.").

CHS makes various policy arguments supporting its position that settlement agreements in actions initiated by public agencies should not be public. In *Poole*, our Supreme Court was clear: it is not our role to expand upon the General Assembly's specific statements in the Public Records Act. *See Poole*, 330 N.C. at 481, 412 S.E.2d at 16 ("While we recognize this policy argument, we must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Law, none of which permanently protects a deliberative process like that of the Commission after the process has ceased.").

Based on the language of N.C. Gen. Stat. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that we construe § 132-1.3 consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, we hold that N.C. Gen. Stat. § 132-1.3 does not except from the Public Records Act settlement documents in actions instituted by public agencies falling within the Public Records Act. We, therefore, reverse the trial court's order granting defendants' motion to dismiss.

Reversed.

Judges STEPHENS and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 DECEMBER 2014)

ANDERSON v. ANDERSON No. 14-748	Surry (12CVD460)	Remanded
ARNOLD v. INS. CO. OF STATE OF PA. No. 14-715	Edgecombe (12CVS996)	Vacated
BECKER v. N.C. CRIM. JUSTICE EDUC. & TRAINING STANDARDS COMM'N No. 14-568	Edgecombe (13CVS106)	Affirmed
BOBBITT v. EIZENGA No. 14-586	Davie (10CVD13)	Vacated and Remanded
BRANCH BANKING & TR. CO. v. HARRELSON BLDG., LLC No. 14-512	Forsyth (13CVS6326)	Affirmed
BRYANT v. HOLZINGER No. 14-711	Randolph (11CVS2727)	Affirmed
CURRITUCK CLUB PROP. OWNERS ASS'N, INC. v. MANCUSO DEV., INC. No. 14-476	Currituck (11CVS118) (11CVS118)	Affirmed
DAWKINS v. CRUZ No. 14-834	Wake (13CVS7633)	Dismissed
GORDON v. GORDON No. 14-484	Wake (11CVD17745)	Affirmed
IN RE C.M.W. No. 14-768	Gaston (10JT200)	Affirmed
IN RE H.H. No. 14-902	Polk (13JA31-32)	Affirmed in Part; Remanded in Part
IN RE J.C.S. No. 14-685	Nash (12JT102)	Affirmed
IN RE L.B-M. No. 14-747	Orange (12JT98)	Affirmed
IN RE M.M.M. No. 14-298	Onslow (11JT166)	Affirmed
IN RE N.D.S. No. 14-826	Wake (12JT219)	Affirmed

IN RE O.K.D No. 14-755	Wilkes (13JA62) (13JA63) (13JA64)	Affirmed
IN RE R.D.L. No. 14-781	Robeson (10JT206)	Affirmed
IN RE S.T. No. 14-825	Guilford (13JA434) (13JA435)	Affirmed
IN RE T.D.J. No. 14-853	Gaston (12JT72-74)	Affirmed
IN RE Z.M. No. 14-866	Orange (11JT2)	Affirmed
JOHNSON v. CITY OF RALEIGH No. 14-730	N.C. Industrial Commission (992368)	Affirmed
LEDBETTER v. CITY OF DURHAM No. 14-656	Durham (12CVS5955)	Affirmed
LOGAN v. MORGAN No. 14-487	Guilford (11CVS8678)	Affirmed
NIXON ASSOCS., LLC v. BROWN No. 14-783	New Hanover (12CVS3806)	Affirmed
PREMIER RES. OF N.C., INC v. KELLY No. 14-602	Mecklenburg (13CVS21279)	Affirmed
RIGSBEE v. WALSH No. 14-628	Onslow (13CVS3660)	Affirmed
STATE v. AMYX No. 14-383	Pasquotank (10CRS51675)	Affirmed
STATE v. AVERY No. 14-601	Mecklenburg (09CRS240639)	No Prejudicial Error
STATE v. BENITEZ No. 14-542	Lee (09CRS1227)	Reversed and remanded; judgment vacated
STATE v. DEESE No. 14-508	Mecklenburg (11CRS202838-40)	Vacated in part; no error in part

STATE v. HIGHSMITH No. 14-608	Pitt (11CRS51062-63)	No Error
STATE v. HOXIT No. 14-439	Transylvania (12CRS50388-97)	New Trial
STATE v. JOHNSON No. 14-543	Mecklenburg (10CRS257480) (11CRS23263)	No Error
STATE v. LENNON No. 14-806	Guilford (12CRS24794) (12CRS70321)	No Prejudicial Error
STATE v. MOORE No. 14-636	Cabarrus (06CRS54375) (10CRS903)	No Error
STATE v. QUICK No. 14-758	Montgomery (11CRS50655)	No Plain Error
STATE v. TSILIMOS No. 13-1369	Mecklenburg (10CRS242533)	Affirmed
STATE v. WILLIAMS No. 14-754	Wake (09CRS25171)	No prejudicial error
STATE v. WYNN No. 14-280	Beaufort (08CRS50412)	New Trial
TONEY v. EDGERTON No. 14-453	Rutherford (12CVD864)	Affirmed
VALLEY PROTEINS, INC. v. ECO-COLLECTION SYS., LLC No. 14-717	Cumberland (12CVS2387)	Reversed, vacated, and remanded.
WALLY v. CITY OF KANNAPOLIS No. 13-1425	Cabarrus (13CVS1562)	Affirmed
WELLS v. CHARLOTTE MECKLENBURG HOSP. AUTH. No. 14-700	N.C. Industrial Commission (X88380) (Y05621)	Affirmed
WILLIAMS v. LYNCH No. 14-769	Mecklenburg (10CVS9849)	No Error
WITCHER v. PARSONS No. 14-684	Guilford (13CVS1470)	Vacated and Remanded

IN THE MATTER OF Z.T.W.

No. COA14-762

Filed 31 December 2014

1. Appeal and Error—appealability—writ of certiorari—unclear order date

Respondent juvenile's writ of certiorari was granted and the Court of Appeals considered his challenges to the trial court's order on the merits as a result of the fact that the date was unclear for when the orders that the juvenile sought to challenge on appeal were entered. The juvenile may have lost his right to seek appellate review of these orders through no fault of his own.

2. Probation and Parole—juvenile delinquency—hearsay evidence

The trial court did not err in a juvenile delinquency case by finding that respondent juvenile had violated the terms and conditions of his probation allegedly based solely on hearsay evidence. Juvenile's argument applied to adjudication rather than dispositional hearings.

3. Probation and Parole—juvenile delinquency—federally recognized disability

The trial court did not err in a juvenile delinquency case by finding that respondent juvenile willfully violated the terms and conditions of his probation allegedly without accounting for the fact that he had a federally recognized disability. Even if this aspect of juvenile's challenge to the trial court's orders were properly preserved for purposes of appellate review, it had no merit.

4. Probation and Parole—juvenile delinquency—secure custody pending placement in out-of-home setting

The trial court did not err in a juvenile delinquency case by ordering that respondent juvenile be held in secure custody pending placement in an out-of-home setting. As a result of the fact that juvenile had been adjudicated delinquent by the trial court and had also been found to be in violation of the terms and conditions of his probation, the trial court had the authority under N.C.G.S. § 7B-1903(c).

Review stemming from the allowance of a petition for the issuance of a writ of *certiorari* filed by juvenile for the purpose of challenging orders entered 18 March 2014 and 21 April 2014 by Judge Vershenia B.

Moody in Northampton County District Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Richard Croutharmel for the juvenile.

ERVIN, Judge.

Juvenile Z.T.W. appeals from orders finding him to be in willful violation of his juvenile probation, ordering that he be placed in an out-of-home placement, and requiring that he be held in secure custody pending placement out of his home. On appeal, Juvenile contends that the trial court erred by finding that he had violated the terms and conditions of his probation based solely on hearsay evidence, finding that he had willfully violated the terms and conditions of his probation without adequately considering Juvenile's federally recognized disability, and ordering that Juvenile be held in secure custody pending placement outside his home despite the fact that the evidence did not support the trial court's decision to place Juvenile in secure custody and the fact that the trial court's dispositional order lacked adequate findings of fact. After careful consideration of Juvenile'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

On 1 November 2013, the Department of Juvenile Justice and Delinquency Prevention filed petitions alleging that Juvenile should be adjudicated a delinquent juvenile based upon the commission of two simple assaults. On 19 November 2013, Judge W. Rob Lewis entered orders adjudicating Juvenile to be a delinquent juvenile based upon a finding that he had committed two simple assaults and placing Juvenile on juvenile probation for 12 months subject to certain terms and conditions. On 16 December 2013, DJJDP filed two more juvenile petitions alleging that Juvenile should be adjudicated a delinquent juvenile for committing the offenses of injury to real property and assault with a deadly weapon. On 20 December 2013, DJJDP filed a juvenile petition alleging that Juvenile should be adjudicated a delinquent juvenile for committing the offense of communicating threats. On 21 January 2014, Juvenile admitted to having committed the offenses of injury to real property and communicating threats in return for the State's agreement

to dismiss the petition alleging that he had committed the offense of assault with a deadly weapon. After accepting Juvenile's admission, Judge Lewis entered orders adjudicating Juvenile to be a delinquent juvenile based upon the commission of the offenses of injury to real property and communicating threats and placing Juvenile on juvenile probation for an additional period of 12 twelve months.

On 10 March 2014, DJJDP filed a motion for review alleging that Juvenile had willfully violated the terms and conditions of his probation by failing to regularly attend school, being suspended from school, and threatening a teacher. On 18 March 2014, the trial court entered an order finding that Juvenile had willfully violated the terms and conditions of his juvenile probation. On 21 April 2014, the trial court entered a supplemental order providing that Juvenile should be placed out of his home and that, pending his transition to the out-of-home placement, Juvenile should be held in secure custody. Juvenile noted an appeal to this Court from the 18 March 2014 order on 16 April 2014.

II. Legal Analysis

A. Appealability

[1] N.C. Gen. Stat. § 7B-2602 provides that an appeal may be noted from an order entered in a juvenile delinquency proceeding in open court following the rendition of judgment or in writing within ten days after the entry of judgment. The extent to which Juvenile noted his appeal from the 18 March 2014 order in a timely manner is not entirely clear, given that the lack of a file stamp on the 18 March 2014 order precludes us from being certain as to the exact date upon which the order in question was entered. Similarly, the absence of a file stamp on the 21 April 2014 order deprives us of any knowledge concerning the date by which Juvenile was required to note an appeal from that order. In apparent recognition of the jurisdictional issues raised by the procedural posture in which this case has come to us, Juvenile filed a petition simultaneously with his brief seeking the issuance of a writ of *certiorari* in order to permit us to examine the merits of his challenges to the trial court's orders in the event that he had failed to appeal from these orders in a timely manner, and we therefore need not address or resolve any issues that might otherwise arise with respect to the extent to which he noted his appeal from the trial court's orders in a timely fashion.

According to well-established North Carolina law, "[t]he writ of certiorari may be issued in appropriate circumstances . . . 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," N.C. R. App. P.

21(a)(1), with a showing that "the right of appeal has been lost through no fault of the petitioner" being generally sufficient to support the issuance of a writ of *certiorari*. *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962). As a result of the fact that the date upon which the orders that Juvenile seeks to challenge on appeal were entered is unclear, Juvenile may have lost his right to seek appellate review of the orders in question through no fault of his own. As a result, in the exercise of our discretion, we hereby grant Juvenile's *certiorari* petition and will consider his challenges to the trial court's orders on the merits.

B. Validity of the Trial Court's Orders

1. Revocation of Probation Based on Hearsay Evidence

[2] In his first challenge to the trial court's orders, Juvenile contends that the trial court erred by finding that he had violated the terms and conditions of his probation based solely on hearsay evidence. As Juvenile has candidly acknowledged in his reply brief, however, the Supreme Court has rejected the validity of the position upon which his argument rests in its recent decision in *State v. Murchison*, __ N.C. __, __, 758 S.E.2d 356, 359 (2014) (holding that, since the formal rules of evidence do not apply in probation revocation hearings, the trial court did not err by relying solely on hearsay evidence in determining that the defendant had violated the terms and conditions of his probation).[1] In view of the fact that the Supreme Court has clearly held that an adult offender's probation may be revoked solely on the basis of hearsay, we are not inclined to take Juvenile up on the unsupported suggestion advanced in his reply brief to the effect that we should make a generalized analysis of the extent to which the manner in which Juvenile's revocation hearing adequately protected his procedural rights and are not persuaded that the trial court's failure to advise Juvenile of the risks that he incurred by testifying at the revocation hearing necessitates an award of appellate relief given that the decision upon which Juvenile's argument applies to adjudication, rather than dispositional, hearings. *In re J.R.V.*, 212 N.C. App. 205, 209, 710 S.E.2d 411, 413 (2011) (stating that N.C. Gen. Stat.

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1. In view of the fact that the Supreme Court rejected the underpinnings of Juvenile's challenge to the trial court's determination that Juvenile had violated the terms and conditions of his probation, we need not address the validity of the State's contention that the conduct of a juvenile probation revocation hearing is governed by N.C. Gen. Stat. § 7B-2501(a) rather than by the statutory provisions governing adult probation revocation proceedings and that the evidence upon which the trial court based its revocation decision was, in fact, admissible under the exceptions to the prohibition against the admission of hearsay evidence applicable to public records and records of regularly conducted activities.

§ 7B-2405(4), under which the trial court has a duty to protect a juvenile's due process right "against self-incrimination" at an adjudication hearing, "requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing") (emphasis in original), *disc. review improvidently granted*, 365 N.C. 416, 720 S.E.2d 387 (2012). As a result, Juvenile is not entitled to relief from the trial court's orders on the basis of this contention.[2]

2. Willfulness of Violation

[3] Secondly, Juvenile contends that the trial court erred by finding that he willfully violated the terms and conditions of his probation without accounting for the fact that Juvenile has a federally recognized disability. More specifically, Juvenile contends that he had a federally recognized disability that determined his behavior and that the existence of this disability should have precluded the revocation of his probation. In addition, Juvenile contends that the trial court erred by revoking his probation given that the record contained evidence tending to show that any violation of the terms and conditions of his probation that he might have committed was not a willful one. Juvenile is not entitled to relief from the trial court's orders based on this set of contentions.

a. Standard of Review

"[A]ll that is required [in order for the trial court to revoke a juvenile's probation] is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the [juvenile] had, without lawful excuse, willfully violated a valid condition of probation." *In re O'Neal*, 160 N.C. App. 409, 412, 585 S.E.2d 478, 481, *disc. review denied*, 357 N.C. 657, 590 S.E.2d 270 (2003) (quotation marks and citation omitted). As a result, the revocation of a juvenile's probation simply requires proof "by a preponderance of the evidence that a juvenile has violated the conditions of his probation under N.C.

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2. In addition to the argument discussed in the text, Juvenile contends that the trial court erred by allowing Juvenile's court counselor, Chris Langston, to read from a school report that had not been provided to Juvenile prior to the hearing. Juvenile has not, however, cited any authority requiring that evidence of this nature be provided to Juvenile before a probation revocation hearing. Although Juvenile does cite N.C. Gen. Stat. § 15A-1345(e), which provides that, "[a]t the hearing, evidence against the probationer must be disclosed to him," this statutory provision does not support the position that Juvenile has asserted before this Court given that the contents of the school report were disclosed to Juvenile at the hearing. Thus, Juvenile is not entitled to relief from the trial court's orders on the basis of this contention.

Gen. Stat. § 7B-2510(e)." *Id.* at 412-13, 585 S.E.2d at 481. In the event that the State establishes that a juvenile violated the terms and conditions of his probation, the juvenile bears the burden of demonstrating the existence of an inability to comply with the condition that he or she violated or some other lawful excuse for the juvenile's failure to comply with his or her obligations under the existing probationary judgment. *See State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (stating that "the burden is on the [juvenile] to present competent evidence of his inability to comply" and, in the event that the juvenile fails to adduce sufficient evidence of an inability to comply, "evidence of [juvenile's] failure to comply may justify a finding that [juvenile's] failure to comply was willful or without lawful excuse"). In the event that "a [juvenile] has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation." *Id.* at 567, 328 S.E.2d at 834.

Assuming that the trial court finds that a juvenile has willfully violated the terms and conditions of his or her probation, N.C. Gen. Stat. § 7B-2510(e) provides that "the court may continue the original conditions of probation, modify the conditions of probation, or . . . order a new disposition at the next higher level on the disposition chart." In instances involving permissive statutory language, such as the language contained in N.C. Gen. Stat. § 7B-2510(e), the validity of the trial court's actual dispositional decision is reviewed on appeal using an abuse of discretion standard of review. *In re A.F.*, __ N.C. App. __, __, 752 S.E.2d 245, 248 (2013). "[A]n abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 231 (2008). As a result, a trial court's dispositional decision should be upheld on appeal unless the decision in question could not have been a reasoned one.

b. Validity of Dispositional Decision

The conditions of probation to which Juvenile was subject provided, in pertinent part, that he had to attend school regularly and obey all school-related rules and regulations. At Juvenile's probation violation hearing, the State presented evidence that, since he had been placed on probation, Juvenile had had numerous unexcused absences and had violated school rules by communicating threats to a teacher, an action that resulted in his suspension from school. As a result, the State clearly

met its burden of establishing that Juvenile violated the terms and conditions of the probationary judgment to which he was subject.

In his brief, Juvenile argues that the fact that he had an Individualized Education Plan that was based on his inability to control his behavior provided competent evidence from which the trial court could have determined that Juvenile did not willfully violate the terms and conditions of his probation when he threatened his teacher. However, instead of presenting evidence that he lacked the ability to comply with the conditions of probation to which he was subject at the hearing held before the trial court, Juvenile simply disputed the accuracy of the State's evidence concerning the events that transpired at the time that he allegedly threatened one of his teachers. For that reason, Juvenile does not appear to have properly preserved this contention for appellate review. N.C. R. App. P. 10(a)(1) (providing 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"). Moreover, even if we were to accept Juvenile's contention that the trial court's recognition in its initial disposition order that Juvenile had "an IEP from the school system" constituted evidence that Juvenile lacked the ability to control his behavior and comply with the applicable school rules, we note that the trial court, after hearing testimony from Juvenile and his mother, explicitly found that Juvenile was able to control his behavior and comply with the applicable school rules.[3] Juvenile has cited no authority requiring the trial court to make additional written findings relating to the effect of any disability from which Juvenile suffered on the willfulness determination in its order, and we have found none in the course of our own research.[4]

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3. The fact that the trial court appears to have based this determination, at least in part, on Juvenile's behavior in court does not, contrary to the argument advanced in Juvenile's brief, invalidate the trial court's decision since the differences in the environment that Juvenile faced in the courtroom and the academic environment goes to the weight to be given to the information available to the trial court rather than to its sufficiency to support a determination that Juvenile acted willfully when he threatened the teacher.

4. Admittedly, Juvenile does cite two cases in which this Court reversed trial court orders that failed to account for any age-related disability under which a young parent labored in determining whether grounds to terminate that parent's parental rights existed. *See In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002); *In re J.G.B.*, 177 N.C. App. 375, 384, 628 S.E.2d 450, 456-57 (2006). However, these decisions, while relevant in termination of parental rights proceedings, have no application in the juvenile probation revocation context.

As a result, even if this aspect of Juvenile's challenge to the trial court's orders were properly preserved for purposes of appellate review, we would find that it had no merit.

In addition, even if the trial court erred in finding that Juvenile had the ability to control his behavior and did not willfully violate the applicable school rules at the time that he communicated threats to a teacher, that fact would have no bearing on the extent to which he was willfully absent from school without a valid excuse on numerous occasions. The only justification that Juvenile has offered for his unexcused absences from school was that he left school when he was having a bad day, an explanation that the trial court could have readily found to be inadequate. Thus, in view of the fact that the trial court had the authority to enter a new dispositional order based solely on the fact that Juvenile's unexcused absences from school constituted a violation of the terms and conditions of his probation and the fact that the trial court had ample justification for determining that the only explanation that Juvenile offered for these unexcused absences was completely inadequate, the trial court did not err by entering a new dispositional order providing for Juvenile's placement in an out-of-home setting even if the fact that Juvenile had an IEP somehow operated to render his conduct in communicating threats toward one of his teachers something other than willful. As a result, Juvenile is not entitled to relief from the trial court's orders on the basis of this set of contentions.

3. Placement in Secured Custody

[4] In his final challenge to the trial court's orders, Juvenile contends that the trial court erred by ordering that Juvenile be held in secure custody pending placement in an out-of-home setting. More specifically, Juvenile contends that the facts did not warrant placing him in secure custody and that the trial court's order placing him in secure custody failed to include findings delineating the evidence upon which it relied in reaching its decision to place him in secure custody and the purposes sought to be achieved by placing him in secure custody in violation of N.C. Gen. Stat. § 7B-1906(g). Juvenile's contention lacks merit.

a. Mootness

As an initial matter, the State contends that Juvenile's challenge to the trial court's decision to place him in secure custody pending his transfer to an out-of-home placement is not properly before us on mootness grounds given that the passage of time makes it likely that Juvenile is no longer in secure custody. Aside from the fact that the record

contains no definitive information concerning Juvenile's current placement, we conclude that Juvenile's challenge to the trial court's temporary secure custody order is properly before us on the grounds that the issue that Juvenile seeks to raise "is capable of repetition, yet evading review." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). An order is reviewable pursuant to this exception to the general rule prohibiting the judicial system from addressing and resolving moot issues in the event that "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (alteration in original). In *In re D.L.H.*, 198 N.C. App. 286, 289, 679 S.E.2d 449, 452 (2009), *rev'd on other grounds*, 364 N.C. 214, 694 S.E.2d 753 (2010), this Court heard the juvenile's challenge to the trial court's decision that she be held in the Guilford County Juvenile Detention Center following her release from detention. In ruling that this Court could consider the juvenile's challenge to the trial court's detention order in spite of the fact that the underlying order had become moot, we stated that, "since the issues in this case concern the scope of statutory authority of the trial court, we address the merits of juvenile's appeal as the matters in controversy are likely to recur." *Id.* Similarly, Juvenile's challenge to the trial court's decision to have him held in secure custody pending his transfer to an out-of-court placement requests that we review an order implementing an inherently temporary measure that is likely to recur in other instances in the future. As a result, for both of these reasons, we will address the merits of the trial court's decision to have Juvenile held in secure custody pending his placement outside the home.

b. Applicable Legal Principles

N.C. Gen. Stat. § 7B-1906(g) provides that:

> If the court determines that the juvenile meets the criteria in [N.C. Gen. Stat. § 7B-1903] and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

A careful review of the relevant statutory language establishes, contrary to Juvenile's contention, that N.C. Gen. Stat. § 7B-1906(g) has no

application to the situation that is before us in this case.[5] Instead, N.C. Gen. Stat. § 7B-1906(g) applies when the trial court holds a hearing to determine whether to continue a juvenile's secure custody following an initial accusation of delinquency rather than when the trial court orders that a juvenile be held in secure custody pending the effectuation of a legally authorized out-of-home placement. The latter situation is addressed in N.C. Gen. Stat. § 7B-1903(c), which provides that, "[w]hen a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to [N.C. Gen. Stat. § 7B-2506]." As a result, our review of Juvenile's challenge to the trial court's decision that he be held in secure custody pending his transfer to an out-of-home placement is limited to determining whether the applicable provisions of the trial court's order violated N.C. Gen. Stat. § 7B-1903(c). Appellate review of a trial court order entered in reliance upon a statutory provision employing permissive language is reviewed to determine whether the trial court abused its discretion, *In re A.F.*, __ N.C. App. at __, 752 S.E.2d at 248, with such an abuse of discretion having occurred in the event "that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *In re E.S.*, 191 N.C. App. at 573, 663 S.E.2d at 478 (internal quotation marks and citation omitted).

C. Validity of Secure Custody Decision

Although Juvenile asserts that the record did not support the trial court's decision that he should be held in secure custody pending his transfer to an out-of-home placement, we do not find this contention persuasive. As we understand its provisions, N.C. Gen. Stat. § 7B-1903(c) allows a juvenile to be held in secure custody pending disposition or placement in the event that the "juvenile has been adjudicated delinquent." As a result of the fact that Juvenile had been adjudicated delinquent by the trial court and had also been found to be in violation of the terms and conditions of his probation, the

5. Juvenile's reliance on our holding in *In re V.M.*, 211 N.C. App. 389, 712 S.E.2d 213 (2011), is similarly misplaced. In that case, we reversed a dispositional order based upon the trial court's failure to make written findings as required by N.C. Gen. Stat. § 7B-2501(c) in support of an order placing the juvenile in secure custody until his 18th birthday. *Id.* at 391-92, 712 S.E.2d at 215-16. As a result of the fact that the order at issue in *In re V.M.* involved a challenge to the trial court's primary dispositional decision rather than to an interim measure that was taken in order to effectuate a longer-term dispositional decision and the fact that Juvenile has not challenged the trial court's dispositional decision in reliance on N.C. Gen. Stat. § 7B-2501(c), *In re V.M.* has no bearing on the validity of Juvenile's attack upon the trial court's order at issue here.

trial court clearly had the authority to hold Juvenile in secure custody pursuant to the authority granted by N.C. Gen. Stat. § 7B-1903(c).

In addition, we have no difficulty determining that the trial court had ample justification for its decision to hold Juvenile in secure custody pending his transfer to an out-of-home placement. In its order, the trial court incorporated the report of Juvenile's court counselor, Mr. Langston, which spoke to Juvenile's suspension from school, his anger-related difficulties, and his disobedience while living at home, by reference. In light of these determinations, Mr. Langston recommended that Juvenile be placed in secure custody pending his placement out of the home. Based on Mr. Langston's recommendations and the testimony provided by Juvenile, Juvenile's mother, and Deputy Ray Lynch, who served as the resource officer at Juvenile's school, the trial court concluded that a decision to order that Juvenile be kept in secure custody pending placement in a group home was proper, noting that, "if [Juvenile is kept] in secure custody he goes to school, he gets his education . . . any medication he needs, any treatment he needs."[6] Thus, the trial court had ample support for a decision that Juvenile should be held in secure custody pending his transfer to an out-of-home placement.[7] As a result, Juvenile is not entitled to relief from the trial court's secure custody order on the basis of the arguments advanced in his briefs.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Juvenile's challenges to the trial court's disposition orders have merit. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges ELMORE and DAVIS concur.

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6. In his reply brief, Juvenile argues that the trial court failed to make adequate findings of fact concerning the reason for requiring that Juvenile be held in secure custody pending his transfer to an out-of-home placement in violation of N.C. Gen. Stat. § 7B-2512 (providing that "[t]he dispositional order shall . . . contain appropriate findings of fact and conclusions of law"). However, Juvenile has not cited any authority in support of his contention that a trial court electing to place a juvenile in secure custody pending transfer to an out-of-home placement is required to make detailed findings in support of this decision, and we know of none.

7. Although N.C. Gen. Stat. § 7B-1903(c) does not, as we have already held, require the trial court to make findings of fact in support of a decision to hold a juvenile in custody pending transfer to a longer-term placement, we believe that the trial court's decision to incorporate Mr. Langston's report into its order by reference would satisfy the finding requirement set out in N.C. Gen. Stat. § 7B-1906(g) in the event that that statutory provision had any application to the situation that is before us in this case, not to mention the findings requirement set out in N.C. Gen. Stat. § 7B-2512.

LACEY v. KIRK

[238 N.C. App. 376 (2014)]

MARY LACEY AND JONATHAN LUCAS, PLAINTIFFS
v.
BONNIE KIRK, INDIVIDUALLY AND AS ATTORNEY-IN-FACT, BONNIE KIRK AS TRUSTEE OF THE MARY FRANCES COCHRAN LONGEST TESTAMENTARY TRUST, AND BONNIE KIRK AS EXECUTRIX OF ESTATE OF MARY FRANCES COCHRAN LONGEST, DEFENDANT

NO. COA14-688

Filed 31 December 2014

1. Appeal and Error—preservation of issues—brief—arguments not pursued—abandoned

Although defendant noted an appeal from the denial of several post-trial motions, the arguments in her brief were directed solely at the denial of her motion for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59. As a result, defendant's appeal from the denial of her other post-trial motions was deemed abandoned.

2. Trials—judge's direction to defendant—not a comment on credibility

In context, the trial court's decision to urge defendant to "tell the truth" was nothing more than an effort to persuade defendant to refrain from giving confusing answers and did not constitute a comment concerning defendant's credibility.

3. Trials—comment by court—not an assertion about defendant's position—not a statement that defendant was being deceptive

In context, a comment by the trial court was nothing more than a reiteration of the trial court's prior statement that defendant should not testify about statements made by other people and was not an assertion that defendant's position had no merit or that defendant was being deceptive.

4. Trials—judge's instruction to answer the questions—restatement of defendant's answers—no error

The trial court did not err when attempting to address defendant's failure to answer directly the questions posed to her. The trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses.

5. Trial—comments to defendant—outside the presence of jury—not prejudicial

Defendant in an action for a breach of fiduciary duty and defamation was not entitled to relief from the trial court's judgment on

the basis of comments made to defendant outside the presence of the jury. Defendant did not establish that these comments prejudiced her chances for a more favorable outcome at trial.

6. Trials—comments by trial judge—impatience—both sides treated equally

The defendant in a breach of fiduciary duty and defamation case did not receive a new trial where she contended that the trial court made inappropriate comments to or about her trial counsel. Although the record clearly indicated that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties and did not make inappropriate jokes.

7. Damages and Remedies—compensatory—supported by evidence—stipulation

The record provided ample support for the compensatory damages awarded to plaintiffs in an action for breach of fiduciary duty and defamation arising from an estate. Although defendant argued that the jury's award of compensatory damages to each plaintiff was contrary to stipulations involving interest, interest began at the date of reasonable distribution and the stipulations allowed the jury to determine when a distribution from the estate could reasonably have been made. Moreover, although defendant argued that the jury's decision to award equal damages to each plaintiff also violated a stipulation concerning shares in the estate, the evidentiary record supported the jury's overall damage award and it is not for appellate court to second-guess the means by which the jury calculated the award of damages.

8. Damages and Remedies—punitive damages—not excessive

A jury award of punitive damages in a breach of fiduciary duty claim arising from an estate was not grossly excessive. Although defendant argued that her actions were not particularly egregious given that she did not do anything more than merely delaying distribution, her conduct considered in its entirety was exceedingly reprehensible.

9. Damages and Remedies—punitive damages—ratio to compensatory—not excessive

A 38 to 1 ratio of punitive to compensatory damages in a breach of fiduciary duty case was not excessive given the ratios held not to be excessive in other cases.

10. Damages and Remedies—punitive damages—no criminal liability—award not excessive

Although defendant argued that a punitive damage award was excessive because she was not subjected to criminal liability for her conduct, nothing in our case law requires the availability of a criminal sanction to uphold a punitive damages award and the fact that defendant was merely subject to a civil rather than a criminal sanction does not in any way serve to mitigate the reprehensibility of her conduct.

11. Defamation—damages—accusation of murder—emotional trauma

The trial court did not err by denying defendant's motion for a new trial concerning the amount of compensatory damages the jury awarded for defamation. Defendant made oral communications to several people in which she accused plaintiff Lacey of having committed murder; any failure on plaintiff Lacey's part to establish pecuniary loss as a result of defendant's statements was simply irrelevant. Moreover, the testimony that plaintiff Lacey provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from defendant's false accusations.

12. Attorney Fees—award reduced due to large punitive damages—improper

The trial court abused its discretion by reducing the amount of attorney fees it awarded to plaintiffs based on the fact that plaintiffs received a large punitive damages award. Plaintiffs did not challenge any of the trial court's findings of fact as lacking in sufficient evidentiary support. The use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorney fee award involved reliance upon a factor that has no reasonable bearing on a proper attorney fee award.

Appeal by defendant from judgment entered 24 February 2014 and orders entered 10 March 2014 by Judge G. Wayne Abernathy in Alamance County Superior Court and cross-appeal by plaintiffs from order entered 10 March 2014 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 5 November 2014.

Wishart Norris Henninger & Pittman, PA, by Molly A. Whitlatch and Pamela S. Duffy, for Plaintiffs.

Robert A. Hassell Attorney At Law, P.A., by Robert A. Hassell, for Defendant.

ERVIN, Judge.

Defendant Bonnie Kirk appeals from a judgment awarding compensatory and punitive damages to Plaintiffs based on Plaintiffs' claim for breach of fiduciary duty and awarding Plaintiff Lacey compensatory and punitive damages for defamation, from an order denying Defendant's post-trial motions, and from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Defendant argues that this Court should order a new trial on the grounds that the trial court made inappropriate remarks to Defendant and Defendant's counsel that violated her right to a fair trial and that the trial court's decision to award compensatory and punitive damages for breach of fiduciary duty and compensatory damages for defamation lacked adequate record support and was contrary to law. Plaintiffs Mary Lacey and Jonathan Lucas cross-appeal from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Plaintiffs argue that the trial court erred by reducing the amount of the attorneys' fee award based on the jury's decision to award punitive damages in Plaintiffs' favor. After careful consideration of the parties' challenges to the trial court's judgment and orders in light of the record and the applicable law, we conclude that the trial court's judgment awarding damages based on Plaintiffs' claims for breach of fiduciary duty and defamation should be affirmed, that the trial court's order denying Defendant's post-trial motions should be affirmed, and that the trial court's order awarding attorneys' fees should be vacated and that this case should be remanded to the Alamance County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 24 June 2011, Mary Frances C. Longest died in Alamance County. Ms. Longest's last will and testament was admitted to probate in common form on or about 6 July 2011. Ms. Longest's will devised fifty percent of her estate to her daughter, Defendant Bonnie Kirk, and fifty percent of her estate to Plaintiffs, who were her grandchildren, with one-third of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lacey and the remaining two-thirds of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lucas. Defendant was named executrix in Ms. Longest's will.

On 18 September 2012, Plaintiffs filed a complaint, petition for partition, petition for declaratory judgment, and motion for preliminary injunction against Defendant, individually and as attorney-in-fact for Ms. Longest, as trustee of the Mary Frances Cochran Longest Testamentary Trust, and as executrix of the estate of Mary Frances Cochran Longest.

In their complaint, Plaintiffs asserted a number of claims for relief, including claims for breach of the fiduciary duty that Defendant owed to Plaintiffs as executrix of Ms. Longest's estate and for defamation of Plaintiff Lacey based on Defendant's assertion that Plaintiff Lacey had murdered Ms. Longest.[1] On 19 November 2012, Defendant filed an answer in which she denied that she was liable to Plaintiffs for breach of fiduciary duty and defamation and asserted that Plaintiffs had stolen from Ms. Longest and that Plaintiff Lacey had murdered Ms. Longest.

On 5 June 2013, following a mediated settlement conference, the parties entered into and signed a memorandum of settlement. On 25 July 2013, Plaintiffs filed a motion to enforce the settlement agreement. At a hearing held on 6 August 2013, Defendant stated that she would not comply with the terms of the settlement agreement. As a result, Plaintiffs withdrew their motion to enforce the settlement agreement, indicated that they would seek a trial on the merits in this case, and announced their intention to prosecute a petition before the Clerk of Superior Court seeking to have the letters testamentary that had been issued to Defendant revoked. On 29 August 2013, the Clerk of Superior Court entered an order revoking the letters testamentary that had been issued to Defendant.

On 7 January 2014, the trial court granted summary judgment in favor of Plaintiff Lacey with respect to the defamation claim.[2] The issue of liability for breach of fiduciary duty and the issue of the amount of compensatory and punitive damages that should be awarded to Plaintiffs for breach of fiduciary duty and defamation came on for trial before the trial court and a jury at the 7 January 2014 civil session of Alamance County Superior Court. On 10 January 2014, the jury returned a verdict finding that Defendant had breached her fiduciary duty to Plaintiffs in the course of administering Ms. Longest's estate and awarding each Plaintiff $6,569.02 in compensatory damages and $300,000 in punitive damages. In addition, the jury awarded Plaintiff Lacey $50,000 in compensatory damages and $100,000 in punitive damages based upon her defamation claim.

At the conclusion of the trial, Defendant made oral motions to set aside the verdict and for a new trial, both of which the trial court

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1. Plaintiffs voluntarily dismissed a number of the other claims asserted in their complaint without prejudice on 11 February 2013.

2. Defendant did not contest her liability to Plaintiff Lacey on defamation-related grounds at the summary judgment hearing.

indicated would be denied. On 23 January 2014, Plaintiffs filed a motion seeking an award of attorneys' fees and costs that was accompanied by a number of supporting affidavits. On 24 February 2014, the trial court entered a written judgment based upon the jury's verdict.[3] On 10 March 2014, the trial court entered orders granting Plaintiffs' motion for an award of attorneys' fees, in part, and an order denying Defendant's post-trial motions. Defendant noted an appeal to this Court from the trial court's judgment, the order denying Defendant's post-trial motions, and the order awarding attorneys' fees and costs. On 28 March 2014, Plaintiffs filed a notice of cross-appeal from the trial court's attorneys' fee order.

II. Substantive Legal Analysis

[1] Although Defendant noted an appeal from the denial of the post-trial motions that she made pursuant to N.C. Gen. Stat. § 1A-1, Rules 50, 59, and 60, the arguments advanced in Defendant's brief before this Court are directed solely at the denial of the motion for a new trial that she made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. As a result, Defendant's appeal from the denial of her other post-trial motions is deemed abandoned. N.C. R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). As a result, "a trial judge's discretionary order pursuant to [N.C. Gen. Stat. §] 1A–1, Rule 59 for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603 (emphasis omitted). An abuse of discretion has occurred in the event that a trial court's discretionary decision is "manifestly unsupported by reason," a standard that requires the party seeking appellate relief to "show[] that it 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). " 'However, where the motion [made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59] involves a question of law or legal inference, our standard of

3. The trial court reduced the $300,000 punitive damage amount awarded to each Plaintiff by the jury based upon their breach of fiduciary duty claim as required by N.C. Gen. Stat. § 1D-25.

review is *de novo*.' " *N.C. Alliance for Transportation Reform, Inc. v. N.C. Dept. of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citation omitted)), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812 (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 Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A. Conduct of Trial Judge

In her initial challenge to the trial court's order, Defendant argues that she is entitled to a new trial on the grounds that the trial court made inappropriate remarks to and about Defendant and her counsel which deprived Defendant of her right to a fair trial. More specifically, Defendant argues that the trial court's repeated expressions of impatience with the manner in which Defendant and her counsel participated in the trial and expressions of opinions indicating that the trial court had a low opinion of Defendant's truthfulness unfairly prejudiced her chances for a more favorable outcome at trial. Defendant is not entitled to relief from the trial court's judgment on the basis of this set of arguments.

1. Relevant Legal Principles

"It is fundamental to due process that every defendant be tried 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' " *State v. Brinkley*, 159 N.C. App. 446, 450, 583 S.E.2d 335, 338 (2003) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). In view of the fact that " 'jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him,' " a trial judge " 'must abstain from conduct or language which tends to discredit or prejudice' any litigant in his courtroom." *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *Carter*, 233 N.C. at 583, 65 S.E.2d at 10). Put another way, "[t]he expression of opinion by the trial court on an issue of fact to be submitted to a jury . . . is a legal error." *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959) (citations omitted). A trial court's "duty of impartiality extends [from the litigant] to [her] counsel," so that a trial judge "should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in [the party's] behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), *cert. denied*, 311 N.C. 404, 319 S.E.2d

275 (1984). However, a trial judge is permitted to "question a witness for the purpose of clarifying his [or her] testimony and promoting a better understanding of it." *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986).

" '[N]ot every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.' " *Brinkley*, 159 N.C. App. at 447-48, 583 S.E.2d at 337 (quoting *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citation omitted)). We use a totality of the circumstances test in evaluating whether a judge's comments were improper and will consider any erroneous statement to be harmless "[u]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)). Among the factors that have been considered in determining the prejudicial effect of a trial judge's comments are "whether the comment occurred in isolation, any ambiguity in the comment, and the degree to which the comment suggested lack of impartiality." *Marley v. Graper*, 135 N.C. App. 423, 426, 521 S.E.2d 129, 132 (1999), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). "Where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial[,]" *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d 338, 345 (1984), with the burden of establishing that the trial judge's remarks were prejudicial resting on Defendant. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

2. Trial Court's Statements to Defendant

a. "Tell the Truth"

[2] In her brief, Defendant challenges the comment that the trial court made to Defendant during the following exchange, which addressed the ownership of a particular asset held by the estate:

> [Plaintiffs' Counsel]: So when you got this letter, did you understand that Ms. Lacey was just asking for information about the estate?
>
> [Defendant]: Not when there were things on here that Ms. Lacey knew were not true.
>
> [Plaintiffs' Counsel]: Objection, move to stike.

> [The Court]: Overruled, go ahead.
>
> [Defendant]: Does that mean I'm supposed to go ahead?
>
> [The Court]: You can answer the question.
>
> [Defendant]: Okay. For instance, the coin collection that was supposed to be Mother's, that was not Mother's. They should have known it had belonged to Daddy.
>
> [The Court]: Your father is dead.
>
> [Defendant]: Do you want me to finish or not?
>
> [The Court]: I want you to tell the truth. Your father was dead –
>
> [Defendant]: That's what I'm –
>
> [The Court]: -- and your mother had inherited the coin collection, correct?
>
> [Defendant]: Right.
>
> [The Court]: So it was your mother's, correct?
>
> [Defendant]: At that point in time, yes. But it said it was always owned by her. To me that means she's the one who started the coin collection. I'm sorry I made that distinction.

Although Defendant vigorously asserts that the trial court's instruction to Defendant to "tell the truth" constituted an expression of opinion to the effect that Defendant had testified in a perjurious manner, we do not find this argument persuasive. As we read the record, Defendant's statement that the coin collection belonged to her father could have potentially confused the jury given the fact that the death of Defendant's father meant that he could not have owned the property in question. In light of this risk of confusion, the trial court acted within lawful bounds by seeking clarification concerning the fact that Ms. Longest, instead of Defendant's father, owned the coin collection at the time of her death. When taken in context, we believe that the trial court's decision to urge Defendant to "tell the truth" was nothing more than an effort to persuade Defendant to refrain from giving what she should have known to be legally confusing answers and did not constitute a comment concerning Defendant's credibility.

b. "Then You've Got a Problem"

[3] Secondly, Defendant challenges certain remarks made by the trial court during the following colloquy between Defendant and her trial counsel:

> [Defendant's Counsel]: And so you were in a quandary, weren't you? I mean, you wanted to administer your mother's estate, didn't you?
>
> [Defendant]: Yes, I did. And I kept asking after the bank had told me that it belonged to me –
>
> [Defendant's Counsel]: Don't say what the –
>
> [Plaintiffs' Counsel]: Objection, move to strike, Your Honor.
>
> [The Court]: Sustained. And, ma'am, you cannot say what the bank said. I don't know whether the bank said that or not. Quit talking about what the bank said.
>
> [Defendant]: I don't know how to tell you what happened if I –
>
> [The Court]: Then you've got a problem.

According to Defendant, the trial court's statement that Defendant had a "problem" implied that Defendant was being deceptive and would have difficulty in proving her case. However, the record clearly reflects that, just prior to the making of this statement, the trial court had sustained an objection directed to Defendant's attempt to testify concerning a statement that had been made to her by a bank employee on hearsay-related grounds. After Defendant's trial counsel and the trial court instructed Defendant to refrain from testifying about what other people had told her, Defendant indicated that the limitations to which she was being subjected would make it difficult to explain what had happened, an interjection that resulted in the making of the challenged comment. When read in that context, the challenged comment seems to represent nothing more than a reiteration of the trial court's prior statement that Defendant should refrain from testifying about statements made by other people rather than an assertion that Defendant's position had no merit or that Defendant was being deceptive. As a result, given the fact that "a construction can properly and reasonably be given to [the trial court's] remark which will render it unobjectionable," *Colonial Pipeline*, 310 N.C. at 104, 310 S.E.2d at 345, Defendant was not, at a minimum, prejudiced by the trial court's comment.

c. "Answer the Question First"

[4] Thirdly, Defendant challenges the trial court's repeated instruction that Defendant should "answer the question first" before attempting to explain her answer and certain comments in which, according to Defendant, the trial court answered certain questions that had been posed to Defendant. In support of this argument, Defendant directs our attention to the following portions of the record:

> [Plaintiffs' Counsel]: Isn't it true, ma'am, that until you were removed, you never filed a claim against the estate for the cash in the safe deposit box?
>
> [Defendant]: I didn't know I had to.
>
> [The Court]: So the answer is no.
>
> [Defendant]: No, yes, sir.
>
> [The Court]: It's yes. I never filed –
>
> [Defendant]: Yes, I never filed a claim.
>
> . . . .
>
> [Plaintiffs' Counsel] And these are all assumptions that you made about Mary, correct?
>
> [Defendant]: After a good while.
>
> [Plaintiffs' Counsel]: Pardon?
>
> [Defendant]: After a good while. After –
>
> [The Court]: So the answer is yes, they're assumptions.
>
> [Defendant]: Yes.

Although Defendant contends that these exchanges prejudiced Defendant in the eyes of the jury, we note that "[t]he trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995). A careful review of the record clearly shows that the comments at issue here represented nothing more than an attempt on the part of the trial court to address the problem created by Defendant's failure to directly answer the questions that had been posed to her. As evidence of the existence of this problem, we note that Defendant's trial counsel made similar comments to

Defendant on multiple occasions during the trial. In addition, the trial court instructed other witnesses in addition to Defendant to "[j]ust answer the question." As a result, given that the trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses, we cannot conclude that the trial court erred by instructing Defendant to "answer the question" or by restating what Defendant's answers to the questions that had been posed to her actually were.

d. Comments Outside the Jury's Presence

[5] Fourth, Defendant objects to certain comments that the trial court made to Defendant outside the presence of the jury. Among other things, the trial court stated that Defendant was being "coy" and was wasting the jury's time. However, given that the particular comments at issue here were not made in the jury's presence and since Defendant has not otherwise shown that the trial court made impermissibly prejudicial comments to Defendant or her trial counsel, we conclude that Defendant has failed to establish that these comments prejudiced her chances for a more favorable outcome at trial. *State v. Hester*, 343 N.C. 266, 273, 470 S.E.2d 25, 29 (1996) (holding that the defendant suffered no prejudice from comments made outside of the jury's presence). As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the making of these comments.

3. Trial Court's Statements to Defendant's Counsel

[6] In addition to contending that the trial court made inappropriate comments to or about Defendant, Defendant contends that the trial court made inappropriate comments to or about her trial counsel as well. In assessing this argument, we are required, once again, to determine whether "the cumulative nature of the trial judge's inappropriate comments to the defense counsel . . . tainted the atmosphere of the trial to the detriment of Defendant." *State v. Wright*, 172 N.C. App. 464, 470, 616 S.E.2d 366, 370, *aff'd in part*, 360 N.C. 80, 621 S.E.2d 874, *disc. review denied in part*, __ N.C. __, 624 S.E.2d 633 (2005).

In her brief, Defendant excepts to certain comments that the trial court made in the course of discussing certain letters that had been admitted into evidence, specifically:

> [The Court]: The letters speak for themselves. It's all established, it's all asked and answered. You've got your basis for your argument, can't you move on? The letters are in evidence, they speak for themselves. The dates speak for themselves.

> [Defendant's Counsel]: Well, she says she doesn't remember this stuff, she doesn't know. It's established through other testimony, but it's not established through her.
>
> [The Court]: It's established.
>
> [Defendant's Counsel]: So you don't want me to ask her these questions.
>
> [The Court]: No, because it's just repetitive. Under Rule 403, I'm going to limit that evidence because it's already in evidence, it's already before the jury. Go to your next topic.

In addition, Defendant challenges the appropriateness of the trial court's statement, in ruling on an objection, that "[i]t's sustained, Ladies and Gentlemen, and we're going to move on with the trial. I will remind you that the issue we're here to determine is whether or not the Defendant breached her fiduciary duty[.]" Although Defendant contends that these comments, which were made in the presence of the jury, cast her trial counsel in an unfair light, the record reflects that the trial court directed similar statements to Plaintiffs' counsel as well. For example, the trial court interrupted Plaintiffs' counsel during a particular line of questioning by saying, "Let's move on"; by telling Plaintiffs' counsel to refrain from "chas[ing] rabbits"; and by inquiring about whether a certain line of questioning being pursued by Plaintiffs' counsel was repetitive. All of these comments were made in the course of an appropriate exercise of the trial court's authority to ensure that the court's time was not wasted by properly controlling the manner in which various witnesses were examined. *White*, 340 N.C. at 299, 457 S.E.2d at 861. Although the record clearly indicates that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties in light of this desire for expedition.[4] As a result, this aspect of Defendant's challenge to the trial court's order lacks merit.

In an attempt to persuade us to reach a different conclusion, Defendant argues that the facts of this case are analogous to those at issue in *McNeill*, in which the Supreme Court held that the cumulative

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4. In addition to the comments discussed in the text of this opinion, Defendant argues that the trial court made improper remarks to her trial counsel outside of the presence of the jury for the purpose of urging her trial counsel to proceed with the trial in a more expeditious manner. The comments upon which this aspect of Defendant's argument is based were directed to "all counsel" and could not, for that reason, have prejudiced Defendant.

effect of a series of remarks that the trial court directed toward the defendants' counsel created an appearance of antagonism and had the effect of depriving the defendant of a fair trial. *McNeill*, 322 N.C. at 427, 368 S.E.2d at 621. In seeking to persuade us of the validity of this analogy, Defendant notes that the trial judge whose conduct was at issue in *McNeill* interrupted the examination of a witness being conducted by the defendants' counsel and asked, "[w]hat in the world has that got to do with this case?" When the defendants' counsel stated, "I'm gonna' move on—I'm gonna' move on," the trial court responded, "I hope so." *Id.* at 428, 368 S.E.2d at 622. In addition, the trial court in *McNeill* interrupted the examination of another witness being conducted by the defendants' counsel and stated, "I'm bored with the repetition, frankly, and I think everybody else is. Let's get on to something that's got something to do with this case without repeating other things." *Id.* at 428-29, 368 S.E.2d at 622. When the defendant's counsel requested permission to approach the bench, the *McNeill* trial court replied, "[n]o, sir, not if you just want to tell me something I already know; that's what you're doing now. . . . But for the love of Mike, let's get down to something new." *Id.* at 429, 368 S.E.2d at 622.

Although there are limited similarities between the statements held impermissible in *McNeill* and the statements at issue here, we do not believe that *McNeill* is controlling in this case given that the Supreme Court's decision to reverse the trial court's judgment in *McNeill* rested on a number of factors that are not present in this case. For example, as the Supreme Court noted, *McNeill* involved a civil action between a governmental agency and a private citizen, a set of facts that created a risk that "[a]ny intimation by the trial court aligning itself with either side was certain to have effect in this environment." *Id.* at 428, 368 S.E.2d at 621. In addition, the trial court made several alcohol-related jokes during the course of the proceedings, causing the Supreme Court to note that, "[t]hroughout the trial, the court maintained an atmosphere of levity" which "diminished the seriousness of the mission assigned to the jury and gave the appearance of antagonism towards the defense attorney." *Id.* at 429, 368 S.E.2d at 622. Finally, the Supreme Court emphasized the fact that "[t]he same disaffection seemed not to be visited upon [the] plaintiff's witnesses." *Id.* Thus, given that the trial court in this case did not create "an atmosphere of levity" by making inappropriate jokes and made similar comments to counsel for all parties, we do not believe that *McNeill* requires an award of appellate relief in this case. As a result, Defendant's challenge to the comments that the trial court directed to her counsel does not justify a decision to overturn the trial court's order.

B. Damages for Breach of Fiduciary Duty

[7] Secondly, Defendant contends that the trial court erroneously denied Defendant's motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the amount of compensatory damages awarded to Plaintiffs for breach of fiduciary duty lacked adequate record support and on the grounds that the amount of punitive damages awarded to Plaintiffs for breach of fiduciary duty was grossly excessive. More specifically, Defendant argues that the compensatory damage award was contrary to certain stipulations that had been entered into between the parties, that Plaintiffs failed to prove the damages that they sustained for breach of fiduciary duty with sufficient certainty, and that the amount of punitive damages that Plaintiffs were awarded was so grossly excessive as to be unconstitutional. Defendant's arguments lack merit.

1. Standard of Review

A trial court is entitled to grant a new trial in favor of any party in the event that "excessive or inadequate damages appear[] to have been given under the influence of passion or prejudice" or in the event that the evidence is insufficient "to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6)-(7). "Whether to grant a [motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1,] Rule 59 [] on the grounds of excessive or inadequate damages is within the sound discretion of the trial judge," *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 317 (1995), with the same being true with respect to the decision to grant or deny a motion for a new trial on the grounds that the evidence is insufficient to justify the verdict. *Haas v. Kelso*, 76 N.C. App. 77, 82, 331 S.E.2d 759, 762 (1985). However, the extent to which the amount of damages "has been proven with reasonable certainty is a question of law we review *de novo*." *Plasma Centers of America, LLC v. Talecris Plasma Resources, Inc.*, __ N.C. App. __, __, 731 S.E.2d 837, 843 (2012) (citations omitted). We will now evaluate the validity of Defendant's challenge to the trial court's decision to deny Defendant's request for a new trial utilizing the applicable standard of review.

2. Relevant Facts

As we have already noted, Plaintiffs were entitled to fifty percent of Ms. Longest's estate, while Defendant was entitled to the other fifty percent. As executrix of Ms. Longest's estate, Defendant had a duty to expeditiously distribute the assets bequeathed in Ms. Longest's will to the appropriate beneficiaries. For a period that exceeded two years,

however, Defendant refused to distribute the property to which Plaintiffs were entitled, with this conduct resting on the fact that Defendant entertained certain beliefs about Plaintiffs' activities and other subjects that were completely devoid of factual support. For example, Defendant asserted that Ms. Longest had been poisoned; that Plaintiff Lacey had given food contaminated with cesium to Ms. Longest; that Plaintiff Lacey gave Ms. Longest an overdose of morphine during a 2004 hospital stay; that Plaintiff Lacey had caused the death of other family members; and that Ms. Longest had executed another will after the date upon which the will that had been admitted to probate had been executed. In addition, Defendant claimed that Plaintiffs had stolen certain items of Ms. Longest's property. The parties stipulated prior to the beginning of the trial that several of Defendant's assertions were not true.

Upon developing these suspicions, Defendant contacted the police. After thoroughly investigating Defendant's assertions, the police concluded that they had no merit. Once she had learned that the official investigation into the alleged murder and thefts had been closed, Defendant hired an independent testing company to check the food that had been contained in her mother's freezer for the presence of poisons. After viewing the test results and consulting with numerous medical professionals, the police concluded that, "[a]s a result of our investigation, [Defendant's] mother's death has been deemed [to have had] natural causes." Even so, Defendant persisted in her refusal to make any distribution to Plaintiffs from Ms. Longest's estate.

At the conclusion of a mediated settlement conference, the parties reached an agreement pursuant to which Plaintiffs were to drop their claims against Defendant in exchange for the distribution of their shares of Ms. Longest's estate. Defendant, however, refused to carry out her obligations under this agreement based upon her belief that Plaintiffs had stolen property from Ms. Longest even though Defendant never took any steps to recover the allegedly stolen property from Plaintiffs and even though there was no evidence whatsoever tending to show that Defendant's contention had any basis in fact.

During the estate administration process, Defendant learned that Plaintiff Lucas was having financial troubles and that he was involved in a foreclosure proceeding that threatened to result in the loss of his home. Even so, Defendant still refused to distribute his share of the estate. Instead, Defendant told Plaintiff Lucas' wife that, while Plaintiffs "were going to get a little bit from the estate," "they weren't going to get as much as they thought they were, because they should have come around more often."

During the time that she served as executrix of Ms. Longest's estate, Defendant kept over $160,000 in cash that belonged to the estate in a safety deposit box rather than placing that amount in an interest-bearing account.[5] In spite of the fact that Plaintiffs had inherited ownership interests in two houses under Ms. Longest's will, Defendant refused to allow Plaintiffs to have access to these houses and failed to distribute the rent that she collected from the occupants of these houses to Plaintiffs. After her removal as executrix on 29 August 2013, Defendant failed to promptly comply with instructions to turn over the estate's records and property to the successor administrator, an action that impaired the successor administrator's ability to administer the estate and make proper distributions to Plaintiffs. Finally, in spite of Defendant's assertions to the contrary, there was simply no evidence that Ms. Longest had ever executed another will that treated Defendant more favorably than the one that had been admitted to probate.

3. Analysis of Trial Court's Rulings

a. Compensatory Damages

In her brief, Defendant argues that the jury's decision to award $6,569.02 in compensatory damages to each Plaintiff based upon Defendant's breach of fiduciary duty was contrary to the stipulations into which the parties had entered and did not rest upon evidence that tended to show the amount of damages that Plaintiffs were entitled to recover with reasonable certainty.[6] Defendant's argument lacks merit.

According to well-established North Carolina law, a party seeking to recover damages bears the burden of proving the amount that he or she is entitled to recover in such a manner as to allow the finder of fact to calculate the amount of damages that should be awarded to a reasonable degree of certainty. *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (citing *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987)), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). "While the claiming party must present relevant data providing a basis for a reasonable

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5. At various times, Defendant attempted to claim that the cash contained in the safety deposit box belonged to her and, at other times, Defendant admitted that the cash belonged to the estate. A successor administrator rejected Defendant's claim to these funds.

6. Defendant does not contest the jury's decision to find her liable to Plaintiffs for breach of fiduciary duty or contend that Plaintiffs are not entitled to recover some amount of compensatory damages from her.

estimate, proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002).

At trial, the parties stipulated that, if the jury found that Plaintiffs had suffered damages as a result of Defendant's failure to distribute the estate in accordance with her duties, their share of the estate would have earned interest at the rate of one percent per year from the date of "reasonable distribution." However, the date upon which distribution could reasonably have been made was left for the jury's determination. In addition, the parties stipulated that the $160,000 in cash that Defendant failed to deposit in an interest-bearing account would have earned between $3,369.54 to $6,093.85 in interest, depending on the manner in which that money was invested. Stan Atwell, who testified on Plaintiffs' behalf as an expert in estate administration, stated that all but about $50,000 of the value of the property contained in Ms. Longest's estate could have been safely distributed by October 2011[7], which was after the date by which Ms. Longest's creditors were required to assert any claims that they might have against the estate, and that the entire estate administration process could reasonably have been concluded by June 2012.

Although we are not, of course, privy to the exact manner in which the jury calculated the amount of damages that should be awarded to each Plaintiff, we are confident that the record contains sufficient evidence to support the award of $6,569.02 in compensatory damages that the jury made in favor of each Plaintiff. Had distribution been made at the earliest possible date for distribution set out in Mr. Atwell's testimony and had an appropriate amount of interest been earned on the $160,000 in cash that Defendant kept in the safety deposit box, Plaintiffs would have been able to earn a total of approximately $14,000 in interest, an amount slightly larger than the total amount of $13,138.04 in compensatory damages that the jury awarded to Plaintiffs.[8] As a result, the

7. As of September 2011, the estate had a value of $769,139.97.

8. The value of the estate as of September 2011 was $769,139.97. In our view, the jury could have reasonably used this amount as the value of the estate as of October 2011, which represented the earliest date upon which distribution could have reasonably been made. After subtracting the $50,000 that needed to be withheld from any distribution made at that time, Plaintiffs' share of this value of the estate comes to $359,569.98. An application of the stipulated interest rate of 1% per year from the reasonable date of distribution until the date of the jury verdict, a period of 27 months, results in a rough total of $8,000 in interest. In addition, the cash that Defendant kept in the safe deposit box would have

record provides ample support for the total amount of compensatory damages awarded to Plaintiffs.

Defendant, however, argues that, since Plaintiffs stipulated that they were entitled to differing shares in Ms. Longest's estate, the jury's decision to award an identical amount of compensatory damages to each Plaintiff was contrary to the evidentiary record developed at trial. However, given that the total amount of damages awarded to Plaintiffs had adequate record support, Defendant has no right to complain about the manner in which the jury elected to apportion the overall damage amount between Plaintiffs given that "the defendant has no voice in the apportionment of damages between" multiple plaintiffs. *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N.C. 418, 428, 74 S.E. 331, 334 (1912) (citing *Hocutt v. Wilmington & Weldon Railroad Co.*, 124 N.C. 214, 217, 32 S.E. 681, 682 (1899)). In view of the fact that "[i]t is not for this Court to second-guess the means by which the jury calculated the award of damages," *Keels v. Turner*, 45 N.C. App. 213, 220, 262 S.E.2d 845, 848 (1980), and the fact that the evidentiary record supports the jury's overall damage award, the trial court did not err by denying Defendant's motion for a new trial with respect to this issue.

b. Punitive Damages

[8] Secondly, Defendant argues that the jury awarded a grossly excessive amount of punitive damages in connection with Plaintiffs' breach of fiduciary duty claim. According to Defendant, the punitive damage award was so large as to violate the due process clause of the Fourteenth Amendment to the United States Constitution. We are not persuaded by Defendant's argument.

N.C. Gen. Stat. § 1D–25(b) provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater," and that, "[i]f a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." *Id.* In view of the fact that the jury awarded each Plaintiff $6,569.02 in compensatory damages, the trial court reduced the jury's punitive damage award of $300,000 for each

earned up to $6,093.85 in interest had it been invested in a 24 month certificate of deposit. As a result, the evidence would have supported a jury determination that Defendant's failure to administer the estate in a proper fashion could have cost Plaintiffs roughly $14,000 in interest.

Plaintiff to $250,000 for each Plaintiff in compliance with N.C. Gen. Stat. § 1D–25(b). As a result, the ultimate issue raised by Defendant's challenge to the punitive damage award is whether an award of $250,000 in punitive damages for each Plaintiff contained in the final judgment is grossly excessive.

"When a punitive damages award is 'grossly excessive,' it violates the due process clause of the Fourteenth Amendment." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 157, 683 S.E.2d 728, 740 (2009) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1596, 134 L. Ed. 2d 809, 822 (1996)). In determining whether an award of punitive damages is grossly excessive, we consider "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) available sanctions for comparable conduct." *Id.* at 157-58, 683 S.E.2d at 740 (citing *BMW*, 517 U.S. at 574-75, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. The degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 688, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004) (citation omitted). The actual amount of punitive damages to be awarded in any particular case is committed to the jury's sound discretion. *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 231, 404 S.E.2d 664, 667 (1991).

In her brief, Defendant argues that, to the extent that she engaged in "reprehensible conduct," her actions were not particularly egregious given that she did not do anything more than "merely delaying distribution." In our view, this argument severely understates the nature and extent of Defendant's conduct. As the record clearly reflects, Defendant deliberately denied Plaintiffs access to property that had been bequeathed to them for an extended period time and engaged in this conduct at a time when at least one of them was suffering from significant financial difficulties without having any legitimate reason for acting in that manner. Defendant made baseless accusations that Plaintiffs had committed murder, attempted murder, and larceny in an attempt to avoid making any distribution of the assets of the estate to Plaintiffs even though these allegations were completely baseless. In the course of depriving Plaintiffs of their rightful inheritance, Defendant ignored official determinations that Ms. Longest had died of natural causes and that there was no evidence that any theft had taken place. Finally, Defendant refused to cooperate with the estate administration process even after her removal as executrix. The willfulness of Defendant's conduct was evidenced by her admission that Plaintiffs "weren't going to get as much

as they thought they were [from the estate], because they should have come around more often." In our view, Defendant's conduct is at least as reprehensible as the conduct at issue in the cases upon which Defendant relies, such as *Greene v. Royster*, 187 N.C. App. 71, 652 S.E.2d 277 (2007), in which we found sufficient reprehensible conduct to support a sizeable punitive damage award against individuals who knowingly sold cars that were unfit for operation on state roads and concealed information concerning the vehicles' net worth from prospective buyers. *Id.* at 80, 652 S.E.2d at 283. As a result, we hold that Defendant's conduct was, when considered in its entirety, exceedingly reprehensible.

[9] In addition, Defendant argues that the 38 to 1 ratio of punitive to compensatory damages present in this case establishes the excessiveness of the punitive damages award at issue here. This Court has, however, upheld punitive damage awards reflecting similar compensatory damages to punitive damages ratios. *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94 (upholding awards involving ratios of punitive damages to compensatory damages of 30 to 1 and 23 to 1 and describing these ratios as "relatively low"); *Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353–54, 420 S.E.2d 199, 204–05 (1992) (upholding the trial court's decision to deny a new trial motion based on the assertion that a $175,000 punitive damages award was excessive when compared to a $4,550 compensatory damages award). As a result, given that the ratio of compensatory damages to punitive damages present in this case is fully consistent with ratios that have been held not to be excessive in other cases, we find no basis for overturning the punitive damages award in this case based on the relative levels of compensatory and punitive damages awarded by the trial court.[9]

[10] Finally, Defendant argues that, since she was not subjected to criminal liability for her conduct, the jury's punitive damages award was grossly excessive. Aside from the fact that nothing in our decisional law makes the availability of a criminal sanction necessary to justify a decision to uphold a punitive damage award, the fact that Defendant was merely subject to a civil, rather than a criminal, sanction for her conduct does not in any way serve to mitigate the reprehensibility of what she did. As a result, since the jury's punitive damages award stemming from Defendant's breach of fiduciary duty involved conduct that was exceedingly reprehensible and involved a ratio of punitive

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9. As Plaintiffs note, Defendant's assertion that a ratio of 38 to 1 is "eight times" greater than a ratio of 30 to 1 is mathematically incorrect.

damages to compensatory damages that was quite similar to ratios that have previously been held not to be grossly excessive, we conclude that the trial court did not err by denying Defendant's motion for a new trial with respect to the amount of punitive damages awarded in connection with Plaintiffs' breach of fiduciary duty claim.

C. Damages for Defamation

[11] Finally, Defendant contends that the trial court erred by denying her motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the $50,000 in compensatory damages awarded in connection with Plaintiff Lacey's defamation claim lacked sufficient evidentiary support and was otherwise unlawful.[10] More specifically, Defendant argues that the amount of damages that the jury awarded for defamation was not established with the required reasonable certainty. Once again, we conclude that Defendant's argument lacks merit.

1. Relevant Facts

As the record reflects, Defendant told numerous third parties, including several of the parties' relatives, that Plaintiff Lacey had either murdered or poisoned Ms. Longest or that Defendant had reason to believe that Plaintiff Lacey had caused Ms. Longest's death. In addition to admitting that she had made these statements, Defendant stipulated that these statements were not true. Plaintiff Lacey testified that Defendant's accusations caused her to be upset, hurt, and embarrassed; that certain family members would not speak to her after learning of Defendant's assertions; and that she was concerned about the impact that having been accused of murdering Ms. Longest would have on her business, her relationship with other members of the family, and her reputation in the community. The evidence clearly showed that Defendant was aware of the impact that the making of such statements would have upon Plaintiff Lacey's friends and family members.[11]

2. Compensatory Damages

According to well-established North Carolina law, oral defamation claims can be classified as either slander *per se* or slander *per quod*. *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994). Slander *per se* consists of " 'an oral communication to a third party which

10. Defendant does not challenge the $100,000 in punitive damages that was awarded in connection with Plaintiff Lacey's defamation claim.

11. In her brief, Defendant concedes that she made statements that damaged Plaintiff Lacey's reputation.

amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.' " *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). A plaintiff may obtain a damage recovery on the basis of a slander *per se* theory without specifically pleading or proving special damages. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575; *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (stating that, in a slander *per se* action, damages are presumed upon proof of publication, with no further evidence of injury being required to support a damage award).

As we have already noted, Defendant made oral communications to several people in which she accused Plaintiff Lacey of having murdered Ms. Longest. It would be difficult to conceive of a criminal offense that involves greater moral turpitude than murdering someone through the use of poison. *Losing*, 185 N.C. App. at 281, 648 S.E.2d at 263. For that reason, any failure on Plaintiff Lacey's part to establish that she sustained pecuniary loss as a result of Defendant's statements is simply irrelevant. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575. However, the testimony that Plaintiff Lacey provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from Defendant's false accusations. As a result, the trial court did not err by denying Defendant's motion for a new trial relating to this issue.

D. Attorneys' Fee Award

[12] In their sole challenge to the trial court's order, Plaintiffs contend that the trial court erred in the course of ruling on their request for an award of attorneys' fees and the costs. More specifically, Plaintiffs assert that the trial court lacked the authority to reduce the amount of attorneys' fees that it awarded to Plaintiffs based on the fact that Plaintiffs were the beneficiaries of a large punitive damages award. Plaintiffs' argument has merit.

1. Standard of Review

"The award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion." *Town of N. Topsail Beach v. Forster-Pereira*, 194 N.C. App. 763, 766, 670

S.E.2d 590, 592 (2009). However, "the trial court's discretion [in awarding attorney's fees] is not unrestrained." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001), *disc. review denied*, 355 N.C. 500, 563 S.E.2d 191 (2002). For example, attorneys' fees may not be awarded in the absence of express statutory authority. *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996). If the trial court decides to award a reasonable attorneys' fee, it must make findings of fact that support the award, including the " 'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629 (quoting *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989)). In addition, a trial court is entitled to examine a number of other factors in the course of determining the reasonableness of an attorneys' fee award, including "the nature of litigation[,] nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts." *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592 (citation and quotation omitted). As a result, "our review [of an order awarding attorneys' fees] 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.' " *Id.* (quoting *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (citation omitted)).

2. Analysis of Attorneys' Fee Award

In its motion seeking an award of attorneys' fees and the costs, Plaintiffs sought to collect a total of $262,744.64, plus any additional amounts incurred from the date of the filing of the motion until the date upon which the motion in question was heard. In its order, the trial court found that, even though the evidence clearly established her liability for breach of fiduciary duty and defamation, Defendant had persisted in defending against Plaintiffs' claims, thereby necessitating the incurrence of the expenses associated with a four day jury trial. In addition, the trial court found that Defendant's conduct during the course of the litigation of this case had caused Plaintiffs to unnecessarily incur substantial additional attorneys' fees, including, but not limited to, fees stemming from Defendant's failure to comply with the applicable discovery rules; the fact that Defendant repeatedly changed her legal position; the fact that Defendant employed four different attorneys, effectively delaying final resolution of this matter; the fact that Defendant gave nonresponsive and evasive answers to questions posed to her during her deposition;

and the fact that Defendant repudiated the mediated settlement agreement. Finally, the trial court found that Plaintiffs had incurred attorneys' fees and expenses that could properly be taxed pursuant to N.C. Gen. Stat. § 7A-305(d) in an amount that exceeded $255,000, that the fees charged by Plaintiffs' attorneys were comparable to those customarily charged for similar work, and that the fees charged by Plaintiffs' counsel were reasonable in light of all of the surrounding circumstances. After making these findings, however, the trial court awarded Plaintiffs $93,709 in attorneys' fees, noting that it would have awarded a much greater amount in attorneys' fees except for the fact that Defendant had been ordered to pay a substantial amount of punitive damages.

As a preliminary matter, we note that Plaintiffs have not challenged any of the trial court's findings of fact as lacking in sufficient evidentiary support. For that reason, the trial court's findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, Plaintiffs have refrained from challenging the majority of the trial court's conclusions of law. For that reason, Plaintiffs have accepted these unchallenged conclusions as well. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (stating that "[f]ailure to [challenge a conclusion] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts).

As Defendant acknowledges, the trial court had the authority to make an award of attorneys' fees in favor of Plaintiffs pursuant to a number of statutory provisions, including N.C. Gen. Stat. §§ 1D-45, 6-20, 6-21, 6-21.5, and 7A-305(d).[12] In addition, the trial court found, based on the evidence that Plaintiffs presented, that the amount of attorneys' fees that Plaintiffs sought to collect was consistent with the level of fees that was customarily charged in the relevant area for similar work and was reasonable given the totality of the surrounding circumstances. Finally, the trial court found, based on sufficient record evidence, that Plaintiffs

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12. As Defendant suggests, the provisions of N.C. Gen. Stat. § 6-18 support an award of costs to Plaintiff Lacey in connection with her defamation claim. However, N.C. Gen. Stat. § 6-18 does not authorize an award of attorneys' fees in such cases. *See McKissick v. McKissick*, 129 N.C. App. 252, 254, 497 S.E.2d 711, 712 (1998) (stating that, since "there is not specific authorization that costs in the context of [N.C. Gen. Stat. § 6-18] are to include attorneys' fees, costs awarded [pursuant to that statutory provision] cannot include an award of attorneys' fees"). Thus, to the extent that any attorneys' fees were awarded to Plaintiff Lacey based solely on N.C. Gen. Stat. § 6-18, that award must be vacated on remand.

had incurred in excess of $255,000 in attorneys' fees. However, instead of awarding the requested amount of attorneys' fees, the trial court awarded a substantially lower amount.

The trial court approved a lower-than-requested attorneys' fee award based on the following logic, which is set forth in the relevant findings of fact:

> 19. Pursuant to N.C. [Gen. Stat.] §§6-18, 6-21.5, 7A-305(d) and 1D-45, the Court finds that Mary Lacey should be awarded attorney's fees in the amount of $18,741.80 and costs in the amount of $2,490.50 (for a total of $21,232.30) for the defamation claim. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.
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> 20. Pursuant to N.C. [Gen. Stat.] §§6-20, 6-21, 6-21.5, 7A-305(d) and 1D-45 The Court finds that the Plaintiffs should be awarded attorney's fees in the amount of $74,967.20 and costs in the amount of $9,961.98 (for a total of $84,929.18) for the breach of fiduciary duty claim, to be allocated equally between the two Plaintiffs. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.
>
> 21. The Court further notes that the undersigned would have awarded a much greater amount in attorneys' fees to the Plaintiffs under these facts were it not for the amount of punitive damages assessed against the Defendant by the Jury.

As a result, the trial court appears to have refused to make the attorneys' fee award that it would have otherwise made based on the fact that Plaintiffs received a large punitive damages award.

The issue of whether, as Plaintiffs contend, the trial court abused its discretion by reducing the amount of attorneys' fees awarded to Plaintiffs based on the fact that they were the recipients of a large punitive damages award appears to be a question of first impression in this jurisdiction. Although our attorneys' fee jurisprudence gives trial judges substantial discretion in determining what amount of attorneys' fees to award in any particular case, we believe that the use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorneys' fee award involved reliance upon a factor that has no reasonable bearing on the making of a proper attorneys' fee award and, for that reason, constitutes an abuse of the trial court's discretion.

In making its attorneys' fee award in this case, the trial court properly considered and made findings of fact concerning the " 'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629. In addition, the trial court properly considered a number of other relevant factors, including the nature of the litigation, the complexity and amount of discovery involved in the case, and the success of the attorneys' efforts. *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592. Each of these factors has direct relevance to the reasonableness of the level of attorneys' fees that should be awarded in any particular instance. The fact that Plaintiffs received a large punitive damages award is not, however, similarly relevant to a proper attorneys' fee calculation. We reach this conclusion for several related reasons.

As an initial matter, we note that the underlying purposes sought to be effectuated by an award of attorneys' fees and an award of punitive damages are different. In essence, an award of attorneys' fees is intended to address costs that arise in the course of the litigation of a particular case while punitive damages are intended to punish a litigant for conduct that had already occurred by the time that the litigation had commenced. In other words, punitive damages "are awarded as punishment due to the outrageous nature of the wrongdoer's conduct," *Juarez–Martinez v. Deans*, 108 N.C. App. 486, 495, 424 S.E.2d 154, 159–60, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993); *see also Nance v. Robertson*, 91 N.C. App. 121, 123, 370 S.E.2d 283, 284 (stating that "[t]he purpose of punitive damages is to punish wrongdoers for misconduct of an aggravated, extreme, outrageous, or malicious character"), *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988); *Rhyne*, 358 N.C. at 166, 594 S.E.2d at 6 (stating that "North Carolina courts have consistently awarded punitive damages 'solely on the basis of [their] policy to punish intentional wrongdoing and to deter others from similar

behavior' ") (citation omitted)), while an award of attorneys' fees serves an entirely different set of purposes, including "restor[ing] Plaintiffs to the same position they would have been in had no breach of fiduciary duty occurred" in the instances to which N.C. Gen. Stat. § 6-20 and 6-21 apply or "discourag[ing] frivolous legal action" in instances governed by N.C. Gen. Stat. § 6-21.5. *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). The Supreme Court recognized the difference between punitive damages awards and attorneys' fees awards in *United Labs. v. Kuykendall*, 335 N.C. 183, 193, 437 S.E.2d 374, 380 (1993), in which it stated that, "[s]ince [attorney fees and punitive damages] serve different interests and are not based on the same conduct," a "plaintiff is not required to elect between them to prevent duplicitous recovery." As a result of the different purposes sought to be achieved by punitive damages and attorneys' fee awards, a decision to reduce an attorneys' fee award based on the fact that a party received a large punitive damages award would necessarily serve to thwart the purposes sought to be achieved by allowing the recovery of punitive damages without serving any purpose sought to be achieved by an award of attorneys' fees. Thus, the trial court abused its discretion to the extent that it reduced the amount of attorneys' fees that it would have otherwise awarded to Plaintiffs based solely on the fact that Plaintiffs received a large punitive damages award. *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008) (stating that, "[w]hen discretionary rulings are made under a misapprehension of law, this may constitute an abuse of discretion") (citations omitted).

In seeking to persuade us to reach a different result, Defendant argues that the trial court's decision represented a proper exercise of the discretion available to trial judges in making attorneys' fee awards and amounted to consideration of the nature and amount of the award that Plaintiffs received. However, for the reasons that we have previously discussed, the trial court's discretion in setting attorneys' fee awards must be based on a consideration of factors that are relevant to the reasonableness of the fee award rather than upon factors that have no bearing on the establishment of a proper attorneys' fee award. In addition, allowing the trial court to reduce the amount of attorneys' fees awarded to a prevailing plaintiff based on the fact that the plaintiff persuaded the trier of fact to approve a large punitive damages award would turn the logic of allowing consideration of the nature and amount of the substantive award in awarding attorneys' fees on its head, punishing, rather than rewarding, a successful litigant for prevailing with respect to his or her substantive claims. As a result, since the trial court erred to the extent that it reduced the amount of attorneys' fees awarded

to Plaintiffs solely on the basis of the amount of punitive damages that had been awarded to them, the trial court's attorneys' fee order must be reversed and this case must be remanded to the Alamance County Superior Court for the entry of a new attorneys' fee order that is based on a consideration of relevant factors and that contains proper findings of fact and conclusions of law.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment and orders have merit and that the trial court erred by considering an impermissible factor in determining the size of Plaintiffs' attorneys' fee award. As a result, the trial court's judgment and the order denying Defendant's motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, should be, and hereby are, affirmed; the trial court's attorneys' fee order should be, and herby is, vacated; and this case should be, and hereby is, remanded to the Alamance County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge ELMORE and Judge DAVIS concur.

LE OCEANFRONT, INC.; RICHARD W. WILLIAMS; NORA J. WILLIAMS; KAREN W. JOHNSON; HORACE M. JOHNSON, Plaintiffs
v.
LANDS END OF EMERALD ISLE ASSOCIATION, INC., Defendant

No. COA14-287

Filed 31 December 2014

1. Associations—homeowners—ownership dispute—prior conveyance—disputed property not included

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, the trial court erred by granting summary judgment in favor of the HOA. Although the HOA claimed that it acquired the land from the developer by deed in 1988, the documents referenced by the 1988 deeds showed that the oceanfront strip was not intended to be included in the conveyance. The HOA had no claim to the strip of land based on the 1988 deeds.

2. Corporations—quitclaim deed—dissolved corporation to de facto corporation—effective conveyance

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, a 2011 quitclaim deed from the developer to the corporate plaintiff was valid. Even though the quitclaim deed was filed forty-nine minutes after plaintiff's articles of incorporation, plaintiff was a de facto corporation because a bona fide effort was made to incorporate and the persons affected acquiesced to the action. In addition, even though the developer was under revenue suspension and otherwise administratively dissolved, the conveyance was permissible as an act of winding up the corporation's affairs. Therefore, the 2011 quitclaim deed, along with the unchallenged 2013 quitclaim deed, transferred whatever interest the developer had in the oceanfront strip to plaintiff.

3. Associations—homeowners—counterclaims—prescriptive easement—slander of title—trespass—issues of fact remaining—remanded to trial court

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, there were issues of fact regarding the HOA's counterclaim for a prescriptive easement and plaintiffs' claims for slander

of title and trespass. The COA remanded the matter to the trial court for determination of these claims.

Appeal by Plaintiffs from judgment entered on 2 October 2013 by Judge Phyllis Gorham in Carteret County Superior Court. Heard in the Court of Appeals 27 August 2014.

Ragsdale Liggett PLLC, by Amie C. Sivon, for Plaintiffs-appellants.[1]

Ward and Smith, P.A., by Ryal W. Tayloe, Alexander C. Dale, and Christopher M. Hinnant, for Defendant-appellee.

DILLON, Judge.

Corporate Plaintiff Le Oceanfront, Inc. and individual Plaintiffs Karen W. Johnson, and Horace M. Johnson[2] appeal from a trial court's ruling granting summary judgment in favor of Defendant Lands End of Emerald Isle Association, Inc. ("the HOA"), declaring the HOA to be the fee simple owner of a certain strip of land adjacent to the Atlantic Ocean's mean high water mark in Emerald Isle. For the following reasons, we vacate the trial court's judgment and remand for further proceedings consistent with this opinion.

I. Background

A. Summary

The Defendant HOA is a homeowners association for the Lands End residential subdivision (the "Subdivision") in Emerald Isle and owns all of the Subdivision's common areas. The individual Plaintiffs are owners of beachfront lots in the Subdivision. The corporate Plaintiff is an entity set up by the individual Plaintiffs.

The subject matter of this action is a strip of land, consisting of over 14 acres, which lies between the Subdivision and the Atlantic Ocean. (This strip of land is hereinafter referred to as "the Oceanfront Strip.") The HOA claims that the Oceanfront Strip is actually *part of* the

1. Originally, James L. Conner, II, was also counsel of record for Plaintiffs-appellants for this appeal and presented oral argument before this Court. However, this Court granted Plaintiffs-appellants' motion for substitution of counsel and notice of appearance which stated that Mr. Conner had changed firm affiliations and was no longer representing Plaintiffs-appellants.

2. Plaintiffs Richard W. Williams and Nora J. Williams, parties to the original complaint, did not appeal from the trial court's judgment.

Subdivision's common area, which it acquired by deeds from developers of the Subdivision (hereinafter "the Developer[3]") in 1988 (hereinafter "the 1988 deeds") or, in the alternative, that the HOA has an easement to use the strip. Plaintiffs, however, claim that the 1988 deeds did *not* include the Oceanfront Strip and that the corporate Plaintiff became the owner of the Oceanfront Strip through three quitclaim deeds from the Developer delivered, one in 2011 and two in 2013 (hereinafter "the quitclaim deeds").

We hold that the 1988 deeds conveying land to the HOA did *not* include a conveyance of the Oceanfront Strip. We hold that the quitclaim deeds conveyed all interest the Developer had in the Oceanfront Strip to the corporate Plaintiff. We make no determination as to the nature of rights or interests the HOA has or may have with respect to the Oceanfront Strip or any portion thereof based on other theories, *e.g.*, adverse possession, prescriptive easement, etc. Accordingly, we vacate the trial court's grant of summary judgment in favor of the HOA and remand this matter to the trial court for further proceedings consistent with this opinion.

B. Subdivision History

In 1973, the Developer acquired adjacent tracts of land which would encompass the Subdivision proper and the Oceanfront Strip. This acreage is located on Bogue Banks, a narrow barrier island which extends east to west, with the Atlantic Ocean to its south.

The acreage is bounded on the north by Coast Guard Road.

The southern boundary of this acreage is the mean high water mark of the Atlantic Ocean. *See* N.C. Gen. Stat. § 77-20(a) (2011) (defining the seaward boundary of all property in North Carolina as "the mean high water mark").

The acreage is bounded on the east and west by what is now other residential subdivisions.

After acquiring the acreage, the Developer proceeded with the development of the Subdivision. In 1974, the Developer filed eight maps ("the 1974 maps"), each depicting a different section of the to-be-developed

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3. The Subdivision was developed by a series of entities over two decades. The property which makes up the Subdivision proper and the Oceanfront Strip, or portions thereof, were transferred on a number of occasions between different developer entities during this time. As used herein, "Developer" refers to any one or all of these entities.

Subdivision, which laid out the location of the proposed lots, streets, common areas, open spaces, and other features within that section. Two of these eight maps depict the sections of the Subdivision that are adjacent to the Oceanfront Strip. The other six maps depict sections that are inland and, therefore, are not relevant to this appeal. At this time, the Developer also recorded a Declaration of Covenants and Easements ("the 1974 Declaration"), which referenced the 1974 maps.

In the 1980's, the Developer filed four maps ("the 1980's correction maps"), correcting certain aspects of four of the original eight 1974 maps. Two of these maps correct the two 1974 maps which depict the sections of the Subdivision adjacent to the Oceanfront Strip.

The aforementioned maps represented that the Subdivision would contain approximately 300 individual home lots, forty-five of which were to be "beachfront," bounded on the south by the Oceanfront Strip. Other parcels within the Subdivision were also depicted to be bounded on the south by the Oceanfront Strip, including a lot for the proposed Subdivision clubhouse (which was completed in 1981) and areas of open space and strips of common area land leading from a Subdivision street to the northern border of the Oceanfront Strip.

In 1986, the HOA was formed. During this time, the Developer sold lots to individual homeowners.

In 1988, the Developer[4] executed the 1988 deeds, essentially conveying the open spaces and common areas depicted on the recorded maps to the HOA.

In 2004, the individual Plaintiffs purchased two of the Subdivision's beachfront lots. In their Complaint, the individual Plaintiffs allege that they believed the lots they were buying extended through the Oceanfront Strip all the way to the Atlantic Ocean's mean high water line. There is evidence that over the course of time, the individual Plaintiffs installed sand fences; planted sea oats; built decks, walkways and gazebos; paid beach nourishment assessments to the Town of Emerald Isle as oceanfront owners; and gave the Town easements for beach nourishment projects with respect to land within the Oceanfront Strip in front of their residence.

In 2005, the HOA, in response to inquiries regarding the installation of structures by homeowners encroaching on the Oceanfront

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4. At this time in 1988, there were three Developer entities who owned some interest in the Subdivision common areas and the Oceanfront Strip.

Strip, sent letters to all beachfront lot owners claiming ownership of the Oceanfront Strip. Further, in 2010, the individual Plaintiffs observed that the HOA had pumped excess storm water into the Oceanfront Strip in front of their residence. The HOA presented evidence that it had, in fact, been pumping excess storm water into the Oceanfront Strip from time-to-time since the 1990's.

In 2011, the individual Plaintiffs formed the corporate Plaintiff and contacted the Developer – who had not been involved in any Subdivision matters in over a decade – to acquire legal title to the Oceanfront Strip. The three Developer entities, who executed the 1988 deeds, delivered the quitclaim deeds in 2011 and 2013, quitclaiming whatever interest these Developer entities had in the Oceanfront Strip.

C. Procedural History

In 2011, Plaintiffs filed suit against the HOA, raising claims (1) to quiet title (based on the quitclaim deeds); (2) for slander of title (claiming ownership); (3) for equitable estoppel (based on alleged conduct by the HOA when selling the beachfront lots in acting in a manner to lead purchasers to believe that those lots extended all the way to the ocean's mean high water mark); (4) for nuisance (based on the storm water pumped into the Oceanfront Strip); and (5) for trespass; and requesting *inter alia* "[t]he Court declare that [the corporate Plaintiff] is the owner of the Oceanfront Strip[.]" The HOA filed its answer including counterclaims for declaratory judgment that it was the owner of the Oceanfront Strip, a claim to quiet title, and, in the alternative, for an easement over the Oceanfront Strip.

In 2013, the HOA filed a motion for summary judgment on all claims and counterclaims. After a hearing on the motion, the trial court granted the HOA's motion for summary judgment. The judgment declared that the Developer deeded the Oceanfront Strip to the HOA in fee simple in 1988 and that the Oceanfront Strip is part of the "common area" of the Subdivision; and dismissed all other claims and counterclaims with prejudice, except Plaintiffs' claims for nuisance based on the storm water pooling in front of their residences. Plaintiffs took a voluntary dismissal of their nuisance claims and, subsequently, filed their notice of appeal from the trial court's judgment.

II. Analysis

On appeal, Plaintiffs contend that the trial court erred in granting summary judgment in favor of the HOA. A motion for summary judgment is appropriately granted where "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(c) (2011). We review the trial court's summary judgment order *de novo*. *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007).

An action to quiet title "may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2011); *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983) (stating that "[t]he beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion"). As ownership of the Oceanfront Strip by the operation of the 1988 deeds conveying land from the Developer to the HOA would preclude any claim by the corporate Plaintiff based on the 2011 and 2013 quitclaim deeds, we first turn to address the parties' arguments regarding the 1988 deeds.

A. The 1988 Deeds to the HOA

[1] The HOA claims that it acquired fee simple title in the Oceanfront Strip through the 1988 deeds. We disagree.

The 1988 deeds do not explicitly reference the Oceanfront Strip, and there are no metes and bounds description for the Oceanfront Strip. Rather, the 1988 deeds reference three other recorded documents. Specifically, the 1988 deeds convey to the HOA "[a]ll streets and other common areas as described" in (1) the 1974 Declaration; (2) an amendment to the 1974 Declaration; and (3) relevant to this appeal, the two 1980's correction maps depicting the sections of the Subdivision adjacent to the Oceanfront Strip.

"When courts are called upon to interpret deeds or other writings, they seek to ascertain the intent of the parties, and, when ascertained, that intent becomes the deed . . . ." *Franklin v. Faulkner*, 248 N.C. 656, 659, 104 S.E.2d 841, 843 (1958). "The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise." *County of Moore v. Humane Soc'y of Moore County, Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003). "The grantor's intent must be understood as that expressed in the language of the deed[.]" *Id.*

In this case, we must examine these other documents[5] referenced in the 1988 deeds to determine whether the Developer conveyed the Oceanfront Strip to the HOA.

1. The 1974 Declaration

First, the 1988 deeds convey all the "common areas" as described in the 1974 Declaration. The 1974 Declaration defines "common area" as being: "[a]ll of that area *dedicated* to the private use of the lot owners of 'Lands End of Emerald Isle' and that portion *referred* to as 'open spaces' on [the 1974 maps]." (Emphasis added.) Additionally, the 1974 Declaration "more particularly describe[s]" the term "common area" as "all the lands contained in the [1974 maps] [except for] the platted [individual] lots." The HOA describes this definition of "common area" in its brief as "all the lands contained in the eight [1974] plats, except for the lots."

We have held that "a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[,]" *Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901), becoming "part of the description and is subject to the same kind of construction as to errors [as the deed]." *Parrish v. Hayworth*, 138 N.C. App. 637, 640, 532 S.E.2d 202, 205 (2000), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 15 (2001). Here, we conclude, however, that the 1974 maps do not contain anything to indicate that any of these maps – most notably the two maps depicting the beachfront sections of the Subdivision - were intended to affect any right or interest of the Developer in the Oceanfront Strip. In other words, there is nothing in any of the 1974 maps to indicate that the Oceanfront Strip were to be considered part of the section of the Subdivision that any of the said maps was intended to include. In fact, we conclude these maps show a contrary intent.

First, each of the 1974 maps contains a small "location map[6]," which unambiguously shows that the Oceanfront Strip was outside the

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5. The description in the 1988 deeds separate each document with the word "and." Plaintiffs argue, therefore, that the 1988 deeds only convey those "streets" and "common areas" which are depicted in *all three* described documents. The HOA argues that we must only find the Oceanfront Strip described in any one of the three documents. However, we do not have to reach this issue, as we do not believe that *any* of the three documents referenced in the 1988 deeds adequately demonstrate that the Developer intended to convey the Oceanfront Strip.

6. In addition to the actual survey, a survey map typically contains other items such as a map legend, notes of the surveyor, and a small "location map." To better describe what is meant by "location map," a large survey map of Central Park might contain a small map – the "location map" - in the corner depicting all of Manhattan with Central Park shaded in.

intended scope of the area being surveyed. Specifically, each of the two 1974 maps depicting the beachfront sections of the Subdivision - namely the maps recorded in Book of Maps 11, Pages 77 and 78 - contains a "location map." Each of these "location maps" depicts the entire Subdivision divided into eight sections, numbered 1-8, with one of the sections shaded in; Coast Guard Road to the north of the Subdivision; the Oceanfront Strip and the Atlantic Ocean to the south of the Subdivision; and parts of the adjacent tracts located to the east and west of the Subdivision. The location maps on each of the eight 1974 maps has a different section of the Subdivision shaded in, depending on which section said map was surveying. Each location map contained the words "This Sheet[,]" with an arrow pointing from those words to the shaded area of the location map, which we believe expressed an intention of what area was to be affected by the map. Therefore, we conclude that these location maps are clear and unambiguous in depicting that the rights and interests of the Developer in the Oceanfront Strip were not intended to be affected by any of the 1974 maps. Specifically, none of the location maps have the Oceanfront Strip or any portion thereof shaded in to indicate that the strip was intended to be part of any of the 1974 maps. Accordingly, the location maps which are a part of the 1974 maps themselves unambiguously show that the Oceanfront Strip was not intended to be part "of the lands contained in [the maps referenced in the 1974 Declaration]."

Further, there is nothing else on the 1974 maps to overcome this clear lack of intent to include the Oceanfront Strip as part of the area affected thereby. For example, even though the mean high water mark is a recognized, although shifting, boundary, *see Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 277 N.C. 297, 303-04, 177 S.E.2d 513, 516-17 (1970), the maps omit much of this boundary. Additionally, while all of the 1974 maps depict different areas as streets, "open space[s]" or "common area[s]," there is no such designation on any portion of the Oceanfront Strip depicted on these 1974 surveys. *See Harry v. Crescent Resources*, 136 N.C. App. 71, 523 S.E.2d 118 (1999) (holding that because the free use of property is favored in this State, the depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space).

2. Amendment to the 1974 Declaration

The 1988 deeds refer to the amendments to the Covenants "by instrument recorded in Book 564 at Page 273[.]" However, none of the parties make reference to this document in their briefs. Therefore, we do not consider it.

3. The Correction Maps

Finally, the 1988 deeds refer to eight maps. Of importance among here are the two 1980's correction maps - Book of Maps 24, Page 135 and Book of Maps 19, Page 7 - correcting the two 1974 maps depicting the sections of the Subdivision adjacent to the Oceanfront Strip. However, like the 1974 maps, we believe that these 1980's correction maps are unambiguous in demonstrating an intent by the Developer not to include the Oceanfront Strip as part of the area affected by those maps.

First, these 1980's correction maps contain "notes" to show that they intend to "correct" certain aspects of the two 1974 maps; however, there is nothing in these notes which indicate that one of the corrections was to enlarge the scope of the 1974 maps to include the Oceanfront Strip.

Further, while the 1980's correction maps depict various portions of the Oceanfront Strip, much of this strip is covered by the survey's seal and notary signature. Further, these correction maps fail to depict the Oceanfront Strip's eastern boundary. Rather, the maps depict the eastern boundary *of the Subdivision* running from Coast Guard Road to the northern boundary of the Oceanfront Strip, but this boundary line does not extend to the mean high water mark of the Atlantic Ocean. This failure to depict the entire southern boundary of the Oceanfront Strip or *any* of its eastern boundary provides additional indication that the Developer did not intend to include the Oceanfront Strip in the conveyance.

Also, though there are many areas on the 1980's correction maps which are designated as "commons [sic] area" and as "open space," there is no such designation on any portion of the Oceanfront Strip. Finally, while each correction map contains a statement of dedication, neither refers to any dedication of the Oceanfront Strip.

In conclusion, the 1988 deeds and the documents referenced therein fail to refer to anything to show that the Oceanfront Strip was intended to be part of the conveyance.[7] Accordingly, any claim by the HOA in the Oceanfront Strip *by virtue of the 1988 deeds* fails.

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7. Included in the record are other deeds conveying various portions of the original acreage to and among the Developer entities and some of these deeds include the Oceanfront Strip as part of the property being conveyed. However, none of these deeds are referenced in the 1980's deeds, restrictive covenants, or plats and, therefore, cannot be considered.

B. The 2011 Quitclaim Deed to the Corporate Plaintiff

[2] The HOA argues that the 2011 quitclaim deed from one of the Developer entities to the corporate Plaintiff was invalid because, at the time the deed was filed, the corporate Plaintiff was not yet a legal entity and, alternatively, the Developer entitled had been dissolved. The HOA does not argue that any such disabilities existed at the time of the 2013 quitclaim deeds and, therefore, it does not challenge the validity of those deeds.

1. Developer 2011 Quitclaim Deed to Corporate Plaintiff

The HOA argues that the corporate Plaintiff's articles of incorporation were filed forty-nine minutes after the 2011 quitclaim deed from the Developer to the corporate Plaintiff was recorded and, therefore, the corporate Plaintiff as grantee was not a "legal person" as required for the conveyance. Plaintiffs contend that the transaction occurred on the same day such that the entity could be considered a *de facto* corporation, validating the conveyance.

N.C. Gen. Stat. § 55A-2-03(a) (2011) states that "[u]nless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed." We have stated that "[t]o be operative as a conveyance, a deed must designate as grantee [a living or] a legal person." *Piedmont & Western Inv. Corp. v. Carnes-Miller Gear Co.*, 96 N.C. App. 105, 107, 384 S.E.2d 687, 688 (1989), *disc. review denied*, 326 N.C. 49, 389 S.E.2d 93 (1990). The documents included in the record on appeal show that the 2011 quitclaim deed was filed before the articles of incorporation for the corporate Plaintiff were filed with the Secretary of State. The evidence in the record shows that Plaintiffs' counsel sent the articles by courier to the Secretary of State's Office hours prior to the recordation of the deed in the Register of Deeds, but that the articles were not actually filed until later that day.

Our Supreme Court has stated that

> [i]f there has been a *bona fide* effort to comply with the law to effectuate an incorporation, and the persons affected thereby have acquiesced therein, and have exercised the functions pertaining to the corporation, it becomes a *de facto* corporation, whose corporate existence cannot be litigated in actions between private individuals nor between private individuals and the assumed corporation. And, again, if a corporation *de facto* exists, it may exercise the powers assumed, and the question of its having a right

> to exercise them will be deemed one that can be raised only by the State.

Wood v. Staton, 174 N.C. 245, 253, 93 S.E. 790, 794 (1917). Here, we hold that a *bona fide* effort was made to comply with the law to incorporate and that "the persons affected" — which would include the Developer and the corporate Plaintiff — acquiesced in the action. Accordingly, we hold that the corporate Plaintiff was a *de facto* corporation at the time of the conveyance.

2. The Developer's Expired Articles of Incorporation

Lastly, the HOA contends that the Developer could not convey property because it was under revenue suspension by the Secretary of State in 2011, pursuant to N.C. Gen. Stat. § 105-230(b), and otherwise administratively dissolved and that it had not been reinstated pursuant to N.C. Gen. Stat. § 105-232. Plaintiffs respond that N.C. Gen. Stat. § 105-232 is inapplicable because the Developer conveyed the Oceanfront Strip *as an act of winding up its corporate affairs* pursuant to N.C. Gen. Stat. § 55-14-05.

N.C. Gen. Stat. § 105-230(b) (2011) states that "[a]ny act performed or attempted to be performed during the period of suspension is invalid and of no effect, unless the Secretary of State reinstates the corporation . . . pursuant to G.S. 105-232." However, N.C. Gen. Stat. § 55-14-05(a) (2011) states that

> (a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> . . . .
>
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
>
> . . . .
>
> (5) Doing every other act necessary to wind up and liquidate its business and affairs.

Therefore, even if the Developer was under revenue suspension, it could still transfer its property if done so pursuant to winding up its affairs.

Although *acquisition* of new property is not an incident to winding up, see *Piedmont & Western Inv. Corp.*, 96 N.C. App. at 108, 384 S.E.2d at 689, we hold that the disposition of property in this case is

precisely what N.C. Gen. Stat. § 55-14-05(a)(2) or (5) was enacted to allow. We note that Ronald Watson, who signed all the 2011 quitclaim deed on behalf of the Developer entities, stated that it was his intention to transfer the entire Oceanfront Strip to the corporate Plaintiff as part of winding up the entities. Further, there is no indication that any of the Developer entities were still engaging in any development activities or had any intent to do so in the future. Accordingly, the HOA's arguments are overruled.

As the corporate Plaintiff was a *de facto* corporation when the deed was signed and the Developer transferred corporate property pursuant to winding up its affairs, we hold that the corporate Plaintiff acquired, through the 2011 quitclaim deed and the 2013 quitclaim deeds, whatever interest the Developer had in the Oceanfront Strip.

C. Easement Counterclaim

[3] We clarify that our ruling does not take a position on any easement claims that the HOA has relating to the Oceanfront Strip or any portion thereof. Here, the trial court's judgments dismissed all claims and counterclaims, including the HOA's counterclaim, in the alternative, for an easement over the Oceanfront Strip.

In order to establish an easement by prescription, the claimant must meet the six criteria set out in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985):

> 1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.
>
> 2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.
>
> 3. The use must be adverse, hostile, or under a claim of right. . . .
>
> 4. The use must be open and notorious. . . .
>
> 5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . .
>
> 6. There must be substantial identity of the easement claimed. . . .

Id. at 49-50, 326 S.E.2d at 610-11 (emphasis added) (quoting *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974)). Additionally,

we have recently stated that to establish an implied easement by necessity

> one must show that: (1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became 'necessary' for the claimant to have the easement." *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996)(internal quotations and citations omitted).
>
> > [I]t is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the [land] in the same manner and to the same extent which his grantor had used it . . . .
>
> *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961).

Barbour v. Pate, ___ N.C. App. ___, ___, 748 S.E.2d 14, 18 (2013).

These issues do not appear to be well developed in the record in this case. There appear to be issues of fact as to whether the HOA has an easement or easements over the Oceanfront Strip and as to the scope and nature of any such easements. For example, there is evidence that the HOA has been using the Oceanfront Strip since the 1990's to pump storm water after large rain storms. There is some evidence that the HOA members have been using the Oceanfront Strip as a means of access to the Atlantic Ocean. Accordingly, we remand this matter to the trial court for further proceedings to determine the rights of the parties in the Oceanfront Strip consistent with this opinion.

We note there was evidence that other lot owners built improvements on the portion of the Oceanfront Strip in front of their residences. However, the trial court presently has no jurisdiction to determine the easement rights of the owners of individual lots as they have not been joined as parties to this action.

III. Conclusion

In conclusion, we hold that the Developer did not convey the Oceanfront Strip to the HOA by virtue of the 1988 deeds. Further, we hold that when the Developer delivered the 2011 and 2013 quitclaim deeds,

the Developer conveyed all of its interest it still had in the Oceanfront Strip at those times to the corporate Plaintiff. Finally, we hold that there are issues of fact regarding the HOA's easement claims and regarding Plaintiffs' claims for slander of title and trespass. Accordingly, we vacate the trial court's judgment, and we remand this matter for proceedings consistent herewith.

VACATED and REMANDED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

SIVARAMALINGAM MANICKAVASAGAR, M.D., Plaintiff-Appellant
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DR. ARMAYNE DUNSTON (in her official capacity and in her individual capacity), and BIANCA HARRIS (in her official capacity and in her individual capacity), Defendants-Appellees

NO. COA14-757

Filed 31 December 2014

1. Employer and Employee—retaliatory discharge—letter to supervisor—grievance rather than report of discrimination

Plaintiff's claim that he was fired in retaliation for reporting discrimination based on race or national origin was without merit and was properly dismissed by the trial court. It was clear that plaintiff-physician's letter to the medical director of the facility constituted an employee grievance rather than his reporting of racial discrimination and that he did not believe that he was ever discriminated against because of his race or national origin in his employment at this facility.

2. Employer and Employee—retaliatory discharge—reasons for discharge pretextual—no reviewable arguments—summary judgment

Plaintiff's claim for retaliatory discharge was properly dismissed by the trial court where plaintiff did not provide reviewable arguments that defendants' articulated reasons for firing him were pretextual.

Appeal by Plaintiff from order entered 25 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 17 November 2014.

Monteith & Rice, PLLC, by Charles E. Monteith, Jr. and Shelli Henderson Rice, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for Defendants-Appellees.

McGEE, Chief Judge.

Dr. Sivaramalingam Manickavasagar ("Plaintiff") was hired by the North Carolina Correctional Institution for Women ("NCCIW") as a Physician III-A, and was fired from that position while still on "probationary/trainee" status. Plaintiff then filed a complaint against the North Carolina Department of Public Safety, NCCIW's medical director, Dr. Armayne Dunston ("Dr. Dunston"), and NCCIW's warden, Bianca Harris ("Warden Harris") (together, "Defendants"). Plaintiff sued Dr. Dunston and Warden Harris in both their official and individual capacities. Plaintiff's complaint alleged that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Defendants moved for summary judgment, which was granted by the trial court. We affirm.

I. Background

Plaintiff was born in Sri Lanka, but is a naturalized American citizen and has been practicing medicine since 1959. Plaintiff began employment with NCCIW as a Physician III-A on 30 January 2012. Plaintiff was to be on "probationary/trainee" status for the first nine months of his employment with NCCIW.

During NCCIW's "new hire orientation," Dr. Dunston received a report from a doctor hired at the same time as Plaintiff, Dr. Stanley Wilson ("Dr. Wilson"). Dr. Wilson stated that Plaintiff often arrived late to their training. On 21 February 2012, less than a month into his employment with NCCIW, Plaintiff reported to Dr. Dunston that Dr. Wilson had recently greeted him by saying "Namasthay," [sic] which Plaintiff felt was insulting because Plaintiff was "an American and . . . speak[s] only English." Plaintiff also reported he felt that Dr. Wilson was second-guessing him and telling him what to do. Subsequently, Dr. Dunston spoke with Dr. Wilson about his greeting, and Dr. Wilson never said "Namasthay" [sic] to Plaintiff again. Dr. Dunston also spoke with Plaintiff about the "very collaborative approach to medicine" at NCCIW and told Plaintiff he would need to be able to "welcome feedback" from his colleagues.

Throughout the next several months, Dr. Dunston received numerous reports from NCCIW medical personnel that Plaintiff was combative and refused to follow NCCIW protocol. When other doctors or medical staff attempted to inform Plaintiff about proper NCCIW protocol, Plaintiff's reported "response to everyone" was simply to dismiss them and state that he had been practicing medicine for over fifty years.

NCCIW's nurse supervisor, Pamela Freeman-Caviness, reported to Dr. Dunston on 25 June 2012 that Plaintiff was asleep in the front Provider Office of the prison ("the 25 June sleeping incident"). Dr. Dunston went to the front Provider Office and saw another doctor enter and bump into Plaintiff; Plaintiff then opened his eyes. Dr. Dunston told Plaintiff that he had been sleeping and asked Plaintiff to come to her office. Dr. Dunston later explained to Plaintiff that "sleeping was inappropriate in the prison setting" and that it was a safety and security breach. Plaintiff did not deny that he was sleeping and instead stated: "No one was going to hurt me, I know the housekeeper, she is a patient of mine and I ask her how she is doing."

Plaintiff later "admit[ted] to" the 25 June sleeping incident in a letter to Warden Harris dated 25 September 2012 ("the 25 September letter"). However, during deposition, Plaintiff clarified his statement by saying: "I admit the allegation, but not [the] description of that as sleeping on the job." To say that he was "sleeping," Plaintiff argued, would require a "differential diagnosis" from a doctor. Plaintiff further stated that he actually could not "remember . . . [the] [e]vents surrounding [the 25 June sleeping] incident and what happened after that, a few days after even," because he was on numerous medications that may have affected his cognitive state and also because he was not eating at the time in order to "remain alert."

Plaintiff wrote Dr. Dunston a letter on 2 July 2012 ("the 2 July letter"), which contained a number of grievances against Dr. Dunston. The 2 July letter generally outlined what Plaintiff saw as mismanagement of NCCIW by Dr. Dunston. It also alleged that Dr. Dunston "engaged in discriminatory activity against" Plaintiff by not assigning him to certain duties at the prison. Dr. Dunston forwarded Plaintiff's 2 July letter up the chain of command to the Equal Employment Opportunity office of the North Carolina Department of Correction ("EEO") because it "contained allegations [that] could be perceived as [racial] discrimination" by Dr. Dunston.

Nonetheless, during the EEO's subsequent investigation into the allegations in the 2 July letter, Dr. Dunston explained that she did not

assign Plaintiff to certain duties because she was concerned about what she saw as Plaintiff's clashes with staff members and refusal to follow NCCIW protocol. Moreover, Plaintiff expressly stated to EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. As such, the EEO report concluded that any intimation of racial "discrimination" in Plaintiff's 2 July letter was unsubstantiated. If anything, the report noted, Plaintiff "communicated [his own] biases of a racial nature and generalized stereotypes of African-Americans as he referenced Dr. Dunston and her health" during the investigation.

Dr. Dunston continued to receive reports of Plaintiff clashing with staff members and not following NCCIW protocol through July of 2012. Dr. Dunston also received a second report of Plaintiff sleeping on the job, this time from Dr. Wilson, on 18 July 2012 ("the 18 July sleeping incident"). Dr. Dunston and NCCIW's deputy warden, John Habuda, met with Plaintiff and Dr. Wilson the following day to discuss the 18 July sleeping incident ("the 19 July conference"). Plaintiff reportedly did not deny that he was asleep, and instead stated: "[A]fter eight hours, I can do what I want[.] [If] there is no work I can sleep, snooze, I can do whatever I want until the telephone rings and I pick it up."

They also discussed a recent argument between Plaintiff and Dr. Wilson, and Plaintiff stated that Dr. Wilson generally acted with an attitude of "white supremacy." Plaintiff also said of Dr. Dunston, his direct supervisor:

> Why should I get any advice from her[.] [S]he is an administrator, she is not a practicing physician. I am the man with the boots on the ground[.] I practice medicine, I do not need to get advice from her. . . . I will not take any clinical advice from her; I am not going to do that[.]"

After receiving a report concerning the 19 July Conference, Warden Harris ordered an internal investigation of Plaintiff due to reports that Plaintiff was still sleeping on the job and after "becoming aware of other worrisome behavior" by Plaintiff.

While the investigation of Plaintiff was pending, Plaintiff sent Dr. Dunston another letter, dated 23 July 2012. In that letter, Plaintiff accused Dr. Wilson of having "the audacity and courage to act out as a Master towards a 'Slave' only as a result of the treatment I had received from this administration since I joined the Department of Corrections about [six] months ago." Dr. Dunston also forwarded this letter up the chain of command to the EEO, which was received while the EEO was conducting its investigation into the 2 July letter.

Warden Harris informed Plaintiff, in writing, that Plaintiff was being placed on "investigatory status" effective 9 August 2012. As a result, Plaintiff would receive pay while he was being investigated, but he was not to report for duty. Plaintiff subsequently delivered another letter to the EEO on 4 September 2012. This letter reportedly documented seventeen instances where Plaintiff felt inmates had received "substandard clinical care" at NCCIW.

Plaintiff was notified by Warden Harris of his pre-disciplinary conference through a letter dated 20 September 2012. The pre-disciplinary conference was held on 24 September 2012. During the conference, Plaintiff was given the opportunity to submit a written response to the allegations against him, and he responded in the 25 September letter to Warden Harris, discussed previously. Again, Plaintiff "admit[ted] to" the 25 June sleeping incident in the 25 September letter. Plaintiff also stated he "became alert" when Dr. Dunston approached him to speak about his allegedly sleeping on the job. Plaintiff did not address the 18 July sleeping incident and stated that: "No other allegations of similar incidents have been brought to my attention[.]" Plaintiff acknowledged that he had an "adversarial relationship" with Dr. Wilson and declined to comment further except to note that he felt the issue "remain[ed] largely unresolved because of the lack of any efforts to resolve it by Dr. Dunston or anyone else in the chain of command." In a subsequent affidavit filed by Plaintiff, he took issue with the incidents involving Plaintiff and other NCCIW staff members being characterized as "confrontations" and stated that he "did not engage in 'confrontations' " with staff members at NCCIW. Instead, Plaintiff averred, "[a]ny disagreements that occurred between Dr. Stanley Wilson and I were initiated by [Dr Wilson]."

Warden Harris mailed Plaintiff written notice of Plaintiff's termination from NCCIW on 24 October 2012 ("the termination letter"). The termination letter briefly summarized many of the reports that Dr. Dunston received from NCCIW staff regarding Plaintiff's general conduct. The termination letter then set out several categories of "unacceptable personal conduct" as provided in the Department of Correction Personnel Manual ("DOC manual"), specifically,

> 4. Participating in any action that would in any way seriously disrupt or disturb the normal operation of the agency, or any sub-unit of the Department of Correction or State government.
>
> . . . .

> 16. . . . intimidation of fellow employees
>
> . . . .
>
> 20. . . . engaging in undue familiarity with inmates
>
> . . . .
>
> 28. Knowingly making false or malicious statements with intent to harm or destroy the reputation, authority, or official standing of an individual or the Department.
>
> . . . .
>
> 33. Willful failure to complete reports[or to] accurately reflect information on reports . . . where such failure could result in harm to employees, inmates, probationers, parolees, property, or other individuals.

The termination letter continued by stating that

> [t]he incidents outlined above clearly indicate an ongoing pattern of behavior that cannot be tolerated. This behavior includes your unwillingness and/or inability to accept direction or training in facility procedures from your supervisor or your colleagues; your inappropriate hostility and aggression in your interactions with other employees and in front of inmates, which disrupts the normal operations of the unit; your failure to recognize and accept such basic security protocols as the requirement to remain alert while on duty; and your unwillingness and/or inability to change your behavior despite numerous counseling attempts.

Plaintiff filed a complaint against the North Carolina Department of Public Safety, Dr. Dunston, and Warden Harris, alleging that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Plaintiff's claims were based entirely on his reporting the contents of the 2 July letter.[1] Defendants filed a motion for summary judgment as to all of Plaintiff's claims, which was granted by order filed 25 March 2014. Plaintiff appeals.

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1. On appeal, Plaintiff argues that he was also fired in retaliation for reporting what he viewed as substandard medical care of some NCCIW inmates. However, this issue is waived because Plaintiff did not raise it at trial. *See* N.C. R. App. P. 10(a)(1).

II. Standard of Review

The North Carolina Supreme Court has stated clearly that

> [s]ummary judgment is appropriate 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. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations and internal quotation marks omitted).

III. Analysis

North Carolina's Whistleblower Act ("the Act"), codified at N.C. Gen. Stat. §§ 126-84 *et seq.* (2013), provides that

> State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;
>
> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C.G.S. § 126-84(a). Section 126-85 states that

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to

> report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C.G.S. § 126-85. In order to succeed on a claim for retaliatory termination,

> the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005). However, complaints merely "concerning employee grievance matters" are not protected by the Act. *Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 117, 622 S.E.2d 702, 707 (2005). Moreover,

> [a] party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial.

Strickland v. Doe, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (citation omitted).

A. Reporting Racial Discrimination

[1] Plaintiff first contends that he was discharged from NCCIW "because he had [reported] that he was being discriminated against on account of his race and national origin" in violation of N.C.G.S. § 126-85. Although Plaintiff's complaint states that he was reporting racial discrimination in the 2 July letter, we find no evidence in the record to support this claim. With the exception of his complaint, Plaintiff has never stated that he was actually discriminated against because of his race, religion, or national origin, or that he was reporting as such. During the EEO's investigation into the 2 July letter, Plaintiff told EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. In the affidavit Plaintiff submitted to the trial court, Plaintiff never stated he felt he was discriminated against because of his race, religion, or national origin, and instead stated that he had "used the word 'discrimination' because [he] was not able to determine any other explanation for

the disparate treatment that [he] received." During deposition, Plaintiff repeatedly refused to state that there was any racial motivation behind this alleged "discrimination," as seen through the following exchanges:

> A: The statistics are startling because it clearly shows a pattern of conduct by your clients. There was something that I couldn't explain except to use the word "discrimination." Now, is it based on race or religion, sex or -- I don't know.
>
> . . . .
>
> A: I have explained to you I don't know whether it was discrimination based on the religion or some -- but I know there was discrimination or disparate treatment. . . . But whether it is based on race, this and that, I don't know.
>
> . . . .
>
> Q: [During a particular argument with Dr. Wilson], did [Dr. Wilson] make any reference to your race or national origin?
>
> A: I don't think so.
>
> Q: Okay. So do you think that interaction regarding the time sheet was motivated by your race or national origin?
>
> A: I never said that.
>
> Q: Okay.
>
> A: I never said that. I don't know why he reacted that way.
>
> . . . .
>
> Q: And at any time during that interaction [involving another argument with Dr. Wilson,] did he reference your race or your national origin?
>
> A: No.
>
> Q: Okay.
>
> A: But he told me . . . "Maybe you have done too much of this, too much of this work before."
>
> Q: You took that to be a reference to your race or national origin?

A: I don't think so. . . . I mean I don't know. This -- as I said, I haven't understood racism in the United States, ma'am . . . . You may have a better idea of racism than I do. . . . But I haven't understood racism here. . . . [N]ever in my life, never during [my time at] the NCCIW that I ever thought Dr. Dunston would do a thing like that to me, because she -- her ancestors probably were slaves here, who were treated by the whites with unusual cruelty.

. . . .

Q: Is it your position that Dr. Dunston didn't assign you to be on call because of your race and national origin?

A: You know, I told you before at the beginning, I don't understand racism in the United States. I only recognize disparate or discriminatory treatment. And I had enough evidence to show it was discriminatory treatment.

. . . .

Q: [] I'm asking you about your allegations that [Dr. Dunston] discriminated against you based on your . . . race and national origin.

A: I cannot – I don't understand the meaning of discrimination, how it is interpreted in the legal circles. You cannot put that word -- because I don't understand that. . . . What is discrimination? Discrimination can take many forms. . . . It may not be on race, this, that, and so on. . . . I am only saying discrimination. Did I say race -- this is on July 2nd letter? I may have said that. . . . I don't know. . . . I don't know what is discrimination.

Q: Well, answer the question based on your understanding . . . of what discrimination is.

A: The -- my understanding of discrimination is that if between physicians you have -- you are not treated -- if you have six physicians and you single out one, like me, I am different, and give shifts that point to a differential treatment, not fair and equitable, then I would say I have no other word to use . . . than discrimination. . . .

Q: [W]hen you say you're different, you're referring to your race and national origin, I assume; is that correct?

> A: I'm not sure of that, but -- difference [maybe] – [maybe] some other things, ma'am.
>
> Q: Like what?
>
> A: Maybe I'm intellectually superior[.]
>
> . . . .
>
> Q: Dr. Manick, you've made the very serious allegation that [Dr. Dunston] discriminated against you [based on race or national origin.]
>
> A: (interposing) I didn't make that allegation. I only said discrimination. . . . For lack of a better word, I called it discrimination[.]

At one point, after opposing counsel again specifically asked Plaintiff about the allegation in his complaint that he was discriminated against based on race or national origin, Plaintiff stated that he could not respond, pointed to his lawyer, and stated "[t]hat's what he wrote."

Based on these statements by Plaintiff, it is clear Plaintiff did not believe, even leading up to trial, that he was ever discriminated against because of his race or national origin at NCCIW. As such, Plaintiff's 2 July letter did not involve his reporting racial discrimination at NCCIW, and instead constituted an employee grievance matter, which was not protected by the Act. *See Hodge*, 175 N.C. App. at 117, 622 S.E.2d at 707. Therefore, Plaintiff's claim that he was fired from NCCIW in retaliation for reporting discrimination based on race or national origin is without merit and was properly dismissed by the trial court.

B. Reporting Fraud, Misappropriation, and Mismanagement

[2] Plaintiff next argues he was fired for reporting fraud, misappropriation of state resources, and gross mismanagement of NCCIW in the 2 July letter. Again, to establish a *prima facie* claim for retaliatory termination, a plaintiff must establish

> (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne, 359 N.C. at 788, 618 S.E.2d at 206. Regarding this third element for establishing a *prima facie* claim,

> [t]here are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's admi[ssion] that it took adverse action against [the plaintiff] [solely] because of the [plaintiff's] protected activity.
>
> . . . .
>
> Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. Cases in this category are commonly referred to as "pretext" cases.
>
> . . . .
>
> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken.

Id. at 790–91, 618 S.E.2d at 207–08 (citations and internal quotations omitted). Plaintiff's complaint alleges that Defendants' stated reasons for firing him were pretextual and, thus, his claim falls within the second category of cases described above.

> ["Pretext" cases] are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981) . . . . Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 790-91, 618 S.E.2d at 207-08 (citations omitted).

Even if we were to assume *arguendo* that Plaintiff has established a *prima facie* claim, his suit against Defendants was still properly disposed of through summary judgment. Defendants have articulated some legitimate, non-retaliatory reasons for terminating Plaintiff's employment with NCCIW, specifically his reported clashes with NCCIW personnel and ongoing refusal to follow NCCIW protocol. Therefore, under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, Plaintiff would have to raise a factual issue regarding whether these proffered reasons for firing Plaintiff were pretextual. "To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive." *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002).

Although Plaintiff argues at length in his brief that he has established a *prima facie* claim against Defendants, Plaintiff has provided this Court with no express argument that the Defendants' stated reasons for firing him were pretextual, nor has he even directly attacked the validity of most of Defendants' articulated reasons for firing him. Plaintiff does not refute the documented instances of his sleeping on the job; instead, he has stated that he either did not remember whether he was asleep or he challenges the characterization of his "non-alert[ness]" as "sleeping." Plaintiff does not dispute the repeated occurrences of his clashing with NCCIW staff; he either does not remember these occurrences or challenges their being characterized as "confrontations."

Instead, Plaintiff argues on appeal that the trial court should not have even considered the numerous reports from NCCIW staff regarding Plaintiff's conduct at NCCIW -- i.e., all of the legitimate articulated bases for firing Plaintiff – because those reports constituted hearsay. Plaintiff has waived this argument on appeal, as he did not raise it with the trial court. *See* N.C.R. App. P. 10(a)(1). In any event, Plaintiff's claim is without merit; "[s]tatements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (citation and internal quotation marks omitted).

Plaintiff does provide this Court with another argument that could be interpreted as an argument that Defendants' articulated reasons for firing him were pretextual. Plaintiff points to a part of the dismissal letter that cites several of the DOC Manual's enumerated forms of "unacceptable personal conduct." Specifically, Plaintiff's dismissal letter notes that the conduct of "[k]nowingly making false or malicious statements with

intent to harm or destroy the reputation, authority, or official standing of an individual or the Department" may have been relevant in NCCIW's determination to fire Plaintiff. Plaintiff argues that "a reasonable juror could infer that Warden Harris was referring to Plaintiff's reports of . . . waste and mismanagement of state resources . . . when she referenced false and malicious statements in Plaintiff's dismissal letter."

Notwithstanding the fact that the termination letter documents a number of inflammatory statements made by Plaintiff about other NCCIW staff members,[2] Plaintiff's own characterization that this is something that a juror "could infer," acknowledges that this is not a non-speculative fact that might establish pretext by Defendants. Because Plaintiff has not provided this Court with any further reviewable arguments that Defendants' articulated reasons for firing him were pretextual, we find that Plaintiff's claim was properly dismissed by the trial court.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.

2. Dr. Dunston's deposition also revealed that Plaintiff had previously made an unfounded report to Dr. Dunston that Dr. Wilson was only giving out narcotics to white inmates, although this instance is not documented in the dismissal letter.

MYC KLEPPER/BRANDON KNOLLS L.L.C., d/b/a Klepper Outdoor Advertising, Petitioner
v
THE BOARD OF ADJUSTMENT FOR THE CITY OF ASHEVILLE, Respondent

No. COA14-539

Filed 31 December 2014

1. Jurisdiction—subject matter jurisdiction—failure to join necessary party

The trial court did not err by denying a Board of Adjustment's motion to dismiss a petition for lack of subject matter jurisdiction based on failure to name the City of Asheville (City) as respondent in the petition. Failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of a proceeding. Further, the City's participation in the proceedings cured the defect in the petition.

2. Zoning—billboard sign—city ordinance—legal nonconforming signs could not be reestablished after discontinued use for more than a year

The trial court did not err by concluding that a billboard sign was not allowed based on a variance granted in 1992 for a sign located on the same property. The City's ordinance provided that legal nonconforming signs may not be reestablished after discontinued use for more than a year, and the pertinent structure was not in use for more than two years. The sign was installed without a permit and was larger than allowed by ordinance.

3. Zoning—billboard sign—cannot rely on misrepresentations of city official

Although petitioner argued that the City Attorney failed to inform him that the previous billboard sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. It is undisputed that the sign was installed without a permit and was larger than allowed by ordinance.

Appeal by petitioner from order entered 27 January 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 October 2014.

Kelly & Rowe, P.A., by James Gary Rowe, for petitioner-appellant.

City Attorney Robin T. Currin and Assistant City Attorney Jannice Ashley, for respondent-appellee.

GEER, Judge.

Petitioner MYC Klepper/Brandon Knolls L.L.C., d/b/a Klepper Outdoor Advertising appeals an order affirming the decision of respondent the Board of Adjustment for the City of Asheville ("the Board") upholding the issuance of a Notice of Violation ("NOV") for a billboard sign owned by petitioner. On appeal, petitioner primarily argues that the sign should be allowed pursuant to a variance granted in 1992 for a sign located on the same property. However, the City of Asheville's Code of Ordinances provides that legal nonconforming signs may not be reestablished after discontinued use for more than a year. Thereafter, the use of the structure must conform to the zoning ordinance. The prior sign was removed in 2007 and the structure was not in use for more than two years. Therefore, any newly constructed sign was required to conform to the zoning ordinance.

Although petitioner argues that the City Attorney failed to inform him that the previous sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. Because it is undisputed that the sign was installed without a permit and is larger than allowed by ordinance, we affirm.

Facts

On 27 October 2010, the City of Asheville issued an NOV to R.L. Jordan SV STA N.C. Inc., the owner of the property located at 1069 Sweeten Creek Road, Asheville, North Carolina ("the property"), for installing an off-premise sign without first obtaining a sign permit. Petitioner, the owner of the sign, appealed the NOV to the Board. The evidence at the hearing before the Board showed the following facts.

In 1992, Donald Feldbusch was granted a variance to erect a 199.88 square foot billboard on the property. Although the order granting the variance does not indicate that it was subject to any conditions, the ordinance in effect in 1992 required that all nonconforming billboards be removed or amortized within seven years of 1990, and the minutes from the board meeting when the variance was granted state that the variance was "good only through amortization period." Nevertheless, the

sign was not removed when the amortization period ended in 1997, and no notice of violation was issued by the City of Asheville.

Sometime in 2007, the sign was removed and only poles remained. On 2 September 2010, petitioner purchased the billboard structure from James and Inger Campen. The sales contract described the billboard structure as one "once known to have been . . . located" on the property. After purchasing the billboard structure and related equipment, petitioner erected a 288 square foot billboard sign on the property.

On 11 October 2010, during a routine inspection of the area, the Asheville City Development Review Specialist, Shannon Morgan, noticed the billboard on the property for the first time. Mr. Morgan searched the City's system and discovered that no sign permit application had ever been submitted for the billboard and that no sign permit for the billboard had ever been issued by the City. Consequently, on 27 October 2010, the City issued an NOV to the property owner for the installation of an off-premise sign without first obtaining a sign permit.

Following the hearing, the Board made the following pertinent findings in an order dated 28 March 2011:

> 6. Prior to 2007 a billboard did exist at the location of the sign that is the subject of the Notice of Violation, but at some time no later than the end of 2007 the sign had been removed, leaving only the poles that had supported the sign.
>
> 7. That a sign at that location had been erected and maintained pursuant to a variance granted in 1992, but the minutes from the hearing at which such variance was granted reflect that the permit issued pursuant to such variance was still subject to the amortization rules of the sign ordinance requiring all non-conforming signs to be removed in 1997.
>
> 8. That no sign existed at that location between some time in 2007 and the time the current sign was erected, a period of between two and three years.
>
> 9. That even if the current sign could be maintained as a non-conforming sign, its use was discontinued for over two years and cannot be re-established. (UDO Section 7-13-8(f)(5) and Section 7-17-3 (a)).

> 10. That the current sign ordinance allows off premise signs of no more than 12 square feet at the location of the subject sign, whereas the current sign is 288 square feet. (UDO Section 7-13-5(b)(1)).
>
> 11. That no permit for the current sign exists, and although the Appellant asserts that a permit was applied for in September of 2010, such permit would not have been issued for the sign that was constructed.
>
> 12. The Appellant spoke of use of the sign for a "Cap and Trade" transaction whereby he would either take down the subject sign so as to be allowed to erect a sign at another location, or that he would take down a sign at another location so as to be able to keep this sign, but illegal signs cannot be used to "trade" for signs elsewhere, and illegal signs cannot be erected and made "legal" as the result of having been the result of the removal of a legal sign elsewhere.

Based upon these findings, the Board concluded that:

> 1. The sign that presently exists at 1069 Sweeten Creek Road is an unlawful sign under the current sign ordinance, being larger than allowed by current code and having been constructed without a permit being obtained from the City.
>
> 2. That any previously existing legal sign of the size and at the location of the present sign should have been removed in 1997.
>
> 3. That if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be re-established after being removed for more than two years.
>
> 4. The Appellant has presented no competent evidence to support his argument for reversal of the decision of City staff to issue a Notice of Violation.

The Board, by a vote of five to zero, upheld the NOV.

Petitioner filed a petition for writ of certiorari seeking review of the Board's decision pursuant to N.C. Gen. Stat. § 160A-393. The petition was granted and a hearing on the matter was held in Buncombe County Superior Court on 19 December 2013. On 27 January 2014, the superior

court entered an order affirming the Board's decision. Petitioner timely appealed the order to this Court.

I

[1] We first address the Board's contention that the trial court erred in denying its motion to dismiss the petition for lack of subject matter jurisdiction. This Court reviews the trial court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction de novo. *Hardy v. Beaufort Cnty. Bd. of Educ.*, 200 N.C. App. 403, 408, 683 S.E.2d 774, 778 (2009).

Quasi-judicial decisions by a city's Board of Adjustment are "subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2013). N.C. Gen. Stat. § 160A-393(e) (2013) provides that "[t]he respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]" In this case, petitioners named the Board of Adjustment for the City of Asheville as respondent instead of naming the City of Asheville, as required by N.C. Gen. Stat. § 160A-393(e). The Board contends that this failure deprived the trial court of subject matter jurisdiction. We disagree.

The defect in the petition in this case amounts to a failure to join a necessary party. *See Mize v. Cnty. of Mecklenburg*, 80 N.C. App. 279, 283, 341 S.E.2d 767, 769 (1986) (holding that petitioner failed to join a necessary party when petition for writ of certiorari named only the County of Mecklenburg as respondent and did not name Mecklenburg County Zoning Board of Adjustment when seeking review of the Zoning Board's decision). This Court has expressly held that "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793 (1986). *See also Phillips v. Orange Cnty. Health Dep't*, No. COA13-1463, ___ N.C. App. ___, ___ S.E.2d ___, 2014 WL 6435697, *3, 2014 N.C. App. LEXIS 1142, *8 (Nov. 18, 2014) (rejecting defendant's argument that trial court lacked subject matter jurisdiction in part "because failure to join a necessary party does not negate a court's subject matter jurisdiction"); *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750 (holding "despite Lee Cycle's failure to name Lee Motor as a plaintiff, the trial court had subject matter jurisdiction over the action"), *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001).

Accordingly, we hold that petitioner's failure to name the City of Asheville as respondent in the petition did not deprive the trial court

of subject matter jurisdiction over the proceedings. Additionally, we note that the Board does not dispute the trial court's finding that "the City was on notice of this action and participated in the defense thereof." Because the City's participation in the proceedings cured the defect in the petition, we hold that the trial court did not err in denying the Board's motion to dismiss the petition. *Cf. In re J.T.(I), J.T.(II), A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (holding failure to name juveniles as respondents in summons as required by the juvenile code was cured by participation of juveniles' GAL in the proceedings).

The Board, nevertheless, cites two recent unpublished decisions, *Whitson v. Camden Cnty. Bd. of Comm'rs*, ___ N.C. App. ___, 748 S.E.2d 775, 2013 WL 3770664, 2013 N.C. App. LEXIS 766 (2013) and *Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, ___ N.C. App. ___, 754 S.E.2d 258, 2014 WL 47325, 2014 N.C. App. LEXIS 51, *disc. review denied*, ___ N.C. ___, 758 S.E.2d 873 (2014), in support of its argument that the trial court lacked subject matter jurisdiction. In each of these cases, the petitioner, an outside party, sought review of the decision-making board's grant of a conditional use permit ("CUP") to an applicant, but failed to name the applicant as a respondent in the petition as required by N.C. Gen. Stat. § 160A-393(e). The respondents moved to dismiss pursuant to Rule 12(b)(7) for failure to join a necessary party, and the trial courts granted their motions. This Court affirmed, and additionally held that the trial courts lacked subject matter jurisdiction.

We first note that these are unpublished opinions and therefore not binding on this Court. Secondly, to the extent that these cases hold that failure to join a necessary party deprives the trial court of subject matter jurisdiction, they are contrary to this Court's holding in *Stancil*. Finally, there is no indication that the defects in the petitions in *Whitson* or *Philadelphus* were cured by the unnamed respondents' notice of and participation in the proceedings, as was the case here. Accordingly, we are not persuaded that the trial court erred in denying respondent's motion to dismiss the petition, and we will review the merits of petitioner's appeal.

II

In a proceeding in the nature of certiorari, the superior court reviews the board of adjustment's decision to determine whether the decision was:

a. In violation of constitutional provisions, including those protecting procedural due process rights.

> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k). " 'The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal.' " *Myers Park Homeowners Ass'n v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 341 (2013) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

Questions of law are reviewed de novo, while questions whether the decision is supported by the evidence or is arbitrary or capricious are reviewed under the whole record test. *Id.* at ___, 747 S.E.2d at 342.

> "Under a *de novo* review, the superior court considers the matter anew[] and freely substitut[es] its own judgment for the agency's judgment. 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. The whole record test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*."

Id. at ___, 747 S.E.2d at 342 (quoting *Mann Media, Inc.*, 356 N.C. at 13-14, 565 S.E.2d at 17-18). This Court reviews the superior court's order to determine whether it applied the correct standard of review and, if so, whether it did so properly. *Id.* at ___, 747 S.E.2d at 342.

[2] In this case, the Board upheld the NOV based upon its finding that the sign is larger than permitted by the ordinance and was constructed without a permit. Petitioner does not dispute this finding, but argues that the sign should be allowed based on the 1992 variance, which, petitioner contends, was not subject to the amortization rules. Alternatively, petitioner argues that the sign should be deemed legal because the City

failed to notify petitioner or any prior owner of the sign of the "cap and replace" provisions adopted by the City in 2004.[1]

These first two arguments are immaterial in light of Asheville, N.C., Code of Ordinances §§ 7-13-8(f)(5) and 7-17-3 (2014). Section 7-13-8(f)(5) provides that a legal nonconforming sign cannot be reestablished after its discontinued use for 60 days. As further explained in section 7-17-3(a), "[a] nonconforming use shall be deemed discontinued after a period of 365 consecutive days regardless of any substantial good faith efforts to re-establish the use. Thereafter, the structure or property associated with the use may be used only for conforming use." Thus, if a nonconforming sign that has been deemed legal by the granting of a variance or through a "cap and replace" agreement is not used for 425 consecutive days, the sign loses the benefit of the variance or the "cap and replace" agreement, and any new sign must comply with all ordinances.

Here, it is undisputed that the prior sign was removed from the property in 2007 and that no sign existed on the property until the current sign was built in 2010. Because the sign was not in use during a period of more than 425 consecutive days, the new sign constructed in 2010 was required to conform with the ordinance. Accordingly, the Board correctly found that even "if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be re-established after being removed for more than two years."

[3] Petitioner next argues, without citing any authority, that he should be able to reestablish the sign because he relied upon the advice of the City Attorney, Mr. Oast. Petitioner consulted Mr. Oast during the time the previous sign was not in use and was being considered for replacement. Mr. Oast did not inform petitioner that there was a time limit for re-establishing the sign and in fact told petitioner that he was proceeding properly.

It is well established, however, "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such

---

1. The "cap and replace" provisions, set forth in Section 7-13-8(g) of the City's Code of Ordinances, provide an option whereby certain qualified nonconforming signs may enter an agreement with the City providing for the removal, relocation, or reconstruction of the sign. Section 7-13-8(g)(2) requires the City planning and development director to notify the owners of nonconforming signs of the adoption of the "cap and replace" option. A sign cannot qualify for the program unless the owner registers the sign with the City's planning and development office within 180 days of receipt of the notice. Asheville, N.C., Code of Ordinances § 7-13-8(g)(2)(b) (2014).

ordinance in times past." *City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). This is because "[i]n enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State[,]" and such power "cannot be bartered away by contract, or lost by any other mode." *Id.*

Accordingly, Mr. Oast's mistaken representations do not immunize petitioner from liability for zoning violations. *See also Helms v. City of Charlotte*, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961) (holding fact that city official mistakenly issued to plaintiff permit to install subterranean oil tanks on his property in violation of city ordinance and plaintiff incurred expenses in reliance on permit did not estop City from seeking to enforce ordinance); *Overton v. Camden Cnty.*, 155 N.C. App. 391, 398, 574 S.E.2d 157, 162 (2002) (holding that county was not estopped from enforcing uniform development ordinance against plaintiff even though it had not done so at earlier hearing).

In reviewing the decision of the Board, the trial court applied whole record review and determined that the Board's findings were supported by substantial evidence in the record. It applied de novo review to the questions of law and determined that the Board correctly interpreted and applied the applicable provisions of the city Code of Ordinances and did not commit any errors of law. We hold that the trial court applied the correct standard of review, and, for the foregoing reasons, did so correctly.

Affirmed.

Judges STROUD and BELL concur.

TERESA J. NORRELL, Plaintiff
v.
WILLIAM MILES KEELY, Defendant

No. COA14-433

Filed 31 December 2014

1. Constitutional Law—First Amendment—no contact order

The trial court properly denied defendant's motions to dismiss and for a directed verdict in a case involving a civil no contact order where defendant contended that the order violated his First Amendment rights. While some of plaintiff's allegations were based upon statements made by defendant, the trial court found that defendant revved his engine and charged his car toward plaintiff in such a manner that she jumped into a ditch, and that defendant fraudulently contacted the sheriff's department regarding plaintiff. It was noted that plaintiff's complaint was filed before 1 October 2013, the effective date of an amendment to N.C.G.S. § 50-7.

2. Stalking—harassment—knowing conduct directed at specific person

The trial court properly concluded that defendant's conduct of charging at plaintiff with a vehicle and making false claims about her to a sheriff's department were forms of harassment. N.C.G.S. § 14-277.3A(b)(2) only requires knowing conduct directed at a specific person.

3. Stalking—harassment—intent

The trial court did not err in determining defendant intended to harass plaintiff in a case involving a no contact where the trial court had found that defendant's "purpose" was to harass plaintiff. A finding regarding defendant's "purpose" was the equivalent of a finding regarding his "intent."

4. Stalking—civil no contact order—emotional distress

In an action for a civil no contact order, the trial court properly found that defendant caused plaintiff substantial emotional distress where the complaint was completed on an AOC form with the words "tormented," "terrorized," and "terrified" underlined; plaintiff wrote detailed allegations in the blanks on the form; While both plaintiff's and her husband's testimony could have been more descriptive of emotional distress, the trial court had the opportunity to see the parties; to hear the witnesses; and the trial court's

ultimate determination that plaintiff was caused substantial emotional distress was supported by the findings.

5. Stalking—emotional distress—substantial

A no contact order was properly entered where defendant contended that the trial court improperly found "considerable emotional distress" rather than "substantial emotional distress." The law in this type of case is not treated as a "magic words" game, and a finding of "considerable emotional distress" is no different than a finding of "substantial emotional distress."

Appeal by defendant from order entered 19 November 2013 by Judge C. Christopher Bean in District Court, Currituck County. Heard in the Court of Appeals 9 October 2014.

No brief filed on behalf of plaintiff-appellee.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr. and Lloyd C. Smith, III, for defendant-appellant.

Defendant appeals no-contact order. For the following reasons, we affirm.

I. Background

On 9 September 2013, plaintiff filed a complaint for a no-contact order pursuant to North Carolina General Statute Chapter 50C; her complaint for the North Carolina General Statute Chapter 50C no-contact order was on a form provided by the administrative office of the courts. The form complaint, AOC-CV-520, Rev. 2/06, had pre-printed language with boxes to check if the sentences following the box are applicable; under certain boxes spaces are provided for writing in additional details. Plaintiff checked box 4 which states,

> The defendant has followed on more than one occasion or otherwise tormented, terrorized, or terrified the plaintiff named above with the intent to place the plaintiff in reasonable fear for the plaintiff's safety or the safety of the plaintiff's immediate family or close personal associates or with the intent to cause, and which did cause, the plaintiff to suffer substantial emotional distress by placing the plaintiff in fear of death, bodily injury, or continued torment or terror in that: *(give specific dates and describe in detail what happened and how it placed the*

> *plaintiff in fear of safety or how it caused substantial emotional distress)*[.]

Plaintiff underlined the words "tormented," "terrorized," and "terrified." Plaintiff then wrote under box 4:

> The defendant's stalking, harassing, and threatening/intimidating conduct has continued over a 5 year period of time; More specifically has escalated to the following more recent incidents:
>
> 7/16/13 at approximately 7:00 AM – Came to the entrance of my drivewa[y] starring [(sic)] in an intimidating manner and stating, "Don't think that[t] fence is going to stop me."
>
> 7/25/13 at approximately 11:00 AM – I was walking my dog down Rocky Top Ro[ad] he was driving toward me, stopped appx 40 ft from me, revve[d] his engine & sped directly toward me as if he was going to run me over; then slowed beside me & was laughing uncontrollably.
>
> 7/29/13 – Subpoenaed for a case I had Nothing to do with just to cause me to lose time for work.

On the following page plaintiff continued:

> 8/17/13 at approximately 10:30-11:00AM, the defendant falsely called & reported to the Currituck County 911/Sherriff's Dept, that I was screaming at him from our residence. This is a total false accusation, as my husband and I were in Virginia. This incident was investigated by Deputy Starcher of the Currituck Cty Sherriff's Dept and was closed due to it being unfounded.
>
> 9/7/13 at approximately 9:30-10:00AM. My husband and I were walking down Rocky Top Rd. The defendant was in a car with RoseAnn Wright-Fulp. They were exiting the neighborhood on Rock Top Rd, but stopped when they saw us walking on Matildas Trace toward Rocky Top. They waited for us to get next to their vehicle, Bill Keely rolled down his window and was holding his cell phone up as if to be videoing us. We walked past the car and they finally left the neighborhood. By the time we got to the end of the street and was coming back, they had turned around & came back & backed into the entrance of the[i]r driveway waiting for us. As we passed them, the defendant and

> RoseAnn were both holding their cell phones out the window and making derogatory comments & laughing. They continued following us, in the vehicle, until we turned off Rocky Top Rd back onto Matilda's Trace.
>
> 9/9/13 – Subpoenaed for case – No involvement to cause loss of work.
>
> Note: Every day when I'm in my yard or in view of his house he comes out or hides behind bushes and screams derogatory and disparaging comments to me.

On 3 October 2012, defendant answered plaintiff's complaint by denying most of the substantive allegations, moved for dismissal based upon North Carolina General Statute § 1A-1, Rule 12(b)(6) and the constitutional protections of the First Amendment, and requested sanctions.

On 19 November 2013, the trial court entered a no-contact order because

> [o]ver a period of five (5) years, Defendant has on a continuous basis yelled at Plaintiff with degrading names such as "whore", "faggot", "loser", and on July 25, 2013 while Plaintiff was walking her dog, Defendant revved the engine of his car and sped toward Plaintiff, causing Plaintiff to jump into a ditch; and on August 18, 2013, Defendant made a false report to the Currituck County Sherriff's Department regarding Plaintiff's alleged conduct. Such conduct by Defendant was for the purpose of harassing Plaintiff and has in fact caused her considerable emotional distress.

On 16 December 2013, the trial court entered an order stating that "[a]t the close of the Defendant's evidence, the Defendant made a motion for a directed verdict on the grounds that the statute that as applied in this case violates his rights of free speech" and thereafter denied the motion in its order. Defendant appeals the no-contact order and the order denying his motion for a directed verdict.

II. Standard of Review

"[W]hen 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. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support

those findings, conclusions of law are reviewable *de novo*." *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted). Furthermore, "[t]he trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). Here, except as specifically noted, defendant does not challenge the findings of fact made by the trial court, so they are binding on this Court; *see id.*, defendant's arguments instead are that the findings of fact do not support its conclusions of law, and these arguments we review *de novo*. *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311.

III. Constitutionality of the No-Contact Order

[1] Defendant first contends that the no-contact order is unconstitutional as applied to him because his "language [did] not rise to the level of 'fighting words' and therefore is protected by the First Amendment[.]"

> [A]ppellate courts must "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002); *see also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided."); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment.").

James v. Bartlett, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005).

It is true that some of plaintiff's allegations were based upon verbal statements which defendant made to her, but defendant here fails to mention in his argument that the trial court also found that defendant revved his engine and charged his car toward plaintiff in such a manner that she jumped into a ditch and fraudulently contacted the sheriff's department regarding plaintiff. Accordingly, even if some of defendant's

statements to plaintiff would be protected under the First Amendment, there were other unchallenged findings of fact regarding defendant's conduct to support the issuance of the no-contact order. *See* N.C. Gen. Stat. § 50C-7 (2011) ("Upon a finding that the victim has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]")[1] As such, the trial court properly denied defendant's motions to dismiss and for a directed verdict on these grounds, and we need not consider defendant's constitutional argument. *See generally id.* This argument is overruled.

IV. Harassment

[2] Defendant contends that "the trial court erred in determining that defendant's actions constitute harassment as defined in North Carolina General Statute § 14-277.3(A)(2)." (Original in all caps.) North Carolina General Statute § 50C-7 states that "[u]pon a finding that the victim has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]" N.C. Gen. Stat. § 50C-7. "Unlawful conduct" is defined as "[t]he commission of one or more of the following acts[:] . . . [s]talking." N.C. Gen. Stat. § 50C-1(7) (2013). "Stalking" is defined as

> [o]n more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to . . .
>
> . . . .
>
> b. [c]ause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress."

N.C. Gen. Stat. § 50C-1(6) (2013). "Harassment" is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2013). Thus, the ultimate determination here is whether defendant engaged in "[k]nowing conduct . . . directed at a

1. North Carolina General Statute § 50-7 (2013) now reads, "Upon a finding that the victim has suffered *an act of* unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]" N.C. Gen. Stat. § 50-7 (2013) (emphasis added). However, the italicized change was "applicable to actions commenced on or after October 1, 2013." *Id.*, Editor's Note. As plaintiff's complaint was filed in September of 2013, the change is not applicable. *See id.*

specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.*

Here, the trial court found that defendant's conduct that constituted harassment included,

> [o]ver a period of 5 (5) years, Defendant has on a continuous basis yelled at Plaintiff with degrading names such as "whore", "faggot", "loser", and on July 25, 2013 while Plaintiff was walking with her dog, Defendant revved the engine of his car and sped toward Plaintiff, causing Plaintiff to jump into a ditch; and on August 18, 2013, Defendant made a false report to the Currituck County Sherriff's Department regarding Plaintiff's alleged conduct.

Even if we were to assume *arguendo* that defendant's speech was protected by the First Amendment as he contends in his first argument, the trial court still found that defendant acted as though he were going to hit plaintiff with his car and engaged law enforcement on a fabricated claim.

Defendant contends that charging his car at plaintiff and making false reports to law enforcement is not a form of "communication" directed toward plaintiff, and therefore not harassment. However, we need not engage in a lengthy analysis determining what conduct may constitute an exercise of communication as North Carolina General Statute § 14-277.3A(b)(2) only requires "[k]nowing conduct . . . directed at a specific person[.]" *Id.* While North Carolina General Statute § 14-277.3A(b)(2) enumerates various kinds of "communications" that may constitute knowing conduct, by its very terms the statute clearly covers both communications and conduct. *See id.* ("Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.") Conduct, including communications, which is "directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose" is covered by North Carolina General Statute § 14-277.3A(b)(2). *Id.* The trial court properly concluded that defendant's conduct of charging at plaintiff with a vehicle and making false claims about her to a sheriff's department are forms of harassment in that they were "[k]nowing conduct . . . directed at a specific person that

torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* This argument is overruled.

V. Intent to Harass

[3] Defendant also contends that "[t]he trial court erred in determining defendant intended to harass plaintiff." (Original in all caps.) Defendant provides this Court with a lengthy legal analysis regarding the trial court's need to find an intent to harass but does little to address the facts of this case. Here, the trial court found that defendant's "purpose" was to harass plaintiff based in part on his decision to act as though he was going to run plaintiff over with his car and frivolously contacting the sheriff's department for a fraudulent claim. A finding regarding defendant's "purpose" is the equivalent of a finding regarding his "intent" in this instance. This argument is overruled.

VI. Substantial Emotional Distress

[4] Defendant next argues that "the trial court erred in determining defendant in fact caused plaintiff . . . considerable substantial emotional distress." (Original in all caps.) Defendant challenges the trial court's finding of ultimate fact that his conduct "in fact caused her considerable emotional distress." As best we can tell, defendant's argument seems to present three sub-issues: (1) plaintiff did not make sufficient allegations of emotional distress in her complaint; (2) plaintiff did not present sufficient evidence of substantial emotional distress; and (3) the trial court was required to make more detailed findings of evidentiary facts regarding plaintiff's substantial emotional distress.

> Neither North Carolina General Statutes Chapter 50B or 50C define substantial emotional distress; however, North Carolina General Statute § 14–277.3A, entitled stalking defines substantial emotional distress as significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

Tyll v. Willets, ___ N.C. App. ___, ___, 748 S.E.2d 329, 332 (2013) (citation, quotation marks, and brackets omitted).

Regarding defendant's first contention, that plaintiff did not make sufficient allegations of emotional distress, it is imperative to note, as we have in the background section of this case, that a complaint for a civil no-contact order is normally filed on a form provided by the administrative office of the courts; it differs greatly from a civil claim in which a plaintiff is starting with a blank page and makes any allegations she

deems pertinent. In addition, most no-contact complaints are filed by *pro se* plaintiffs, just as plaintiff in this case. On the form complaint here, AOC-CV-520, Rev. 2/06, plaintiff was provided with boxes to check as applicable; under certain boxes some space is provided for writing in additional details. Plaintiff checked box 4 which states,

> The defendant has followed on more than one occasion or otherwise tormented, terrorized, or terrified the plaintiff named above with the intent to place the plaintiff in reasonable fear for the plaintiff's safety or the safety of the plaintiff's immediate family or close personal associates or with the intent to cause, and which did cause, the plaintiff to suffer substantial emotional distress by placing the plaintiff in fear of death, bodily injury, or continued torment or terror in that: *(give specific dates and describe in detail what happened and how it placed the plaintiff in fear of safety or how it caused substantial emotional distress)*[.]

(Emphasis in original.) Here, plaintiff underlined the words "tormented," "terrorized," and "terrified[.]" While underlining the words in the form may not be the best way to convey plaintiff's emotional distress, her emphasis on these words is relevant, particularly when read in conjunction with her factual allegations. As directed by the italicized language on the form, plaintiff gave "specific dates" and described "what happened" and "how it caused substantial emotional distress." The underlining of these words was part of plaintiff's attempt to "describe in detail" her "substantial emotional distress," and this must be read in conjunction with her detailed allegations written in the blanks on the form. We do not believe that plaintiff is required to make detailed allegations of her emotional state upon each act of defendant's alleged conduct, especially where common sense is all that is needed to understand why the conduct alleged would be distressing to any reasonable person. For example, if a person has been daily yelling derogatory language at an individual and then acts as though he will run over her with a vehicle, "tormented, terrorized, [and] terrified" are reasonable ways to describe the "substantial emotional distress" such conduct would cause; as such, plaintiff has adequately alleged "significant mental suffering [and] distress[;]" *i.e.*, "substantial emotional distress." *Id.*

[5] The second sub-issue raised by defendant's argument is whether plaintiff actually presented sufficient evidence of substantial emotional distress. At the hearing for the no-contact order, plaintiff testified that defendant had put her "in fear of [her] life" and plaintiff's husband testified that the "toll" on his wife was so severe she was "having problems

sleeping, eating, [and] concentrating." While both plaintiff's and plaintiff's husband's testimony could have been more descriptive of emotional distress, the trial court had the "opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[,]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation and quotation marks omitted). Accordingly, there was evidence presented of "significant mental suffering [and] distress" and thereby "substantial emotional distress." *Id.*

The third sub-issue is whether the trial court's ultimate determination that plaintiff was caused substantial emotional distress was supported by the findings of fact. We first note that the trial court found that defendant over the course of five years yelled derogatory language at plaintiff, acted as though he was going to hit her with a vehicle, and falsely made a report to the sheriff's department regarding her; as these findings are unchallenged they are binding on appeal. *See Peltzer*, ___ N.C. App. at ___, 732 S.E.2d at 360.

Furthermore, although North Carolina General Statute § 50C-1(6) refers to "substantial emotional distress[,]" the trial court found that defendant had caused plaintiff "considerable emotional distress[,]" but this is a distinction without a difference. N.C. Gen. Stat. § 50C-1(6). In this context, "[s]ubstantial is defined as *considerable* in value, degree, amount or extent[,]" and thus, in this case, "considerable emotional distress" is the equivalent of "substantial emotional distress." *Ramsey v. Harman*, 191 N.C. App. 146, 150, 661 S.E.2d 924, 927 (2008) (emphasis added) (citation, quotation marks, and brackets omitted).

In *Ramsey*, this Court addressed "substantial emotional distress[,]" *id.* and there found that "the record [was] wholly devoid of any evidence" the plaintiffs suffered substantial emotional distress due to the defendant's comments made on a website. *Id.* at 151, 661 S.E.2d at 927. Specifically, in *Ramsey*, the

> [p]laintiffs, [a mother and daughter,] alleged defendant had posted information on her website stating that [the plaintiff daughter] . . . harasses other children and accused [the plaintiff daughter] of being the reason kids hate to go to school. Plaintiffs also alleged that on numerous occasions defendant had referred to [the plaintiff daughter] on her website as endangered, offspring, bully and possum, which caused [the plaintiff daughter] to suffer emotional distress.

Id. at 146, 661 S.E.2d at 924-25 (quotation marks omitted). This Court ultimately determined that the no-contact order should not have been granted because

> [w]hile [the plaintiff mother's] self-serving testimony indicated that she felt threatened by the messages, the trial court expressly stated the messages posted on defendant's website did not contain language threatening to inflict bodily harm or physical injury. Plaintiffs' only other assertion was that [the plaintiff daughter] became embarrassed when she had allegedly observed teachers viewing defendant's website in her school's library.

Id. at 151, 661 S.E.2d at 927 (quotation marks omitted). In *Tyll v. Willets*, a brother requested a no-contact order be enforced against his sister because she threatened "to make statements about plaintiff to various others, including plaintiff's employer and the Department of Social Services." ___ N.C. App. ___, 748 S.E.2d 329 (2013). This Court again found there was no substantial emotional distress based upon these facts. *Id.* Both *Tyll* and *Ramsey* are distinguishable from this case, both as to the facts and as to the evidence presented regarding the impact of the defendant's conduct on the plaintiffs. *Id.*; *Ramsey*, 191 N.C. App. 146, 661 S.E.2d 924.

In *Ramsey*, the trial court "expressly stated" that no physical threats had been made and the defendant's conduct had resulted only in "embarrass[ment;]" here, however, plaintiff was physically threatened by defendant when he acted as though he was going to run over her with a car. *Ramsey*, 191 N.C. App. at 151, 661 S.E.2d at 927; *contrast Tyll*, ___ N.C. App. ___, 748 S.E.2d 329 (threatening behavior was only regarding communication to third parties). Furthermore, here, defendant's conduct was not on the internet, but in person where defendant harassed plaintiff over the course of five years to the point that plaintiff's daily functions such as eating, sleeping, and concentrating were impaired. *Contrast Ramsey*, 191 N.C. App. at 146, 661 S.E.2d at 924; *Tyll*, ___ N.C. App. ___, 748 S.E.2d 329. Based upon the trial court's findings, over the course of five years, defendant has made frequent contact with plaintiff in person, screaming derogatory language at her. Defendant has gone so far as to involve law enforcement by making false reports to the Currituck County Sherriff's Department, and most disturbingly, physically threatened defendant by charging a moving vehicle at her; such behavior "tormented, terrorized, [and] "terrified" plaintiff to the point that her daily life was affected by defendant's conduct. Under these

circumstances, the trial court properly found that defendant has caused plaintiff substantial emotional distress, *i.e.*, "significant mental suffering or distress[.]" *Tyll*, ___ N.C. App. at ___, 748 S.E.2d at 332. This argument is overruled.

VII. Considerable Emotional Distress

Lastly, defendant contends that because the trial court found "considerable emotional distress" rather than "substantial emotional distress" the no-contact order could not properly be entered. As we have already noted, our case law defines "substantial" in the context of emotional distress as "considerable[.]" *Ramsey*, 191 N.C. App. at 150, 661 S.E.2d at 927. The law in this type of case is not treated as a "magic words" game, and a finding of "considerable emotional distress" is no different from a finding of "substantial emotional distress." This argument is overruled. *See id.*

VIII. Conclusion

For the foregoing reasons, affirm.

AFFIRMED.

Judges GEER and BELL concur.

JERRY SEAMON, Plaintiff-Appellant
v.
INGERSOLL RAND, Employer, and TRAVELERS, Carrier, Defendants

No. COA14-324

Filed 31 December 2014

1. Workers' Compensation—findings of fact—nature of job and cause of injuries—supported by competent evidence

In a workers' compensation case, the Industrial Commission's findings of fact challenged by defendant were supported by plaintiff's testimony regarding the manner in which he performed his job and by his doctor's testimony regarding the nature and cause of the injuries.

2. Workers' Compensation—conclusions of law—compensable injury—supported by findings of fact

In a workers' compensation case, the Industrial Commission did not err by concluding that plaintiff had suffered from a compensable work-related injury. The Commission's findings of fact supported its conclusions that plaintiff suffered from a bilateral peripheral vascular disorder that (1) was characteristic of someone working in his particular job balancing air compressor units, (2) was not an "ordinary disease of life," and (3) was caused by plaintiff's job.

3. Workers' Compensation—findings of fact challenged by plaintiff—manner of work attempt to return to work

In a workers' compensation case, the Industrial Commission's findings of fact challenged by plaintiff were supported by competent evidence. Plaintiff misread or misinterpreted the findings regarding the manner in which he performed his job. In addition, there was no evidence in the record that plaintiff attempted to return to work, or that he had a pre-existing condition that would make it futile for him to do so.

4. Workers' Compensation—conclusions of law—failure to make reasonable efforts to return to work—supported by findings of fact

In a workers' compensation case, the Industrial Commission's findings of fact supported its conclusion that plaintiff failed to establish that he suffered from a continuing disability after 16 November 2011. The Commission found that plaintiff did not make reasonable efforts to return to work after 16 November 2011 and did not have a pre-existing condition that would make it futile for him to do so.

5. Workers' Compensation—credit for payments made before award—from plan entirely funded by employer—not abuse of discretion

In a workers' compensation case, the Industrial Commission did not abuse its discretion by awarding defendant employer a credit for certain disability payments it made to plaintiff before workers' compensation benefits were awarded. Plaintiff's election to pay approximately $10.00 per month for an additional twenty percent of coverage in addition to the forty percent coverage provided by defendant did not render the insurance plan "no longer fully employer funded." In addition, the payment of the employer-funded coverage by insurance carrier Cigna was not a payment

from an outside source. Because the plan was employer-funded, the Commission had the discretion to award a credit to defendant.

Appeal by plaintiff-appellant and defendants-appellants from Opinion and Award entered by the North Carolina Industrial Commission on 17 March 2014. Heard in the Court of Appeals 19 November 2014.

WALLACE and GRAHAM, PA, by Whitney V. Wallace, for plaintiff-appellant and for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Neil P. Andrews, M. Duane Jones, and Amanda A. Johnson, for defendants-appellants and for defendants-appellees.

ELMORE, Judge.

Ingersoll Rand ("defendant-employer") and Travelers (collectively "defendants") appeal from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award on the grounds that the Commission erred in finding and concluding that plaintiff suffered a compensable work-related injury under the North Carolina Workers' Compensation Act. Jerry Seamon ("plaintiff") appeals from the Commission's Opinion and Award on the grounds that the Commission erred in finding and concluding that he was not completely disabled after 16 November 2011. After careful consideration, we affirm the Full Commission's Opinion and Award.

I. Background

Plaintiff, a sixty-year-old man, began his employment with defendant-employer in 1972. Defendant-employer manufactures compressor units for commercial use. During the course of his employment, plaintiff worked in various capacities for defendant-employer. From 2001 to 27 April 2011, plaintiff worked as a machinist in the CENTAC Balance Room. Plaintiff was responsible for balancing the air compressor units to customer specifications. A machinist must balance the units using hand-held grinders. The units that came into the CENTAC Balance Room ranged from four inches in diameter to twenty-five inches in diameter, but the most common units were eight inches in diameter. Plaintiff was responsible for balancing two to three of the small to medium sized units per day. Once a unit became balanced, plaintiff had to disassemble the unit using a rubber mallet. The disassembly process had to be done gently to prevent damaging the unit. Plaintiff testified that he often used

the palms of his hands rather than a rubber mallet to dislodge the parts from the units due to the close proximity of the compartments.

In late 2010, plaintiff began waking during the night with pain in his hands. His symptoms worsened in February 2011, when he began to experience numbness in his left index and middle finger. By April 2011, plaintiff's nails were turning black and he was in extreme pain. Plaintiff's primary care physician referred him to Dr. Scott Brandon, an orthopedic specialist, for further evaluation. Dr. Brandon was concerned that plaintiff had a vascular insufficiency and he referred plaintiff to Dr. Louis Andrew Koman, a board-certified orthopedist with a certificate subspecialty in hand surgery. Dr. Koman had been treating patients with hand abnormalities for over thirty years, and he had invented operations for the treatment of peripheral hand-related vascular problems. Dr. Koman diagnosed plaintiff as most-likely suffering from a vaso-occlusive disease and an aneurysm in his hand which was throwing clots into his fingers. Dr. Koman referred plaintiff to Dr. Matthew Edwards, a vascular surgeon, for an arteriography to further evaluate plaintiff's condition. Dr. Edwards diagnosed plaintiff with "ulnar artery aneurysm to the right hand and with distal occlusion and thrombosis to the left hand ulnar artery with aneurysm and distal occlusive disease." Dr. Edwards performed thrombolytic therapy to remove the clots from plaintiff's fingers. On 2, 3, and 5 May 2011, Dr. Koman performed multiple surgical procedures on plaintiff, which included amputations of plaintiff's left index and middle finger.

Plaintiff reached maximum medical improvement on 16 November 2011, at which point Dr. Koman assigned a thirty percent rating to each of defendant's hands and imposed a permanent work restriction of lifting no more than thirty pounds or carrying more than twenty pounds. Dr. Koman advised plaintiff to avoid any physical stress to his hands, including exposure to vibrations or cold. Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's condition was work-related due to plaintiff's use of the palms of his hands to dislodge the rotatory assemblies. He believed plaintiff's use of tools that vibrated exacerbated plaintiff's condition. Dr. Koman testified that it was unnecessary for plaintiff to hit the assembled parts using his palm with much force to cause the injury because it was the repetitive trauma, not the amount of force used, that caused the disease and the necessary finger amputations. On 20 May 2011, Dr. Koman put into writing his diagnosis that plaintiff's condition was work-related. On 16 June 2011, plaintiff filed a Form 18 alleging that he suffered from a work-related injury/disease involving his upper extremities.

William Tom McClure performed an ergonomic evaluation and assessment of the CENTAC Balance Room machinist position to determine whether the machinist position increased plaintiff's risk of developing an upper-extremity musculoskeletal and/or cumulative trauma disorder. Mr. McClure did not have the opportunity to observe plaintiff perform his job duties, but he did watch another machinist use a rubber mallet to disassemble a unit. Based on his observations, Mr. McClure concluded that a machinist did not use forceful exertion of his hands or fingers and was not at an increased risk of developing upper-extremity musculoskeletal and/or cumulative trauma disorders.

Defendants retained Dr. Frank R. Arko, III, a vascular surgeon, to provide his opinion concerning the cause of plaintiff's condition. Dr. Arko did not personally examine plaintiff but he did review plaintiff's medical file, Mr. McClure's findings, and a video of a machinist performing his job duties. Dr. Arko opined to a reasonable degree of medical certainty that plaintiff's job did not cause his condition and did not place him at an increased risk of developing the condition from which he suffered as compared to members of the general public not so employed.

Dr. Brandon testified that he would defer to Dr. Koman's opinion concerning the issue of causation in plaintiff's case. Despite deferring to Dr. Koman on the question of causation, Dr. Brandon did opine that plaintiff's use of tools such as a rubber mallet and low vibration grinding tools placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

Based upon a preponderance of the evidence in view of the entire record, the Full Commission gave greater weight to the opinions and findings of Dr. Koman than to the contrary testimony and opinions of Dr. Arko and Mr. McClure. The Commission found that plaintiff suffered from a bilateral peripheral vascular disorder/condition and that plaintiff's duties as a machinist caused or significantly contributed to the development of this condition. The Commission also found that plaintiff's job duties placed him at an increased risk of developing a bilateral peripheral vascular disorder as compared to members of the general public not so employed. The Commission determined that from 27 April 2011 to 16 November 2011, plaintiff was physically incapable of earning any wages in any employment as a result of his compensable occupational disease. In addition, it determined that plaintiff failed to prove by a preponderance of the evidence that beginning 16 November 2011, when he was capable of some work, that he made reasonable efforts to find other employment or that such effort would have been futile. Both

plaintiff and defendants appeal from portions of the Full Commission's Opinion and Award.

II. Defendants' Appeal

This Court reviews an Opinion and Award of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285–86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

Defendants primarily argue on appeal that the Full Commission's determination that plaintiff suffered from a compensable occupational disease is unsupported by competent evidence. Specifically, defendants challenge findings of fact #5, #11, #12, #17, #19, #20, #22, #24, and #25 as being unsupported by competent evidence. Defendants likewise challenge the Commission's conclusions of law #2, #3, and #5 to the extent that the Commission concluded that plaintiff met his burden of proving the compensability of his medical condition. We conclude that the Commission did not err in finding and concluding that plaintiff suffered a compensable work-related injury.

For an injury or death to be compensable under the North Carolina Workers' Compensation Act "it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992) (quotation and citation omitted). "Where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97–53(13), the opinion and award must contain findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision." *Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 106-07 (1981).

A. Challenged Findings of Fact

[1] Initially, we will address defendants' challenges to the following findings of fact as being unsupported by competent evidence:

> 5. Once the unit was completely balanced, Plaintiff had to disassemble the unit. The disassembly process had to be

done gently to avoid damaging the part or nicking off any extra metal, which would affect the balance of the unit. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.

11. After discussing with Plaintiff his job duties as a machinist, including his exposure to vibration and the use of the palms of his hands to dislodge rotatory assemblies, Dr. Koman advised Plaintiff that his condition was work-related.

12. On May 20, 2011, Dr. Koman followed up in writing with a letter stating that in his medical opinion, Plaintiff's condition was work-related. . . .

17. . . . Dr. Brandon testified that he would defer to Dr. Koman's opinion on causation in Plaintiff's case, but that he would not defer to the causation opinion of a vascular surgeon over Dr. Koman because "the hand is a little bit different organ system," and vascular surgeons are trained generally and do not have specialized hand training. Although Dr. Brandon was unable to state a causal opinion, he did opine, based upon his personal knowledge of a machinist's job duties, that Plaintiff's job as a machinist for 10 years in the CENTAC Balance Room utilizing tools, such as rubber mallets and low vibration grinding tools to balance parts, placed Plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

19. Plaintiff's condition is rare in that he does not have peripheral vascular disease, but he has a peripheral vascular disorder which includes aneurysm, thrombosis and embolism. The potential causes of his condition include abnormalities of collagen, clotting abnormalities or atherosclerosis. Dr. Koman ruled out these potential causes of Plaintiff's condition and opined that Plaintiff's vascular disorder was due to trauma based on his review of the arteriograms and the ergonomic reports, as well as "knowing how he [Plaintiff] actually fixed the impellers. . . ." More specifically, the way in which Plaintiff used the palms of his hands like a hammer to dislodge the assembled parts caused the ulnar vessel to dilate and then become turbulent. The turbulence caused thrombosis which led to the

formation of embolisms. The embolisms spread to the fingers, which led to the amputation of the dead portions of the fingers. Dr. Koman did not believe that it was necessary that Plaintiff hit the assembled parts with a lot of force with the palm of the hand. Rather, according to Dr. Koman, the most important factor was how Plaintiff hit the palm of his hand on the part, because the ulnar artery is only a few millimeters beneath the skin. The repetitive trauma to the palm caused the vessel to dilate resulting in the eventual amputation of the fingers. Dr. Koman's opinion was reinforced by the fact that he found no problems with the big blood vessels in his left arm, elbow or forearm, and the fact that aneurysms occur over time, suggesting lower impact but repeated trauma.

20. Dr. Koman opined to a reasonable degree of medical certainty that Plaintiff's history of using his hands as a hammer to dislodge the parts of the assembled units caused his bilateral ulnar artery thrombosis and placed him at an increased risk of developing the condition as compared to members of the general public not so employed. Dr. Koman agreed with Dr. Arko that Plaintiff's daily exposure to vibration from using grinders at work did not cause Plaintiff's bilateral hand condition.

22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.

24. The Full Commission finds that a preponderance of the evidence in view of the entire record establishes that Plaintiff suffers from a bilateral peripheral vascular disorder condition as described by Dr. Koman, and that dislodging the assemblies with his hands as part of his job duties as a machinist in the CENTAC Balance Room with Defendant-Employer caused or significantly contributed to the development of this condition.

25. The Full Commission also finds that dislodging the assemblies with his hands as part of his job duties in his position as a machinist in the CENTAC Balance Room for the past 10 years placed Plaintiff at an increased risk of

> developing bilateral peripheral vascular disorder as compared to members of the general public not so employed, and that such a condition is not an ordinary disease of life to which the general public is equally exposed.

Defendants challenge each of these findings only to the extent that the findings support the Full Commission's conclusion that plaintiff's job placed him at an increased risk of developing his vascular condition. We have carefully reviewed the record and conclude that each of these findings is supported by competent evidence. In support of finding #5, that plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts, plaintiff testified: "When you dissembled [the unit], sometimes you'd use your hands, palm of your hands, sort of bump it up a little bit to get it loose . . . you have to be real gentle with [the part] as far as getting it off."[1]

In support of finding #11, regarding the fact that Dr. Koman was of the opinion that plaintiff's medical condition was work-related, Dr. Koman testified that "to a reasonable degree of medical certainty [the injury] is post-traumatic work-related" and "this is a work[-]related injury."

In support of finding #12, the record reflects that Dr. Koman was asked, "I noted on two different occasions that it is written in your medical note that [plaintiff's] condition was work[-]related[?] That's in a 5/20/11 note." Dr. Koman agreed that his written records reflected his opinion that plaintiff's condition was work-related.

In support of finding #17, Dr. Brandon was asked, "[s]o would you be able to say more likely than not that this particular machinist job that [plaintiff] did placed him at an increased risk for the development of these diseases?" Dr. Brandon responded, "I would say it would put him at an increased risk."

Finding #19 is also supported by the record. When asked if he believed plaintiff's aneurisms were more likely than not caused by plaintiff's use of the palms of his hands as a hammer, Dr. Koman responded, "that's correct." He further opined, "[i]t doesn't take a whole lot of force

1. Defendants take issue with the Commission's use of the word "hammer" in its findings of fact when there was no evidence that plaintiff used his hand as "hammer" to performing his job duties. We hold that the use of the word "hammer" is inconsequential. There is evidence that plaintiff used the palm of his hand to hit the parts. According to Dr. Koman's testimony, it was not the amount of force used but the repetitive trauma to the hand that led to the amputation of plaintiff's fingers.

depending on how you hit it. If your muscle [is] relaxed and you – I mean, your ulnar artery is only a few millimeters beneath the skin. It's not that far down there."

As to finding #20, Dr. Koman reiterated that plaintiff's use of his hands in the performance of his job duties placed him at an increased risk of developing his condition. When asked, "it's your opinion that the -- [plaintiff] using his hands as a hammer throughout his — your discussions with him about his employment, combined with or contributed to by his vibration exposure, would have been sufficient enough trauma to cause [plaintiff's] aneurysms?" Dr. Koman replied, "[t]hat's my opinion, and it's within a reasonable degree of medical certainty." Dr. Koman clarified that the vibration tools would not generally cause thrombosis but the use of the tools could "contribute" to it or "exacerbate" it.

Finding #22, that plaintiff used his hands to dislodge the assembled units, is supported by plaintiff's testimony that he would "work lose" the impellers by giving a "gentle" "bump" using his hands.

Finally, findings #24 and #25, that plaintiff suffered from a bilateral peripheral vascular disorder condition as described by Dr. Koman and that such a condition was not an ordinary disease of life to which the general public was equally exposed, are best classified as conclusions of law and are supported by the findings of fact discussed above. Upon review, we conclude that the challenged findings of fact are each supported by competent evidence in the record.

B. ***Rutledge*** Test

[2] To bring a successful workers' compensation claim, plaintiff must have shown that his condition was:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the [claimant's] employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and quotations omitted) (alteration in original). "To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. . . . Only such ordinary diseases of life to which the

general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* Accordingly, the first two elements of the *Rutledge* test are satisfied if, "as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). As for the third prong of *Rutledge*, "[t]his element of the test is satisfied if plaintiff's employment significantly contributed to, or was a significant causal factor in, the disease's development." *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003) (quotation and citation omitted). "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 370.

With respect to whether plaintiff's employment exposed him to a greater risk of suffering from the disorder than the public generally, Dr. Brandon opined that plaintiff's job as a machinist, utilizing tools such as a rubber mallet and low vibration grinding tools, placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder (finding #17). Dr. Koman testified, and the Full Commission found, that plaintiff's job duties placed him at an increased risk of developing his medical condition as compared to members of the general public not so employed and that his condition is not an ordinary disease of life to which the public is equally exposed (findings #19, #25).

Based on these findings, which are supported by competent evidence, we hold that plaintiff satisfied the first two elements of *Rutledge*. With respect to whether plaintiff's employment significantly contributed to, or was a significant causal factor in the condition's development, Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's history of using his hands while at work to dislodge the parts from the assembled units caused his condition (finding #20). Plaintiff established the requisite causal connection between the disease and his employment, thus satisfying the third element of *Rutledge*. Based on the record before us, we conclude that the Commission's conclusions of law #2, #3, and #5 are supported by the findings of fact. The Commission did not err in concluding that plaintiff sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13) from 27 April 2011 through 16 November 2011.

III. Plaintiff's Appeal

A. Challenged Findings of Fact

[3] Plaintiff's primary contention on appeal is that the Full Commission erred in concluding that he was no longer disabled after 16 November 2011. Plaintiff first challenges six findings of fact as being unsupported by competent evidence: findings #5, #10, #22, #23, #29, and #34.[2] Plaintiff also challenges the Commission's conclusions of law #5, #6, #8 on the basis that the Commission erred in concluding that plaintiff was not disabled after 16 November 2011. We hold that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. The Commission did not err in concluding that plaintiff was not disabled after 16 November 2011.

Initially, we will address plaintiff's challenges to the following findings of fact:

> 5. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.
>
> 10. . . . Plaintiff has not returned to work or looked for work within the restrictions assigned by Dr. Koman.
>
> 22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.
>
> 29. Plaintiff has failed to prove by a preponderance of the evidence in view of the entire record, however, that beginning November 16, 2011, when he was capable of some work, that he has made reasonable efforts to find other employment or that it would have been futile because of preexisting conditions such as age, education and work experience for him to look for other employment.

Plaintiff challenges findings #5 and #22 on the same basis. He contends that, while the Commission properly found that plaintiff used the

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2. We decline to address plaintiff's challenge to finding #23. Plaintiff concedes that this finding is supported by competent evidence and merely suggests that the Commission include additional evidence presented by Dr. Koman. It is not the duty of this Court to supplement the Commission's findings of fact.

palm of his hands as a hammer to bump or dislodge the parts, he "disagrees there is any competent evidence that other machinists did not similarly use their hands to dislodge the parts, but rather used solely a rubber mallet." Plaintiff has either misread or misinterpreted findings #5 and #22. The Commission did not find that other machinists "solely" used a rubber mallet to dislodge the units, as plaintiff argues. In fact, finding #22 clearly states that other employees "primarily" used a mallet to dislodge the units. As discussed above, both findings #5 and #22 are supported by competent evidence in the record.

With respect to finding #10, that plaintiff has not looked for employment within the restrictions assigned by Dr. Koman, the record is devoid of evidence that plaintiff sought alternative employment after 16 November 2011. In addition, while plaintiff may have attempted to return to work with defendant-employer *before* 16 November 2011, at which time he was advised that there was no position for him given his medical restrictions, there is no evidence that plaintiff contacted defendant-employer about resuming his employment *after* 16 November 2011. During the hearing, plaintiff merely professed his willingness to return to work for defendant-employer should there be a suitable position. Finding #10 is supported by competent evidence.

Plaintiff argues that finding #29 is a conclusion of law and must be reviewed *de novo* by this Court. Plaintiff further contends that this conclusion of law is not supported by the findings of fact and therefore we must remand this case for additional findings of fact. We disagree with plaintiff and will review finding #29 to ascertain if it is supported by sufficient evidence in the record. Finding #29, that plaintiff failed to prove that he made reasonable efforts to find employment or that his efforts would have been futile, is supported by the record. Plaintiff presented no evidence that he made reasonable, yet unsuccessful efforts to obtain employment with another employer or return to his employment with defendant-employer after the 16 November 2011 date. In addition, plaintiff did not argue before the Commission that he suffered from a pre-existing condition such as age, limited education, or work history, which would make it futile for him to seek alternative employment opportunities. We conclude that finding #29 is supported by competent evidence. In sum, the findings of fact that plaintiff challenges are each supported by competent evidence in the record.

B. <u>Continuing Disability</u>

[4] In order to meet the burden of proving that he suffered from a continuing disability, plaintiff was required to prove that he was incapable

of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by the employee's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982). *Russell v. Lowes Prod. Distribution* sets forth a four prong test delineating alternative ways that plaintiff could have satisfied this burden. 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Plaintiff must have produced either:

> (1) medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[;] (2). . . evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[;] (3) . . . evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[;] or (4) . . . evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. On appeal, plaintiff contends that the Commission's findings of fact are insufficient to support a determination as to whether plaintiff met his burden under the *Russell* prongs (2) or (3). Specifically, plaintiff contends that the Commission failed to include any findings of fact, other than #29, which he contends is a conclusion of law, that addressed plaintiff's efforts to return to work. Accordingly, plaintiff argues that the Commission erred by making conclusion #6, which states: "Having failed to prove disability under *Russell* after November 16, 2011, Plaintiff is entitled to permanent partial disability benefits pursuant to N.C. Gen. Stat. § 97-31(12) for a period of 120 weeks."

We disagree and hold that conclusion #6 is supported by the findings of fact. Specifically, finding #29 provides that plaintiff did not make reasonable efforts to obtain employment after 16 November 2011. As such, Plaintiff did not satisfy prong two of *Russell* because he failed to show that he made reasonable efforts to obtain employment. To satisfy prong three, plaintiff was required to show that it would have been futile for him to seek other employment due to certain pre-existing conditions such as age, education level, or inexperience. Plaintiff contends that the Commission neglected to make a finding that addressed whether he satisfied these pre-existing conditions. We disagree.

Finding #1 shows that the Commission considered the fact that plaintiff was sixty-years-old, left-hand dominant, and a high school

graduate who had worked for defendant-employer for over thirty-nine years. Thus, the Commission did consider plaintiff's age, education level, and work experience. The Commission also found that plaintiff failed to show that due to a pre-existing condition, his efforts to obtain employment would have been futile (finding #29). As such, there is no evidence in the record that plaintiff satisfied prong three of *Russell*. Given that plaintiff failed to satisfy the *Russell* test, the Commission did not err in determining that plaintiff was unable to establish that he suffered from a continuing disability after 16 November 2011.

C. Credit for Disability Payments

[5] Lastly, plaintiff argues that the Commission erred in awarding defendant-employer a credit for certain disability benefits paid by it to plaintiff. Specifically, plaintiff argues that the Commission's finding of fact #34 is unsupported by competent evidence and its conclusion of law #8 is unsupported by the findings of fact. We disagree and find no merit in plaintiff's argument.

Under the Workers' Compensation Act, the only statutes that allow the Commission to award credits are N.C. Gen. Stat. § 97-42 and N.C. Gen. Stat. § 97-42.1. *Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001). "These statutes allow for a credit for amounts voluntarily paid by the employer before the workers' compensation benefits are awarded." *Id.* The "laudable purpose" of this section is "to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages[.]" *Evans v. AT & T Technologies*, 103 N.C. App. 45, 48, 404 S.E.2d 183, 185 (1991).

> A "credit" is a deduction by the employer of a prior payment made to an injured employee from the compensation benefit that is now due the employee. . . . N.C.G.S. § 97-42 [] provides, in order to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages, that any payments made by the employer [(pursuant to an employer-funded salary continuation)] to the injured employee which were not due and payable when made, may in certain cases be deducted from the amount of compensation due the employee.

Gray v. Carolina Freight Carriers, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). "This credit applies to payments made by the employer, not to any and all other payments the employee may receive from outside sources." *Jenkins*, 147 N.C. App. at 426, 557 S.E.2d at 108-09. "The

decision of whether to grant a credit is within the sound discretion of the Commission" and "will not be disturbed on appeal in the absence of an abuse of discretion." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002).

Finding of fact #34 provides:

> 34. Defendants are entitled to a credit for the employer-funded short-term disability payments Plaintiff received, as well as that portion of the long-term disability benefits Plaintiff has received that were paid pursuant to the fully employer-funded 40 percent plan and which Plaintiff will not have to repay. Defendants are not entitled to a credit for any long-term disability benefits that were paid pursuant to the additional coverage Plaintiff purchased or that Plaintiff will have to repay to the long-term disability plan.

Conclusion of law #8 provides:

> 8. Defendants are entitled to a credit for that portion of short-term and long-term disability benefits that Plaintiff has received pursuant to plans that were fully funded by Defendant-Employer and that Plaintiff does not have to repay to the long term-disability benefit provider. N.C. Gen. Stat. § 97-42.

Plaintiff challenges the Commission's award of a credit for the long-term disability benefits funded by defendant-employer on the basis that (1) the plan is not considered "fully-funded" by the employer under N.C. Gen. Stat. § 97-42 if the employee contributes any monies to the plan, and (2) the employer cannot recover a credit if a third-party insurance carrier pays the benefit directly to the employee. Neither of plaintiff's arguments are supported by case law nor by statute.

Here, the Commission found as fact that plaintiff began receiving long-term disability benefits pursuant to a plan that was fully-funded by defendant-employer after his short-term disability benefits terminated. Specifically, defendant-employer paid the full premium for a long-term disability plan that would allow a disabled employee to collect up to forty percent of his regular earnings if he became disabled. Should an employee wish to collect an additional twenty percent of his regular earnings, making his total recovery sixty percent of his regular earnings, the employee was also permitted to purchase additional coverage.

In the instant case, plaintiff elected to pay approximately $10.00 per month to receive the additional coverage. On appeal, plaintiff contends

that because he purchased the additional insurance coverage, thus contributing to the plan, the plan was no longer fully employer-funded. Therefore, defendant-employer was no longer entitled to a credit. However, plaintiff is unable to direct this Court to any case law that supports his position. This is likely because neither case law nor N.C. Gen. Stat. § 97-42 requires that an employer forgo its right to receive a credit for benefits paid merely because an employee elects to purchase additional coverage in order to collect a greater portion of his salary than that which the employer-funded plan allows. For the purposes of N.C. Gen. Stat. § 97-42, an insurance plan is considered "employer-funded" when the employer pays the entire premium to fund the requisite amount of coverage the employer elects to provide. The fact that an employee purchases additional coverage beyond that which the employer offers has no bearing on whether the plan is employer-funded. We overrule plaintiff's first argument concerning this issue.

In addition, plaintiff's contention that defendants are not entitled to a credit because the insurance carrier CIGNA distributed plaintiff's disability funds is likewise unsupported by law. Plaintiff cites *Jenkins*, *supra*, for the proposition that a credit applies solely to payments made by the employer, not to any and all other payments the employee may receive from outside sources. While true, *Jenkins* is inapplicable to this case since *Jenkins* involved a situation in which the distribution of royalty income was at issue, not the payment of employer-funded disability benefits. Here, CIGNA was not an outside party that independently provided plaintiff with certain disability funds. We overrule plaintiff's second argument with respect to this issue.

It is undisputed that defendant-employer paid the full premium for the disability plan so that plaintiff could receive forty percent of his take-home pay. Upon reviewing the record, we conclude that there is competent evidence in the record to support finding of fact #34. In addition, conclusion of law #8 is supported by the findings of fact. Because the plan was entirely "employer-funded," it was within the Commission's discretion to award defendant-employer a credit for monies paid. There is no evidence that the Commission abused its discretion by approving such a credit. Plaintiff's arguments are without merit.

IV. Conclusion

Based upon our review of the evidence and the applicable law, we conclude that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. Plaintiff suffered a compensable occupational disease

and was entitled to receive full disability benefits from 27 April 2011 to 16 November 2011. After the November date, plaintiff failed to meet his burden of showing that he was entitled to additional disability benefits. We affirm the Full Commission's Opinion and Award.

Affirmed.

Judges ERVIN and DAVIS concur.

SIX AT 109, LLC, A North Carolina limited liability company, Petitioner
v.
TOWN OF HOLDEN BEACH, North Carolina, Respondent

No. COA14-388

Filed 31 December 2014

1. **Jurisdiction—subject matter jurisdiction—condemnation—statutory authority**

   Respondent Town had subject matter jurisdiction to condemn petitioner's ocean-side motel. The order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing.

2. **Cities and Towns—condemnation—demolition—motel—standard of review**

   The superior court did not err by affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side motel and ordering the demolition of the property based on an alleged arbitrary and capricious standard. The decision of the Board of Commissioners was supported by substantial evidence.

3. **Cities and Towns—condemnation—demolition—motel—decision not arbitrary and capricious**

   The Town of Holden Beach Board of Commissioners' decision to condemn petitioners' ocean-side motel and order its demolition was not arbitrary and capricious.

Appeal by petitioner from order entered 1 July 2013 by Judge Gary E. Trawick in Brunswick County Superior Court. Heard in the Court of Appeals 8 October 2014.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for petitioner-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier and Jarrett W. McGowan, and H. Mac Tyson II, for respondent-appellee Town of Holden Beach.

BRYANT, Judge.

Because the Superior Court utilized the appropriate standard of review applicable to an appeal from an order of the Town of Holden Beach Board of Commissioners and did not err in affirming the order of the Board which affirmed an order condemning petitioner's oceanside motel and authorizing its demolition, we affirm the Superior Court's order.

Petitioner Six at 109, LLC ("petitioner"), owns a building known as Captain Jack's Motel ("the motel"), located in the Town of Holden Beach ("the Town"). The structure is an oceanfront, four-unit motel built in 1989.

In 2008, petitioner received a building permit from the Town authorizing the making of non-structural improvements to the interior of the motel, including replacing exterior doors, door trim, baseboards, windows, cabinets, plumbing, an HVAC system, and electric wiring. Petitioner also received a Coastal Area Management Act ("CAMA") permit authorizing the making of the proposed improvements.[1] Work commenced pursuant to the building permit. On 8 December 2009, the Town Building Inspector issued a Certificate of Compliance relating to the work completed on the motel up to that time. The Certificate of Compliance stated that three of the four units in the motel were in compliance with the Town Building Code and that occupancy would be permitted.

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1. "CAMA" or "Coastal Area Management Act of 1974" is codified within Article 7 of Chapter 113A of our General Statutes and governs "the development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area." N.C. Gen. Stat. §§ 113A-100, -106 (2013). "'Coastal area' means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean . . . ." *Id.* § 113A-103(2). "[E]very person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part." *Id.* § 113A-118(a).

On 3 August 2010, a new town building inspector, Timothy Evans, issued a stop work order relating to petitioner's motel property in response to a report that work was taking place on the motel that was not authorized by the building permit. The stop work order remained in place until the end of the year when Inspector Evans determined that all work done on the property had been performed in compliance with the building permit.

In early 2011, petitioner submitted an application for another building permit authorizing continued work on the motel, including: demolition and replacement of exterior siding, existing plumbing, electrical and heating fixtures, and non-load bearing walls. In August 2011, Inspector Evans notified petitioner that because the motel met the criteria for an unsafe building pursuant to North Carolina General Statutes, section 160A-426, it had been condemned.[2] On 17 November 2011, petitioner's permit application was denied and a condemnation notice was posted at the building site.[3] Afterwards, Inspector Evans provided petitioner with a memorandum outlining the basis for the notice and condemnation (citing violations of specific provisions of the N.C. Building Code) and advised petitioner that a hearing on the matter would be conducted before him as the Town Building Inspector.

In January 2012, a hearing was conducted before Inspector Evans in his capacity as Director of the Inspections Department for the Town of Holden Beach. Petitioner submitted documentary evidence in the form of exhibits and offered testimonial evidence through witnesses. Furthermore, Inspector Evans granted petitioner's request for additional time to supplement the record with further evidence, exhibits, arguments and authorities. On 12 March 2012, following the January hearing, Inspector Evans, on behalf of the Inspections Department, entered an order making the following ultimate findings of fact:

> [T]he structure is a hazard to the surrounding properties, that its current condition constitutes (among other things) a fire hazard, that the structure has attracted a criminal

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2. Pursuant to General Statutes, section 160A-426, "[e]very building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe . . . ." N.C. Gen. Stat. § 160A-426(a) (2013).

3. Petitioner did not appeal the denial of its building permit application to the North Carolina Department of Insurance as allowed pursuant to N.C. Gen. Stat. §160A-434, and petitioner failed to submit an application for a CAMA permit or request an exemption.

> activity and other activities which constitutes a nuisance, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children and that the only option available under N.C.G.S. § 160A-429 is to order the demolition of the structure . . . .

Accordingly, Inspector Evans ordered that the motel be demolished, pursuant to N.C. Gen. Stat. § 160A-429.[4]

Petitioner appealed the inspector's order to the Town of Holden Beach Board of Commissioners pursuant to N.C. Gen. Stat. § 160A-430.[5] A hearing before the Board of Commissioners was conducted on 11-13 June 2012. Petitioner presented evidence by way of exhibits and witnesses and made arguments supported by authorities submitted to the Commissioners. The Commissioners also conducted a site visit as part of the hearing. By order dated 7 September 2012, the Board of Commissioners found that, viewed in the light most favorable to petitioner, the evidence supported the following factual finding:

> [T]he ocean side structure of the property is a hazard; that the structure has attracted criminal activity and other activities which constitute a nuisance; and, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children . . . .

In accordance with these findings, the Board of Commissioners affirmed the order of the Inspections Department. Petitioner then petitioned the Brunswick County Superior Court to issue a writ of certiorari for the purpose of reviewing the proceedings below.

On 25 April 2013, in Brunswick County Superior Court, the Honorable Gary E. Trawick heard arguments from petitioner and the Town and, on 3 July 2013, entered an order upholding the 7 September 2012 order of the Board of Commissioners. Petitioner appeals.

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4. "If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, . . . demolishing the building or structure . . . ." N.C. Gen. Stat. § 160A-429 (2013).

5. "Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order. In the absence of an appeal, the order of the inspector shall be final." N.C. Gen. Stat. § 160A-430 (2013).

On appeal, petitioner argues that (I) the Town lacked subject matter jurisdiction to condemn the property; (II) the Board of Commissioners used an improper standard of review in considering petitioner's June 2012 appeal; and (III) the Board of Commissioners' decision to condemn the property and order its demolition was arbitrary and capricious.

I

[1] Petitioner contends the Town did not have subject matter jurisdiction to condemn the ocean-side motel because the motel is located in a public trust area of Holden Beach and this Court has held that only the State has standing to enforce the public's claims in the public trust lands of the State. We disagree.

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *In re Thompson*, ___ N.C. App. ___, ___, 754 S.E.2d 168, 172 (2014).

In *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 723 S.E.2d 156, *appeal dismissed*, 366 N.C. 386, 732 S.E.2d 580, *and review denie*d, 366 N.C. 386, 733 S.E.2d 580 (2012), the plaintiff Town was granted summary judgment against the defendant homeowner with respect to a nuisance claim, resulting in the condemnation of the defendant homeowner's dwelling. The dwelling was reported to have been located "in its entirety on the wet sand beach," to be in a deteriorated and damaged condition, and to have restricted pedestrian access along the public trust beach area. *Id.* at 67-68, 723 S.E.2d at 157. In its motion for summary judgment, the plaintiff Town provided two bases for its nuisance claim: (1) the damaged structure or debris from it was likely to cause injury to persons or property; and (2) the structure "[was] located in whole or in part in a public trust area or on public land." *Id.* at 68-69, 723 S.E.2d at 157-58. On appeal, this Court considered the argument that the trial court erred in failing to grant the defendant's motion to dismiss because the plaintiff Town lacked jurisdiction to enforce the State's sovereign right to protect land held pursuant to the public trust doctrine. In pertinent part, we agreed, reasoning that "this is a case where [the Town of Nags Head] [was] attempting to take private property from an individual, destroy the dwelling, and claim the land on the basis that it currently lies within a public trust area." *Id.* at 74, 723 S.E.2d at 160. Acknowledging that our case law "heavily emphasizes the sovereignty of the State as being the only body which can affirmatively bring an action to assert rights under the public trust doctrine[,]" this Court reversed the trial court's decision to deny the defendant's motion to dismiss the

plaintiff Town's nuisance claim since the ruling was premised on protecting land in the public trust. *Id.* at 74-75, 723 S.E.2d at 161 (citing *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005), and *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002)); *see also* N.C. Gen. Stat. § 113-131 (2013) (recognizing public trust rights). However, while this Court held that the plaintiff Town could not assert its claim "based solely on public trust rights," the condemnation of property as a nuisance if the property created a "reasonable likelihood of personal or property injury" was held to be allowable. *Town of Nags Head*, 219 N.C. App. at 80, 723 S.E.2d at 164 (citing Town of Nags Head, N.C., Code § 16–31(6)(b) (2007)). The matter was remanded in part to the trial court for further proceedings.

Petitioner contends that an examination of findings of fact 1,[6] 7,[7] 18,[8] 19,[9] 20,[10] and 21,[11] contained in Inspector Evan's 12 March 2012 order, which mention "tidal action" and "proximity to the Atlantic Ocean," indicate that the Town's action was impermissibly premised on enforcing the public trust doctrine. We note that findings 1, 7, 19, and 21 contained in Inspector Evans' order relate to structural defects in the building and petitioner's failure to establish that repairs would decrease the danger of further damage due to the proximity of the structure to the ocean. Finding of fact 18 relates to the accessibility of the structure to persons involved in unacceptable, unsafe, and illegal activities as documented by law enforcement officers. Based on these findings of fact, Inspector Evans ordered the demolition of the ocean-side structure. Petitioner appealed the order to the Town of Holden Beach Board of Commissioners.

The Board of Commissioners' 7 September 2012 order to condemn the ocean-side structure was, like Inspector Evans' 12 March 2012 order,

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6. Finding of fact number 1 states that "[t]he loss of the frontal dune on the ocean side of the property has resulted in erosion of the foundation and caused pilings to list as much as 24%. This movement along with weathering of fasteners and bolts has caused the structure to sag and has resulted in floor level variations of as much as ¾ inch per 8 feet."

7. Finding of fact number 7 states that "[t]idal action regularly encroaches upon and under the structure, negatively affecting the pilings and structural support, and in such a manner as to require extensive modification of the existing electrical service to the property."

8. Finding of fact number 18 states that "[t]he location of the structure beyond the existing frontal dune allows for access to persons involved in unacceptable, illegal and unsafe activities which have been documented by local law enforcement and complaints of citizens."

based on findings that the structure was a hazard and that it had been the site of criminal conduct and other activities which constituted a nuisance. Furthermore, the Commissioners found that the structure was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children.

We note that neither Inspector Evans, in his 12 March 2012 order; the Board of Commissioners, in its 7 September 2012 order; nor the Superior Court, in its 3 July 2013 order, reference the structure's location within the public trust area as a basis for its condemnation.

Pursuant to North Carolina General Statutes, section 160A-426, a municipality has jurisdiction to condemn a structure if it is unsafe. *See* N.C.G.S. §§ 160A-426 ("Every building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe . . . ."), -432(b) ("[A] city may . . . cause the building or structure to be removed or demolished."). The respective orders of Inspector Evans and the Board of Commissioners make clear that the ocean-side structure was condemned because it was determined to be unsafe. These orders were proper based on General Statutes, section 160A-205(a) ("A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries."). Accordingly, we overrule petitioner's argument to the effect that the Board's action was based on an impermissible premise.

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9. Finding of fact number 18 states that "[t]he extent of damage and weathering suffered by the structure and sustained, at least in part, through mother nature, makes permitting any repair, remediation or reconstruction of the structure legally impossible under current local, state and federal rules, codes, guidelines, ordinances and statutes."

10. Finding of fact number 20 states that "[w]hile this (or arguably any) structure can be engineered back to compliance with the applicable state building code, Petitioner has failed to present sufficient evidence that the repair, renovation and reconstruction of this structure as proposed would comply with the applicable requirements of the local, state and federal rules, regulations, guidelines, ordinances, codes and statutes, including, by not necessarily limited to, the regulations of FEMA and CAMA."

11. Finding of fact number 21 states that "[p]etitioners have failed to establish that any repair, renovation or reconstruction of the structure would decrease the danger of further severe damage and failure due to its proximity to the Atlantic Ocean."

Petitioner also contends that because the 7 September 2012 order of the Board of Commissioners states that the order of the Town's Inspection Department "should be affirmed and/or the factual findings thereof adopted and incorporated herein[,]" the Board of Commissioners reviewed petitioner's appeal by seeking only to determine if the evidence supported Inspector Evans' findings rather than by granting petitioner a de novo hearing. We disagree, since the record establishes that the Commission engaged in de novo review.

At the outset of its 7 September 2012 order, the Board of Commissioners stated that the 12 March 2012 order of the Chief Building Inspector for the Town was before them pursuant to N.C.G.S. § 160A-430 "upon appeal de novo." By the consent of the parties and the permission of the Commissioners, both petitioner and the Inspection Department presented supplemental information, materials, arguments and authorities which were adopted as part of the record. *See generally*, *Morris v. Se. Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 440, 681 S.E.2d 840, 850 (2009) (granting the plaintiff's petition to supplement the record with material submitted to but not considered by the trial court for de novo review on the issue of whether the complaint met the Rule 9(j) compliance standard for allegations of medical malpractice). After a two-day hearing, which included a site visit, the Commission made an independent finding of fact (based on its de novo review) that the structure was a hazard, had attracted criminal activity, had attracted other activities which constituted a nuisance, was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children. Thereafter, the Board of Commissioners affirmed the order of the Town of Holden Beach Planning and Inspection Department with modifications. *See* N.C.G.S. § 160A-430 ("The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order [of the inspector]."). Therefore, the order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing. *See id.* Accordingly, petitioner's argument is overruled.

II & III

[2] Next, petitioner argues that the Superior Court erred in affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side building and ordering the demolition of the property based on an arbitrary and capricious standard. Specifically, petitioner contends the conclusions in the Building Inspector's order, as adopted by the Board of Commissioners, were "overwhelmingly refuted by evidence to the contrary"; that the Certificate of Compliance issued

for the work completed on the first three units of the ocean-side building indicated the prior Town building inspector's conclusion that the building was not a hazard or unsafe; and petitioner has a vested right to continue with the project. We disagree.

> When reviewing the decision of a decision-making board under the provisions of this section, the [superior] court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2013). "On appeal to this Court, our review of a [superior] court's [review of a town board's] determination is limited to determining (1) whether the superior court applied the correct standard of review, and to determining (2) whether the superior court correctly applied that standard." *Myers Park Homeowners Ass'n, Inc. v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 342 (2013) (citation and quotations omitted).

Petitioner first contends that in adopting the conclusions of Inspector Evans, as stated in his 12 March 2012 order, the Board of Commissioners acted in an arbitrary and capricious manner.

"If the petitioner complains that the [decision-making board's] decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test." *Id.* at ___, 747 S.E.2d at 342 (citation omitted).

> [When a applying the whole record test] reasonable but conflicting views [may] emerge from the evidence[.] [T]he Court cannot substitute its judgment for the administrative

> body's decision. The Court, however, must take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. The Court must ultimately decide whether the decision has a rational basis in the evidence.

Id. at ___, 747 S.E.2d at 343 (citation omitted).

In its 1 July 2013 order, the Superior Court stated that in drawing its conclusions, the "whole record test" was applied. We note the following conclusions:

> a) The 7 September 2012 decision of the Board of Commissioners of the Town of Holden Beach was in conformity with applicable law;
>
> . . .
>
> d) The 7 September 2012 decision of the Board of Commissioners was based upon competent material and substantial evidence in the record;
>
> e) The 7 September 2012 decision of the Board of Commissioners was fair, reasonable and not arbitrary and capricious; and
>
> f) The 7 September 2012 decision was within the statutory authority conferred upon the Town and the Board of Commissioners.

Upon review of the record before us, we conclude the trial court did not err by determining that the decision of the Board of Commissioners was supported by substantial evidence. The evidence of record received at the hearing before the Board of Commissioners showed that storms, erosion, tidal action and/or other natural events materially changed the real property upon which the ocean-side structure was located; that these changes to the real property and the resulting impact on the structure created a hazard; and that the structure had attracted criminal activity. Therefore, we overrule petitioner's argument that the conclusion of the Board of Commissioners was arbitrary and capricious.

Next, petitioner contends that the Certificate of Compliance issued on 8 December 2009 by building inspector David Eakins with respect to the first three units of the four unit complex "is tantamount to a finding by the Town that the completed work complies with all applicable State and local laws and the terms of the [building] permit [issued to rehabilitate the property]." Petitioner does not cite any authority in support of

its assertion that the certificate of compliance issued on 8 December 2009 by the former building inspector precluded Inspector Evans from making a determination that the structure was unsafe on 3 August 2010, and we find none. Therefore, we overrule this argument.

[3] Lastly, petitioner contends that it has a vested right to continue with the project due to its investment in the property and the issuance of building permits and a CAMA permit in 2008. In its argument before the Superior Court and in its brief to this Court, petitioner contends that the rehabilitation of its property was to take place in phases. The evidence presented to the Board of Commissioners indicates that petitioner's 2008 building permit authorized non-structural improvements to the interior of the structure, including: replacement of exterior doors; door trim; baseboards; windows; cabinets; plumbing; an HVAC system; and electric wiring. On the other hand, the findings of Inspector Evans' 12 March 2012 order described major structural defects in the building, including: movement of the pilings supporting the structure; movement of fasteners and bolts which have caused the structure to sag, resulting in floor level variations within the structure; egress components described as structurally unsound; rotted girders and structural members unable to support uniform loading conditions; tidal action encroaching upon and under the structure, negatively affecting the pilings and structural support; rotted exterior siding that allowed water to seep into the interior of the structure; a buckled roof (likely due to the effect of the tidal action on the pilings); interior attic space containing extensive animal waste; weathered and corroded structural elements of the egress overhang; and deteriorated fasia members.

In its 7 September 2012 order, the Town of Holden Beach Board of Commissioners, like Inspector Evans, ordered the demolition of the structure. However, the Commission gave petitioner an opportunity to bring his motel into compliance prior to demolition. The Commission noted that it would allow petitioner to complete any work necessary to comply with the building inspector's 12 March 2012 order, provided such work could be "completed and inspected/approved by the Holden Beach Building Inspector by or before 1 April 2013."

Thus, petitioner has not been deprived of its right to rehabilitate the property. Rather, this right has simply been limited by the condemnation of the property as unsafe and the Board of Commissioners' authority to demolish the structure should petitioner fail to act. *See Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 785 (1964) ("The permit created no vested right; it merely authorized [the] permittee to act. If he, at a time when it was lawful, exercised the privilege granted him,

he thereby acquired a property right which would be protected; but he could not remain inactive and thereby deny to the municipality the right to make needed changes . . . ."). Accordingly, we overrule petitioner's argument and, thus, affirm the Superior Court's 3 July 2013 order upholding the 7 September 2012 order of the Town of Holden Beach Board of Commissioners.

Affirmed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
MATTHEW STEPHAN COAKLEY

No. COA14-559

Filed 31 December 2014

1. Criminal Law—jury instruction—malicious maiming—disabled eye

The trial court did not err by instructing the jury that it could convict defendant under North Carolina's malicious maiming statute if it found that he had "disabled" the victim's eye. The total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" under N.C.G.S. § 14-30. Even assuming that the trial court erred by instructing the jury on an improper theory of disabling, any such error was harmless beyond a reasonable doubt.

2. Criminal Law—jury instruction—malicious maiming—put out or disabled eye

The trial court did not err by allegedly instructing the jury on a theory of malicious maiming that was not included in the indictment. Although the indictment charging defendant with malicious maiming only stated that defendant "put out" the victim's eye while the jury instructions stated that defendant had "disabled or put out" his eye, this distinction was illusory. The term "disabled," as applied to the facts, could only be interpreted to mean total loss of sight.

3. Sentencing—assault inflicting serious bodily injury—assault with deadly weapon inflicting serious injury—remanded for resentencing

The trial court erred by entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. The assault inflicting serious bodily injury judgment was arrested and the case was remanded to the trial court for resentencing.

Appeal by defendant from judgments entered 21 November 2013 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for Defendant.

BELL, Judge.

Matthew Stephan Coakley ("Defendant") appeals from judgments sentencing him to an active term of 72 to 99 months imprisonment for malicious maiming and to a consecutive term of 24 to 41 months imprisonment suspended with supervised probation for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. On appeal, Defendant contends that the trial court erred by (1) instructing the jury that it could convict him under North Carolina's malicious maiming statute if it found that he had "disabled" Mr. Clark's eye; (2) instructing the jury on a theory of malicious maiming that was not included in the indictment; and (3) entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. After a careful review of the record and applicable law, we conclude that Defendant's first two contentions lack merit. We agree with Defendant on his third ground for appeal and therefore arrest judgment on the conviction for assault inflicting serious bodily injury and remand this case to the trial court for resentencing.

I. Factual Background

A. State's Evidence

On 7 July 2012, Denny Clark ("Mr. Clark") went to The Brickhouse, a sports bar located in Raleigh, North Carolina, to visit his girlfriend,

Reina Diaz ("Ms. Diaz"), and watch an Ultimate Fighting Championship ("UFC") fight on pay-per-view. The Brickhouse had four large projector screens and eight flat screen televisions around the bar. On the night in question, the bar was filled to capacity.

Around 10:00 p.m., Mr. Clark was standing in the area next to the booth where Defendant was sitting. Mr. Clark heard Defendant cursing and demanding that he move out of Defendant's line of sight. Mr. Clark stated that he could not move anywhere else because of the crowded environment. This brief encounter ended shortly thereafter. Later that evening, Mr. Clark ran into his former co-worker, Zachary Smith ("Mr. Smith"), and told him about the incident with Defendant.

Around 1:00 a.m., Mr. Clark and Mr. Smith went to the restroom. Defendant and his friend, William Phillips ("Mr. Phillips"), also went into the restroom. When Mr. Clark exited the restroom stall, he saw Defendant and Mr. Phillips in the restroom. Defendant was staring at Mr. Clark with his fist clenched and a tense look on his face. Mr. Clark stated, "[R]eally, over a T.V.?" Defendant proceeded to repeatedly punch Mr. Clark in his eye. Mr. Clark was knocked unconscious and woke up on the floor of the restroom. He told Mr. Smith to go after Defendant and call the police. Mr. Smith ran out of the restroom and told Ms. Diaz to call the police. He then went outside and saw Defendant attempting to leave. Defendant was prevented from leaving the premises when a police vehicle blocked his path.

Mr. Clark was transported to Duke Hospital via ambulance. Tyler Clark ("Tyler"), Mr. Clark's brother, received a call from Ms. Diaz around 2:00 a.m. asking him to come to the hospital because his brother had been badly injured in a fight. Mr. Clark was not given any pain medication during his initial medical treatment and Tyler testified that he could hear his brother screaming from the other side of the door.

At the emergency room, Mr. Clark presented with severe trauma to and zero light perception in his left eye. He had a large scleral laceration from his cornea along the posterior side of his eyeball into his retina. The on-call resident was able to suture a large portion of the laceration but could not reach the back side of the eye where the laceration ended. As a result, the posterior of Mr. Clark's eye remained open. Mr. Clark's retina was also completely detached. Dr. Michael Richard ("Dr. Richard"), an optic plastic surgeon who treated Mr. Clark, testified that it was not possible to repair the damage to Mr. Clark's eye, which he described as "a devastating injury." Dr. Richard further testified that he consulted with a retina specialist who agreed with Dr. Richard that the

injury was irreparable. According to Dr. Richard, Mr. Clark was at risk of developing calcium build-up on the wall of his injured eye, a condition called phthisis bulbi. If Mr. Clark were to develop this condition, the eye would begin to atrophy and Mr. Clark would experience extreme pain. Dr. Richard also feared the onset of sympathetic ophthalmia, a condition that results from the body's immune system attacking the healthy eye due to fluids from the damaged eye seeping into the healthy eye. After observing Mr. Clark for approximately one month, Dr. Richard determined that Mr. Clark would never regain his vision and made the decision to surgically remove Mr. Clark's eye on 5 October 2012.

B. Defendant's Evidence

At trial, Defendant testified as follows: Defendant had practiced Brazilian Jujitsu and amateur cage-fighting for approximately six years.[1] Defendant trained in Brazilian Jujitsu "a couple times a week."

On the date of the incident, Defendant went to The Brickhouse with his girlfriend to meet friends from his training gym and watch the UFC fight. Defendant testified that prior to his encounter with Mr. Clark, two individuals had blocked his view of the projector screen on which he was watching the fight. Defendant had asked them to move and they complied. When Mr. Clark stood in that same location, Defendant informed him that he had just asked two other individuals to move out of his way. Mr. Clark replied that Defendant could watch the UFC fight on one of the several other televisions. After the two of them "went back and forth" with more words, a waitress told Mr. Clark to move.

When the UFC fight ended, Defendant and Mr. Phillips went to the restroom. While in the restroom, Mr. Phillips asked Defendant about the confrontation with Mr. Clark. As Defendant began to describe the incident, he "hear[d] some snickering in one of the stalls." While Defendant was waiting to wash his hands, Mr. Clark came out of the bathroom stall and walked towards Defendant. Defendant put his hands up in response. According to Defendant, Mr. Clark "grab[bed] [Defendant] by the throat, squeeze[d] [his] neck and start[ed] pushing [him] . . . against the wall." Defendant took a step back, "popped" Mr. Clark's elbow away from him, and struck Mr. Clark in the face. Mr. Clark attempted to strike Defendant, but Defendant evaded the punch and pushed Mr. Clark into a corner, facing the wall. Mr. Clark began to elbow Defendant on the top

1. Although at the time of trial, Defendant also practiced Muy Thai, which included mastering powerful strikes, he had not begun training in this martial arts practice at the time of the altercation.

of his head and the back of his neck. Defendant buried his head in Mr. Clark's underarm and hit Mr. Clark three more times with his left fist until Mr. Clark stopped fighting back. Defendant pushed Mr. Clark away from him and left the bathroom.

C. Procedural History

A warrant for Defendant's arrest was issued on 25 July 2012. On 10 September 2012, Defendant was indicted on charges of malicious maiming, assault with a deadly weapon inflicting serious injury, and assault inflicting serious bodily injury. The case came on for trial on 19 November 2013 in Wake County Superior Court. On 21 November 2013, the jury returned verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to an active term of 72 to 99 months imprisonment for his malicious maiming conviction. Defendant was also sentenced to a consecutive suspended term of 24 to 41 months imprisonment for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. Defendant gave notice of appeal in open court.

II. Jury Instructions

[1] Defendant's first argument is that the trial court erred by disjunctively instructing the jury that it could convict him of malicious maiming if it found that he had "disabled or put out" Mr. Clark's eye. Defendant asserts that the "disabling" of an eye does not support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30 because the statute requires physical removal of the victim's eye. Alternatively, Defendant argues that "disabling" includes temporary injuries and injuries less serious than the total loss of use of the eye. As such, Defendant contends, the trial court's jury instruction deprived him of his right to a unanimous jury verdict under N.C. Const. Art. I because (1) it permitted the jury to convict him under a theory unsupported by the statute; and (2) it was impossible to determine whether the jury relied on the proper theory when it found him guilty of malicious maiming.

A. Appealability and Standard of Review

We note that Defendant failed to object to the jury instructions given by the trial court. "As a general rule, [a] defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *see also* N.C.R. App. P. 10(a). When, however, "the error violates [the] defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.* "Issues

of unanimity have usually arisen in the appellate courts when the trial court gave a disjunctive jury instruction." *State v. Davis*, 188 N.C. App. 735, 740, 656 S.E.2d 632, 635, *cert. denied*, 362 N.C. 364, 664 S.E.2d 313 (2008). Therefore, this issue is properly preserved for appeal.

Having concluded that this matter is properly before us, we must determine the appropriate standard of review. "Conclusions of law are reviewed *de novo* and are subject to full review. 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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and internal quotation marks omitted). Arguments made on appeal "challenging the trial court's decisions regarding jury instructions are reviewed *de novo*." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). We note, however, that utilizing a *de novo* standard of review only determines whether an error has occurred. Defendant failed to argue whether the error will be subject to a harmless error analysis and, if so, which party bears the burden of proof on appeal.

This Court has held that

> [w]here the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error. The State bears the burden of showing that the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.

State v. Wilson, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009) (citations and internal quotation marks omitted). Thus, we apply a harmless error analysis to Defendant's contention that the trial court's instruction violated his right to a unanimous jury verdict.

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. While our Courts have found that disjunctive jury instructions may jeopardize this right, our Supreme Court has held that not every disjunctive jury instruction violates this constitutional right. *State v. Lyons*, 330 N.C. 298, 299, 412, S.E.2d 308, 310 (1991).

In *Lyons*, our Supreme Court noted the difference between disjunctive jury instructions on alternative acts that will establish an element of the charged offense and disjunctive jury instructions that allow the jury to find a defendant guilty based on one of two underlying acts, *either of which is in itself a separate offense*. 330 N.C. 298, 299, 412 S.E.2d 308,

310 (1991). The former type of jury instruction does not violate a defendant's right to jury unanimity while this latter type of instruction may be fatally ambiguous if it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. *Id.* at 302-03, 412 S.E.2d at 312. Our Supreme Court stated that even those cases in which the jury was instructed on two underlying acts, each of which is a separate offense, are subject to a harmless error analysis, as "[a]n examination of the verdict, the charge, the initial instructions by the trial judge to the jury . . . , and the evidence may remove any ambiguity created by the charge." *Id.* at 307, 412 S.E.2d at 315 (alteration in original)(citation and quotation marks omitted). The Court cautioned that a case "where an examination of the whole of the trial leads to a conclusion that any ambiguity raised by the flawed instructions is removed" is exceptional. *Id.* at 309, 412 S.E.2d at 315.

B. "Physical Removal" Requirement

In the case *sub judice*, Defendant was charged with malicious maiming under N.C. Gen. Stat. § 14-30, which makes it a Class C felony "[i]f any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure." N.C. Gen. Stat. § 13-40 (2013). The trial court instructed the jury, in pertinent part, as follows:

> The Defendant has been charged with malicious maiming. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant disabled or put out Denny Clark's eye, thereby permanently injuring him.
>
> * * *
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant, with malice aforethought, unlawfully, and with the intent to maim Denny Clark disabled or put out Denny Clark's eye, thereby permanently injuring him, it would be your duty to return a verdict of guilty.

In his brief, Defendant first argues that by allowing the jury to return a guilty verdict if it found that Defendant had *either* disabled or put out Mr. Clark's eye, the trial court gave a fatally disjunctive instruction because the evidence did not support a finding that Defendant "put out or removed any eye in the altercation." Although Defendant abandoned this position during oral argument and the State offered a persuasive

argument that the term "put out" does not require proof of physical removal, we nonetheless address this question, as it currently stands unanswered by our case law.

Although the term "put out" is reasonably interpreted to involve the physical removal of the eye, the New Oxford American Dictionary defines to "put someone's eyes out" to mean to "blind someone, typically in a violent way." The New Oxford American Dictionary 1378 (2nd ed. 2005). Therefore, it is fair to conclude that the statute is ambiguous on its face and subject to two different reasonable interpretations. When "a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation and quotation marks omitted).

The offense of malicious maiming was first codified in North Carolina in the Seventeenth Century, originating from the common law crime of mayhem. *See State v. Bass*, 255 N.C. 42, 47, 120 S.E.2d 580, 584 (1961). In *Bass*, our Supreme Court recognized that the common law definition of mayhem encompassed "violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary." *Id.* at 45, 120 S.E.2d at 582. The focus of the crime was on the disabling effect on the victim, rather than the physical acts that took place. *See id.* (recognizing that "cutting off his ear, or nose, or the like, are not held to be mayhems at common law[] because they do not weaken but only disfigure him").

Additionally, we find guidance from other jurisdictions that have interpreted similar maiming statutes. For example, under California law, "[e]very person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." Cal. Penal Code § 203 (2014). In interpreting the statute, the California Court of Appeals held that "[t]he expression 'puts out an eye' means the eye has been injured to such an extent it cannot be used for the ordinary and usual practical purposes of life." *People v. Green*, 130 Cal. Rptr. 318, 319 (1976) (citation and internal quotation marks omitted).

Similarly, Texas courts require the "total destruction of the sight of an eye" to constitute maiming under the Texas statute. *Phillips v. State*, 143 S.W.2d 591, 592 (1940). Although the California court defined maiming to include something less than total blindness, while the Texas court required total destruction of sight, neither required the physical removal of the eye in order to support a conviction of maiming.

We agree with the holdings in these jurisdictions that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30. Therefore, this portion of Defendant's argument is without merit.

C. Scope of the Term "Disabled"

In the second part of his first argument, Defendant contends that because the term "disabled an eye" may encompass less serious injuries than total loss of vision, and because it was impossible to tell upon which theory the jury based its conviction, he should be granted a new trial.

Defendant relies on our Supreme Court's decision in *State v. Pakulski* as standing for the proposition that a trial court commits reversible error when it instructs a jury on disjunctive theories of a crime and one of the theories is improper. 319 N.C. 562, 356 S.E.2d 319 (1987). The defendant in *Pakulski* was convicted of first-degree murder pursuant to the felony murder rule, with felony breaking or entering and armed robbery as the predicate felonies. 319 N.C. at 564, 356 S.E.2d at 321. On appeal, the defendant argued that there was insufficient evidence to support a conviction for either underlying felony and that he was deprived of his constitutional right to a unanimous jury verdict when the trial court instructed the jury disjunctively on both offenses as the predicate for the felony murder charge. *Id.* Our Supreme Court concluded that, although there was sufficient evidence to submit the armed robbery charge to the jury, there was insufficient evidence to submit the charge of felony breaking or entering to the jury. *Id.* at 571-73, 356 S.E.2d at 325-26. In addressing whether the error was harmless, the Court held that it "will not assume that the jury based its verdict on the theory for which it received a proper instruction" if "the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted." *Id.* at 574, 356 S.E.2d at 326. The Court added as a caveat that such an approach only applies to circumstances in which it could not "discern from the record the theory upon which the jury relied." *Id.*

Defendant relies on the language quoted above as support for his position that this Court should grant him a new trial due to the lack of clarity in the record as to which theory — disabling or putting out — the jury relied on in convicting him under N.C. Gen. Stat. § 14-30. We find Defendant's reliance on *Pakulski* misplaced, as the Court in *Pakulski* stated:

> Because we must remand the case for a new trial on the first-degree murder charges for insufficiency of the evidence as to breaking or entering committed with the use of a deadly weapon, *we need not address* defendants' contentions concerning error in the charge relating to the use of the deadly weapon or *unanimity of the verdict upon submission of the case on alternative theories.*

Id. at 574, 356 S.E.2d at 326-27 (emphasis added). While we agree that the plain meaning of the term "disabled" may include temporary injuries as well as injuries not resulting in complete loss of vision, the facts before this Court in the present case do not require us to decide whether partial or temporary blindness constitutes malicious maiming under N.C. Gen. Stat. § 14-30.

Although Defendant contends that the term "disabled" is open to an interpretation that is both factually and legally inconsistent, and that such ambiguity was so severe that it created a fatally ambiguous jury verdict, the facts of this case do not support this contention. The evidence in the record showed that Mr. Clark completely lost his eyesight because of Defendant's actions.[2] Defendant would have us conclude that, despite the evidence before it, the jury interpreted the term "disabled" to mean something less than complete blindness and that some jurors convicted Defendant under this improper theory. We find this argument to be unsupported by the evidence presented at trial. We hold that because the evidence presented at trial only supported one interpretation of the term "disabled," and such an interpretation was legally sufficient to sustain a conviction under N.C. Gen. Stat. § 14-30, the trial court did not commit reversible error in its instruction to the jury.

Even assuming, without deciding, that the trial court erred by instructing the jury on an improper theory of disabling to support a conviction of malicious maiming, we believe any such error was harmless beyond a reasonable doubt. The evidence regarding the extent of Mr. Clark's injuries was overwhelming and undisputed. Therefore, we are

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2. Additionally, Defendant has offered no argument or support for a contention that he did not cause the removal of Mr. Clark's eye. Despite the fact that Mr. Clark's eye was physically removed by his treating doctor, the testimony at trial clearly established that the removal was a medical necessity and was a direct result of the actions of Defendant. Defendant has not convinced this Court that causation was not established. Therefore, we cannot conclude that, for purposes of N.C. Gen. Stat. § 14-30, a defendant has not "put out" the eye of a victim if the victim's eye is so severely damaged that it is rendered useless, but preserved for aesthetic purposes. Such a situation has the same practical effect as a situation in which the victim's treating physician decides to remove the injured eye.

able to unequivocally discern from the record that the jury based its verdict on a finding that Mr. Clark suffered a total and permanent loss of sight in his eye as a result of the assault by Defendant. Thus, we conclude that the instructions given to the jury were not "fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict." *Lyons*, 330 N.C. at 301, 412 S.E.2d at 311. This argument is overruled.

III. Conviction Under a Theory Not Alleged in Indictment

[2] Next, Defendant argues that the trial court committed plain error when it allowed him to be convicted under a theory of malicious maiming that was not alleged in the indictment. According to Defendant, because the indictment alleged malicious maiming by "putting out" Mr. Clark's eye and the trial court instructed the jury on both putting out and disabling, he is entitled to a new trial. For the following reasons, we disagree.

A. Standard of Review

Defendant did not object to the instruction on malicious maiming at trial. Therefore, this Court reviews for plain error and Defendant bears the burden of "showing that such an error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," meaning that the defendant must establish that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 324 (citation and internal quotation marks omitted).

B. Substantive Legal Analysis

The indictment charging Defendant with malicious maiming alleged, in pertinent part, that:

> Defendant named above unlawfully, willfully, and feloniously did with malice *put out an eye of Denny Clark*, with the intent to maim or disfigure that person, and as a result did permanently injure the eye of that person.

(emphasis added). As previously noted, the trial court permitted the jury to convict Defendant if it believed, beyond a reasonable doubt, that he had "disabled or put out Denny Clark's eye."

Our Supreme Court has held that instructions that permit the jury "to predicate guilt on theories of the crime which were not charged in the bill of indictment and which [are] not supported by the evidence

at trial" constitutes plain error. *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (citation and quotation marks omitted). In *Tucker*, the Court found plain error where, "[a]lthough the state's evidence supported [the court's] instruction, the indictment [did] not." *Id.* at 537, 346 S.E.2d at 420. Thus, it is clear that instructing a jury on a theory of an offense not alleged in the indictment may constitute plain error.

Although the indictment charging Defendant with malicious maiming only stated that Defendant "put out" Mr. Clark's eye while the jury instructions stated that Defendant had "disabled or put out" his eye, we agree with the State that this distinction is illusory. As we stated earlier in this opinion, the term "disabled," as applied to the facts in this case, can only be interpreted to mean total loss of sight. The trial court did not instruct the jury that it could find Defendant guilty if he "partially" or "temporarily disabled" Mr. Clark's eye. Further, the trial court's rationale for using another term in addition to "put out" is found in a review of the trial transcript.

The State requested that the trial court use the pattern jury instruction for malicious maiming, which included the term "disabled." The State explained that this request was to prevent the jury from becoming "confused since the eye isn't literally falling out on the floor in the bathroom." This explanation is consistent with our holding that the eye does not have to be physically removed from its socket in order to constitute maiming under N.C. Gen. Stat. § 14-30. The purpose of the language in the instruction was to clarify that permanently blinding Mr. Clark was sufficient to prove malicious maiming. We therefore conclude that the trial court did not instruct the jury on a theory that was not alleged in the indictment.[3] Defendant is not entitled to relief on this ground.

IV. Judgment and Sentence on Two Assault Convictions

[3] Defendant's final argument on appeal is that the trial court erred by sentencing him for both assault inflicting serious bodily injury and assault with a deadly weapon. The State concedes that the court acted contrary to the statutory mandate by entering judgment and sentencing Defendant on both assault offenses.[4] We agree.

3. Again, we note that we do not decide whether the State was *required* to show total blindness to prove maiming. Such a decision is not necessary under the facts of this case.

4. Although the State initially conceded the issue in its brief, it held a position during oral argument that, although the sentence should be vacated, the judgment should stand.

First, we note that Defendant failed to object to this issue at trial. However, as Defendant has alleged a failure to comply with a statutory mandate, we nonetheless review the issue. *See State v. Jamison*, __ N.C. App. __, __, 758 S.E.2d 666, 671 (2014). Issues of statutory construction are questions of law, reviewed *de novo* on appeal. "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted).

In the case *sub judice*, Defendant was charged with and convicted of two assault offenses arising out of the incident on 8 July 2012: (1) assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4(a); and (2) felonious assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b). N.C. Gen. Stat. § 14-32.4(a) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-32.4(a) (2013). Here, Defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of N.C. Gen. Stat. § 14-32(b), which permits a greater punishment than N.C. Gen. Stat. § 14-32.4(a). *See* N.C. Gen. Stat. § 14-32(b) (2013).

Contrary to the statutory mandate, the trial court entered a consolidated judgment for both assault convictions. Therefore, we arrest judgment on Defendant's conviction of inflicting serious bodily injury and remand for resentencing on Defendant's conviction of felonious assault with a deadly weapon inflicting serious injury. *See State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 871 (2005), *disc. review denied*, __ N.C. __, 628 S.E.2d 8 (2006).

V. Conclusion

For the reasons set forth above, we conclude that the trial court did not err by instructing the jury on two different theories of malicious maiming. However, we conclude that the trial court erred by entering judgment and sentencing Defendant on both assault convictions. Therefore, judgment against Defendant on the charge of assault inflicting serious bodily injury is arrested and remanded to the trial court for resentencing. Judgment on Defendant's malicious maiming conviction remains undisturbed.

NO ERROR in part, JUDGMENT ARRESTED AND REMANDED in part.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA
v.
BURNICE ANTWON HINNANT, JR.

No. COA14-599

Filed 31 December 2014

1. Criminal Law—failure to give jury instruction—self-defense

In a murder prosecution, the trial court did not err by refusing to instruct the jury on self-defense. Defendant was not entitled to the instruction because he testified that he did not intend to shoot anyone but rather intended to fire a warning shot.

2. Homicide—jury instruction—intent to kill—voluntary manslaughter

In a murder prosecution, the trial court did not err by refusing to instruct the jury on voluntary manslaughter based on adequate provocation. One of the elements of voluntary manslaughter based on adequate provocation is the intent to kill, but defendant testified that he did not intend to kill anyone.

3. Homicide—jury instruction—involuntary manslaughter

In a murder prosecution, the trial court did not err by refusing to instruct the jury on involuntary manslaughter. Even though defendant testified that he did not intend to shoot anyone, his firing of the gun was intentional and occurred under circumstances naturally dangerous to human life.

4. Evidence—improper witness testimony—curative instruction not required

In a murder prosecution, the trial court did not commit plain error by failing to give a curative instruction not requested by defendant, where a witness gave his own opinion as to what "made reasonable sense." The trial court sustained trial counsel's objections to the testimony and granted his motion to strike. Even assuming the trial court erred, any error did not have a probable impact on the jury's verdict.

Appeal by Defendant from judgments entered 17 October 2013 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 21 October 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Brenda Menard, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for the Defendant.

DILLON, Judge.

Burnice Antwon Hinnant, Jr., ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of assault with a deadly weapon and second degree murder.

I. Background

The evidence tended to show the following: In the early morning hours of 2 September 2012, Defendant was involved in an altercation with his cousin C.J. Hinnant[1] at a party. During the altercation, Defendant shot Jayquan Tabron with a .38 caliber revolver. Defendant testified in his own defense, stating that C.J. was reaching for what he believed to be a gun and that he intended to fire warning shots in the direction of C.J. but did not intend to hit him. One of these warning shots, however, hit Mr. Tabron in the chest, killing him. Mr. Tabron had been standing in a crowd next to C.J.

One of the State's witnesses testified that C.J. reached for his waistband before Defendant drew his weapon, and further, that it was C.J., not Defendant, who started the fight.

On 29 October 2012, a Nash County grand jury indicted Defendant with carrying a concealed handgun, assault with a deadly weapon with intent to kill, and first degree murder.[2] Defendant pleaded guilty to carrying a concealed handgun. The remaining charges in the matter came on for trial in Nash County Superior Court.

The jury found Defendant guilty of assault with a deadly weapon and second degree murder. The trial court sentenced Defendant to prison for 180 to 228 months for second degree murder and 75 days for assault with a deadly weapon, consolidating the concealed weapon charge with

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1. Because Defendant and C.J. Hinnant are cousins and share the same last name, C.J. Hinnant is referred to herein as "C.J."

2. Defendant's liability for the murder is based on the doctrine of transferred intent, which provides that where "one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

the assault charge and ordering that the sentences run consecutively. Defendant filed notice of appeal in open court.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Self-Defense and Voluntary Manslaughter Instructions

[1] Defendant first contends that the trial court erred in refusing to instruct the jury on self-defense and in omitting an instruction on voluntary manslaughter. We disagree.

A defendant is only entitled to an instruction on self-defense if evidence exists that (1) he "in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm" *and* (2) that such a belief was reasonable. *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). In this case, Defendant's argument fails because there was no evidence to support the first element of self-defense - that he "in fact" formed a belief that it was necessary to kill C.J. – in that he testified that he was only firing warning shots. Specifically, our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter "while still insisting . . . that he did not intend to shoot anyone[.]" *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996).

On the witness stand, Defendant testified that he did not intend to shoot C.J. or anyone else when he fired his weapon, but rather his intent was to fire warning shots, because he believed C.J. was reaching for a weapon:

> I wasn't trying to harm C.J. or [Mr. Tabron], you know, I was just trying to get C.J. to back off of me. And I felt like if I pulled my gun out at the time, that would get him to back off of me. And that's what he did, he backed off of me.
>
> . . .
>
> If I had reached my arm out and pointed my gun directly in front of me, I mean, I would have shot C.J. But like I said, *I was just trying to get C.J. to back off of me.* That's why I had pulled my gun out. *And if C.J. had have pulled his gun out, yes, I would then have shot C.J.,* ***but that wasn't my intent. My intent was just to get him to back off of me.***

(Emphasis added).

The facts of this case are almost identical to that faced by our Supreme Court in *Williams*. In *Williams*, the defendant testified that he felt threatened during an altercation when he believed that one of his adversaries was reaching for a gun and testified that he fired warning shots in the air to make his adversaries back off, one of which struck and killed the victim:

> The defendant testified that he felt threatened because [an adversary] reached at his belt as if he were reaching for a pistol. Defendant testified that he then pointed his pistol in the air and fired three shots to scare [his adversaries] and make them back off.

Id. at 872, 467 S.E.2d at 393. In holding that the defendant was not entitled to an instruction on self-defense, our Supreme Court stated as follows:

> The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

Id. at 873, 467 S.E.2d at 394.

Defendant argues that, notwithstanding his own testimony about his intent, he was nonetheless entitled to jury instructions on self-defense and voluntary manslaughter because there was other evidence presented at trial to support a finding by the jury that he acted in self-defense. We agree that the testimony of other witnesses may have been sufficient for the jurors to conclude that it was reasonable for Defendant to use deadly force during his encounter with C.J.; however, such evidence only satisfies the second element of self-defense. Our Supreme Court has held that such evidence is irrelevant where the defendant's testimony about his own belief demonstrates that the first element was not present. *State v. Nicholson*, 355 N.C. 1, 30-31, 558 S.E.2d 109, 130-31 (2002). Specifically, in *Nicholson*, the Supreme Court held that the testimony of a witness stating that it was reasonable for the defendant to believe deadly force was necessary was irrelevant where the defendant himself testified that he did not intend to shoot anyone when he fired his weapon. *Id.* at 31, 558 S.E.2d at 131.

Here, Defendant's own testimony was that he did not intend to shoot anyone when he fired his weapon. Therefore, based on *Williams*, *Nicholson*, and other decisions by our appellate courts, we hold that Defendant was not entitled to an instruction on self-defense. *See*, *e.g.*, *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) ("[F]rom defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone," but rather intended to shoot at the top of a door); *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789-90 (1994) (defendant cannot claim self-defense while also asserting that he did not aim his gun at the victim); *State v. Gaston*, ___ N.C. App. ___, ___, 748 S.E.2d 21, 26-27 (2013) (defendant was not entitled to instruction on self-defense or voluntary manslaughter where he testified that the gun fired accidentally).

[2] Defendant devotes the final two paragraphs of his first argument to the alternate contention that the trial court erred in refusing to instruct the jury on voluntary manslaughter based on a theory of adequate provocation. We disagree for the same reasons expressed above concerning his argument regarding self-defense. Voluntary manslaughter committed in the heat of passion and with adequate provocation requires that the defendant perpetrate the killing with the intent to kill. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Again, Defendant testified that he did not intend to kill or injure anyone when he fired the gun. As in *Lyons*, where the defendant fires warning shots not intending to kill anyone, "the evidence . . . does not tend to indicate that the defendant in fact formed a belief that it was necessary to kill," and the defendant is not entitled to a jury instruction on voluntary manslaughter based on a theory of adequate provocation. 340 N.C. at 663, 459 S.E.2d at 779. Accordingly, this final portion of Defendant's first argument is overruled.[3]

B. Involuntary Manslaughter Instruction

[3] Defendant next argues that the trial court erred in refusing to instruct the jury on involuntary manslaughter. We disagree.

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3. We note that in his reply brief Defendant relies heavily on. *State v. Owens*, 60 N.C. App. 434, 299 S.E.2d 258 (1983). In that case, this Court held that an instruction on voluntary manslaughter was required despite the defendant's testimony that he pulled his gun out of fear of the victim, stating that "the jury could have concluded that [the] defendant intentionally fired the gun in self-defense but used excessive force." *Id.* at 436, 299 S.E.2d at 259. However, more recently, we recognized that *Owens* and other decisions in that line of cases were implicitly overruled by the Supreme Court's more recent decisions in *Williams* and *Nicholson*. *Gaston*, ___ N.C. App. at ___, 748 S.E.2d at 26. Therefore, Defendant's reliance on *Owens* is misplaced.

Involuntary manslaughter is an unintentional killing committed *without malice* that "proximately result[s] from the commission of an unlawful act not amounting to a felony or [] from some [other] act done in an unlawful or culpably negligent manner[.]" *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986). Our Supreme Court has held that where an unintentional killing results from the unintentional – yet reckless or culpably negligent – use of a firearm "in the absence of intent to discharge the weapon," a jury instruction on involuntary manslaughter is appropriate. *State v. Wallace*, 309 N.C. 141, 146, 305 S.E.2d 548, 551-52 (1983). Where death results from the intentional use of a firearm or other deadly weapon as such, malice is presumed. *State v. Gordon*, 241 N.C. 356, 358-59, 85 S.E.2d 322, 323-24 (1955).

We believe that our resolution of this issue is controlled by our decision in *State v. Martin*, 52 N.C. App. 373, 278 S.E.2d 305, *disc. review denied*, 303 N.C. 549, 281 S.E.2d 399 (1981), which involved facts very similar to those in the present case. In *Martin*, the defendant testified that she intended to fire a gun in the direction of her husband but that she was intending only to fire warning shots to "keep him back," and was not trying to hit him:

> I intentionally pulled the trigger. I did not intentionally shoot my husband. I intentionally pulled the trigger, thinking at the time that it would warn him back, not realizing that it was in the position to actually hit him.

Id. at 374, 278 S.E.2d at 307. We held that where the defendant testified that she intentionally fired the weapon and that the weapon did not discharge accidentally, the intentional discharge was "under circumstances naturally dangerous to human life" and that "[t]his could not be involuntary manslaughter[,]" even if the defendant did not intend to wound anyone with the shot. *Id.* at 375, 278 S.E.2d at 307. Accordingly, we held that it was error to instruct the jury on involuntary manslaughter.

Like in *Martin*, Defendant here admitted that he intentionally fired the gun, but that he did not intend to wound C.J. or anyone else. However, since he intentionally fired the gun under circumstances naturally dangerous to human life, we hold that the trial court did not err in not giving an instruction on involuntary manslaughter. The cases cited by Defendant, *State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984), and *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011), are easily distinguishable. Neither involved the intentional discharge of a firearm. *Buck* involved a stabbing, 310 N.C. at 605, 313 S.E.2d at 552, and *Debiase* involved an attack with a

beer bottle, 211 N.C. App. at 508-09, 711 S.E.2d at 443-44. In the present case, the uncontradicted evidence showed that Defendant drew a loaded .38 caliber revolver and intentionally fired it twice in rapid succession in the direction of C.J. and the surrounding crowd. As in *Martin*, "all the evidence, including [D]efendant's testimony, shows that the deceased was fatally wounded when [D]efendant intentionally discharged [his] gun under circumstances naturally dangerous to human life. There was no evidence of an accidental discharge of the weapon." 52 N.C. App. at 375, 278 S.E.2d at 307. Accordingly, this argument is overruled.

C. Absence of a Curative Instruction

[4] In his final argument, Defendant contends that the trial court committed plain error by failing to instruct the jury to disregard certain testimony by a deputy investigating the case, after granting his motion to strike that testimony. The following colloquy transpired on direct examination of the deputy:

> [DEPUTY]: [W]hy would you in the middle of a conflict with someone who . . . is pulling out a firearm on you, why would you choose to shoot up in the air over them. That doesn't make reasonable sense. That's not something that a reasonable person would do. If I believe someone is going to pull a weapon out on me, it's my intention to get my weapon out as quick as I can to discharge my weapon.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [DEPUTY]: -- to defend myself.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Motion to strike.
>
> THE COURT: Motion is allowed.
>
> [DEPUTY]: So, it didn't make sense to me why he was doing what he was doing and saying what he was saying. . . . You look down, believing that this person is pulling out a gun and then you come up and shoot your gun up in the air. That doesn't make sense.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.

Defendant thus contends that the trial court's omission of an unrequested curative instruction constituted plain error where the court sustained his counsel's objections to the deputy's testimony as to what "made reasonable sense" twice, did so once more on its own motion, and granted his motion to strike that portion of the testimony. We disagree.

A trial court does not err in failing to provide an unrequested curative instruction unless the error or impropriety is extreme. *Smith v. Hamrick*, 159 N.C. App. 696, 699, 583 S.E.2d 676, 679, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 674 (2003). Assuming, *arguendo*, that the trial court's failure to provide this instruction was error, we do not believe this failure had any *probable* impact on the jury's final determination. Accordingly, this argument is overruled.

III. Conclusion

We believe that Defendant received a fair trial free from reversible error, and therefore uphold the challenged convictions.

NO ERROR.

Judge HUNTER, Robert C. and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANTHONY CHRIS JOHNSON

NO. COA14-566

Filed 31 December 2014

1. Witnesses—subpoena—continuing obligation—compulsory attendance—initial session of court required

The trial court erred in ordering, under threat of contempt, that defense counsel's legal assistant, Martinez, appear as a witness for the State. Martinez was subpoenaed to appear on specific weeks in November and December 2013, and January 2014. However, the trial did not occur until a week after the first date listed in the subpoena. Although the State argued that Martinez was required to appear on the first date, and then from session to session until released by the court, there must first be a session of court at which a particular case is scheduled to be heard to trigger compulsory attendance.

2. Constitutional Law—right to counsel—defense counsel legal assistant—compelled to appear by State

There was prejudice in a methamphetamine precursor prosecution where the trial court compelled defense counsel's legal assistant to appear for the State to authenticate a written statement in which defendant took full responsibility for possession of the chemicals. But for the written confession, there was a reasonable possibility that the jury might have believed that one or both of the other people in the car were responsible for possession of the precursors.

3. Constitutional Law—effective assistance of counsel—testimony by defense counsel legal assistant—conflict of interest hearing required

Given the likelihood that an effective assistance of counsel issue would arise on remand of a prosecution for possession of methamphetamine precursor chemicals, the Court of Appeals held that a conflict of interest hearing should be held if defense counsel's legal assistant testified, even if the State's only purpose in admitting the testimony was the verification of a document signed by defendant. The privileged communications issue should be addressed even if defendant obtained new counsel.

Appeal by defendant from judgment entered on or about 20 November 2013 by Judge Reuben F. Young in Superior Court, Johnston County. Heard in the Court of Appeals 23 October 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Brian D. Rabinovitz, for the State.

Reece & Reece by Michael J. Reece, for defendant-appellant.

STROUD, Judge.

Anthony Chris Johnson ("defendant") appeals from a conviction for possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2) (2013). Defendant contends that (1) the trial court erred in ordering defendant's counsel's legal assistant to appear to testify at trial; and (2) his trial counsel did not provide effective assistance of counsel due to a conflict of interest. Finding prejudicial error, we hold that defendant is entitled to a new trial.

I. Background

The State's evidence showed that on the morning of 3 April 2013, defendant called James Best and asked him to purchase a box of Sudafed for him. That afternoon, defendant drove Best to a Walmart store. Defendant's wife, Tina Lynn, rode in the front passenger seat. Best entered the Walmart and bought a box of Sudafed. Best returned to the car and gave the box of Sudafed to defendant. Defendant then drove Lynn and Best to a Walgreens store. Defendant entered the Walgreens, leaving Lynn and Best in the car.

After receiving a report of possible drug activity, Officer Sean Cook arrived in the Walgreens parking lot. Officer Cook approached defendant as he was exiting the Walgreens and walking toward the car in which Lynn and Best were waiting. Officer Cook asked defendant if he could search his person, and defendant consented. Officer Cook found a pill in a clear container and car keys in defendant's pockets. Officer Cook asked defendant if he could search the car, and defendant consented. After Officer Cook directed Lynn and Best to leave the car, Officer Cook conducted a search of the car and found three boxes of Walgreens instant cold packs, three cans of starter fluid, a four-pack of Energizer Ultimate lithium batteries, a 26-ounce can of table salt, and a box of pseudoephredine hydrochloride tablets. Officer Cook arrested defendant for possession of methamphetamine precursors.

On or about 5 August 2013, a grand jury indicted defendant for possession of an immediate precursor chemical, pseudoephredine, knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2). Defendant pled not guilty. At trial, the State proffered expert testimony that all of the items found by Officer Cook are necessary to manufacture methamphetamine. The State also used testimony by Margarita Martinez, defendant's counsel's legal assistant, to authenticate defendant's written confession of "full responsibility" for the charge against him. On or about 20 November 2013, a jury found defendant guilty of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. On or about 20 November 2013, the trial court sentenced defendant to 16 to 29 months' imprisonment. Defendant gave notice of appeal in open court.

II. Order to Appear

A. Standard of Review

We review questions of law *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468, *disc. rev. denied*, 363 N.C. 585, 683 S.E.2d 211 (2009).

B. Analysis

[1] Defendant challenges the trial court's order, under threat of contempt, that Martinez, his own counsel's legal assistant, appear as a witness for the State. On or about 8 November 2013, the State served Martinez a subpoena directing her to appear to testify in this case at 10:00 a.m. on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014.[1] The trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Defendant contends that Martinez was not required to appear on Tuesday, November 19, 2013, because the subpoena did not include the week of Monday, November 18, 2013. The State counters that Martinez was required to appear on Friday, November 8, 2013 and then to continue to appear "from session to session" until released by the trial court. *See* N.C. Gen. Stat. § 8-63 (2013) ("Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and . . . continue to attend from session to session until discharged[.]"). The use of "term" refers to the typical six-month assignment of a superior court judge, whereas "session" refers to the typical one-week assignment within a term. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154 n.1., 446 S.E.2d 289, 291 n.1 (1994).

But the trial court did not hold a session for this case on Friday, November 8; rather, the session and the trial began over a week later, on Monday, November 18.[2] Defendant's counsel also pointed out to the trial court that the Johnston County Superior Court did not hold a session for any case on Friday, November 8. Because Martinez was directed to appear specifically for this case for specific dates and the trial court did

1. The subpoena incorrectly lists the last date as January 13, 2013, instead of January 13, 2014.

2. We also note that the State apparently contemplated that the case may possibly be reached at one of several sessions of court, as three were specified on the subpoena. If the State truly believed that the subpoena for November 8, 2013 would remain continuously in force from November 8 until the case was actually reached, there would have been no reason to list the two later dates on the subpoena.

not hold a session of court at which this case was calendared on Friday, November 8, Martinez was not required to appear on Friday, November 8. We interpret "from session to session" to mean that first there must be a "session" of court at which a particular case is scheduled to be heard to trigger compulsory attendance for that case. *See* N.C. Gen. Stat. § 8-63. From that point onward, a properly subpoenaed witness is required to appear "from session to session" for that case until discharged. *See id.* Given that Martinez was not required to appear on Friday, November 8, we hold that Martinez was not required by the State's subpoena to appear on Tuesday, November 19.

The trial court strongly expressed its displeasure with defendant's counsel because it believed that counsel "knew that [the] subpoena did not have the accurate date on it." But defendant had no duty to ensure that State's witnesses were properly subpoenaed. *See State v. Love*, 131 N.C. App. 350, 358, 507 S.E.2d 577, 583 (1998) ("[T]he State had no burden to see to it that [defendant] procured the attendance of the witnesses he desired to have present."), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L.Ed. 2d 280 (1999). Because Martinez had not been properly subpoenaed to appear on Tuesday, November 19, we hold that the trial court erred in ordering, under threat of contempt, that Martinez appear on that day as a witness for the State.

C. Prejudice

[2] "A defendant is prejudiced . . . 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." N.C. Gen. Stat. § 15A-1443(a) (2013). The State used Martinez's testimony to authenticate defendant's written confession of "full responsibility" for the charge against him. The prosecutor also elicited testimony that Martinez worked for defendant's counsel. Apart from defendant's confession, the only evidence linking defendant to the methamphetamine precursors is Officer Cook's testimony that he discovered the methamphetamine precursors in the car in which defendant and two other passengers were riding and Best's testimony that defendant had asked him to buy a box of Sudafed and had accepted the box from him. But for the written confession, there is a reasonable possibility that the jury may have believed that one or both of the other people in the car were responsible for possession of the precursors. Accordingly, we hold that, had Martinez not appeared at trial, there is a "reasonable possibility" that defendant would not have been convicted of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that it will be used to manufacture methamphetamine. *See id.*

Because the trial court committed prejudicial error, we hold that defendant is entitled to a new trial.[3]

III. Conflict of Interest

[3] Defendant next contends that his trial counsel did not provide effective assistance of counsel due to a conflict of interest arising from Martinez testifying as a prosecution witness. Given the likelihood that Martinez will testify again on remand, we address this issue.

A criminal defendant has the right to effective assistance of counsel under both the federal and state constitutions. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed. 2d 674, 692 (1984); *State v. Braswel*l, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

> The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest.
>
> When a defendant raises a claim of ineffective assistance of counsel, in most instances he or she must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. However, when the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest arising out of an attorney's multiple representation, a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief.

State v. Choudhry, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citations and quotation marks omitted). Although the conflict of interest here does not arise from an attorney's representation of a prosecution witness, we analogize this case to that line of cases, because here defendant's counsel employed Martinez, a prosecution witness. *See*, *e.g.*, *id.*, 717 S.E.2d 348; *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993).

> When the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially compelling interest is known to be a prosecution witness[,] the [trial] judge shall conduct a hearing to determine whether

3. Defendant also contends that his constitutional right to be present was violated, because he was not present during the trial court's conference with the lawyers regarding the State's subpoena of Martinez. Because we hold that defendant is entitled to a new trial, we do not reach this issue.

> there exists a conflict of interest. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

James, 111 N.C. App. at 791, 433 S.E.2d at 758-59; *see also State v. Ballard*, 180 N.C. App. 637, 643, 638 S.E.2d 474, 479 (2006), *disc. rev. denied and dismissed*, 361 N.C. 358, 646 S.E.2d 119 (2007). A defendant can waive his right to conflict-free representation, if done knowingly, intelligently, and voluntarily. *James*, 111 N.C. App. at 791-92, 433 S.E.2d at 759. Defendant here had no opportunity to knowingly, intelligently, and voluntarily waive any conflict that may have existed. *See id.*, 433 S.E.2d at 759.

In *State v. James*, the defendant's counsel represented a prosecution witness in another matter. *Id.* at 788, 433 S.E.2d at 757. Here, although the nature of the relationship between defendant's counsel and the prosecution witness was employer and employee, the same types of concerns exist.

> We believe representation of the defendant as well as a prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. at 790, 433 S.E.2d at 758. Here, the trial court was fully aware that Martinez was employed by defendant's counsel and, perhaps for that reason, just prior to her testimony, had ordered her to appear despite the lack of a valid subpoena.

The record does not reveal the circumstances under which Martinez came to notarize an incriminating statement for her own employer's client, and it would seem quite likely that this information may implicate privileged attorney-client communications. As an employee of counsel, Martinez was potentially aware of communications and information that would be protected by the attorney-client privilege. *See Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) ("[C]onfidential communications made to an attorney in his professional capacity by his

client are privileged, and the attorney cannot be compelled to testify to them unless his client consents."), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994). This privilege applies to Martinez, as an employee of defense counsel. *See State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 948 (Ohio 2012) (per curiam) ("[T]he attorney-client privilege applies to agents working on behalf of legal counsel[.]"); *Augustine v. Allstate Ins. Co.*, 807 N.W.2d 77, 85 (Mich. Ct. App. 2011) ("The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents."). Placing defendant's counsel in the position that he may need to extensively cross-examine Martinez but cannot because this may require disclosure of privileged communications between Martinez or defendant's counsel and defendant raises a potentially severe conflict of interest. *See State v. Gonzelez*, 234 P.3d 1, 13-14 (Kan. 2010) (holding that, "[i]n view of the role and importance of a trustworthy and confidential attorney-client relationship, particularly in [an adversarial] system of criminal justice, and of the potential for damage to that system if the relationship is too cavalierly invaded or compromised," a prosecutor who wishes to subpoena a criminal defense counsel to testify about a current or former client's confidential information must establish, among other elements, that the information sought is not protected by the attorney-client privilege).

The State argues that the only purpose for Martinez's testimony was to provide the foundation for admission of the defendant's statement, since she notarized it. The State's argument implies that Martinez had no relevant knowledge of the case other than the fact that defendant signed the statement. This assumption may be true, but the record does not demonstrate it since no inquiry was made into the conflict of interest. And if this assumption were the case, the State had no reason to ask Martinez about her employment as defense counsel's legal assistant—other than to let the jury know that defendant had essentially confessed to his own attorney.

The trial court did not conduct a *James* hearing to determine whether an actual conflict of interest existed. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758-59. Accordingly, we hold that, should Martinez testify again for the State on remand, the trial court must conduct a hearing to determine whether an actual conflict of interest exists. *See id.* at 791, 433 S.E.2d at 758-59; *Ballard*, 180 N.C. App. at 643, 638 S.E.2d at 479. We also note that even if defendant has new trial counsel on remand, the issue of privileged communications between defendant and his prior counsel still exists and should be addressed.

IV. Conclusion

Because the trial court committed prejudicial error in ordering Martinez to appear, we hold that the defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and BELL concur.

STATE OF NORTH CAROLINA
v.
JOSEPH ORTIZ

No. COA14-782

Filed 31 December 2014

1. Sentencing—nonstatutory aggravating factor—insufficient notice

The trial court erred by allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Simply providing notice in compliance with N.C.G.S. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor that defendant committed the sexual offense against the victim knowing that he was HIV positive and could transmit the AIDS virus.

2. Sentencing—robbery with dangerous weapon—assault with deadly weapon—separate acts sufficient for separate convictions

The trial court did not err by entering judgment and imposing sentences for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. There was sufficient evidence for the jury to find that the acts necessary to convict defendant of robbery with a dangerous weapon concluded before defendant committed the acts which constituted the offense of assault with a deadly weapon. Thus, separate convictions and sentences for the two offenses were appropriate.

Appeal by defendant from judgments entered 20 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 3 November 2014.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.

BELL, Judge.

Defendant Joseph Ortiz appeals from a judgment sentencing him to life imprisonment for his conviction of first degree sexual offense and a consolidated judgment sentencing him to a consecutive term of 146 to 185 months imprisonment for convictions of robbery with a dangerous weapon, felony breaking and entering, assault with a deadly weapon, and attaining habitual felon status. On appeal, Defendant raises three issues. First, Defendant contends that the trial court erred in allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Second, Defendant contends that, should this Court determine that the State was not required to include the aggravating factor in the indictment, the trial court erred in denying Defendant's motion to dismiss the aggravating factor for insufficient evidence. Third, Defendant argues that the trial court erred in entering judgment and imposing sentence for both Defendant's conviction of robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. In that we find error and remand Defendant's first degree sexual offense judgment for resentencing, we will not address Defendant's second argument.

I. Factual Background

A. State's Evidence

In July 2009, Stacey moved from Indianapolis, where she was getting her PhD in clinical psychology, to a downtown apartment in Asheville, North Carolina.[1] Defendant was a neighbor of Stacey's, and had made Stacey uncomfortable when they encountered each other in the common areas of the apartment complex. For example, when Stacey returned from being out of town over the Thanksgiving holiday, Defendant asked her where her car had been for the number of days Stacey had been gone. Stacey thought it odd that Defendant would have paid attention to her car and had noted how long it had not been parked in the parking area.

1. Stacey is a pseudonym created by this Court to protect the victim's identity.

On Friday, 21 May 2010, Stacey came home from work and took a nap prior to meeting friends for dinner. She woke up around 6:00 p.m. and went to the bathroom. While in the bathroom, Stacey heard a loud pounding at her door. When she opened the door, Defendant, wearing a ski mask and brandishing a knife, forced himself into the apartment, at which point Stacey began screaming.

Defendant told Stacey to "shut up," forced her to lay on the floor, put duct-tape over her eyes and tied her hands and feet together. Defendant then asked Stacey for her ATM card. Stacey told Defendant that she did not have a card but had cash in her wallet. Defendant then began making sexual comments towards Stacey. As Defendant began to pull down Stacey's pants, she told Defendant, falsely, that if he was going to have sex with her, he should use a condom because she was HIV positive. At that point, police officers, responding to a domestic disturbance call, knocked on Stacey's apartment door and identified themselves. Defendant forced Stacey into her bathroom where he held the knife to Stacey's throat and threatened to kill her if she said anything. After hearing no response from inside the apartment, the officers left.

Defendant then put a pillowcase over Stacey's face, cut off her clothing and, over the course of three hours sexually assaulted her by performing cunnilingus on her, rubbing vodka on her body and sucking her breasts. Defendant drank approximately three-fourths of the bottle of vodka, and eventually became so intoxicated that he passed out. After Defendant passed out, Stacey ran from her apartment, got in her car, called 911, and drove to the police station. Upon arriving at the police station, Stacey gave her keys to officers, who returned to her home to find Defendant passed out, face down, on her living room floor. Defendant awoke after handcuffs were placed on him. As a result of the sexual assault by Defendant, Stacey had to report to a hospital to receive prophylactic HIV treatment for a total of thirty days.

B. Defendant's Evidence

Defendant, who was age 53 at the time of his trial, moved into the same apartment complex as Stacey in 2009. According to Defendant, he and Stacey developed a sexual relationship. Defendant would go to Stacey's apartment and the two would role-play and then perform oral sex on each other. They devised a "signal," consisting of Stacey parking in front of Defendant's apartment, by which Defendant would know Stacey was interested in a sexual encounter.

Defendant received the "signal" on the day of the incident and went to Stacey's apartment as, he contends, he and Stacey had agreed. While

in Stacey's apartment, Defendant drank vodka, which after interacting with certain medications he was taking, caused him to pass out. When Defendant awoke, he was surprised to find himself in handcuffs and explained to police officers that the encounter between he and Stacey was consensual.

B. Procedural Facts

Warrants for Defendant's arrest were issued on 22 May 2010. On 12 July 2010, the Buncombe County grand jury returned bills of indictment charging Defendant with felonious breaking and entering, robbery with a dangerous weapon, assault with a deadly weapon, first degree kidnapping, first degree sexual offense, and attaining habitual felon status. Superseding indictments were entered on 2 August 2010 on Defendant's first degree kidnapping and first degree sexual offense charges, adding a sentencing enhancement under N.C. Gen. Stat § 15A-1340.16(d) based upon the allegation that defendant committed these acts by using, displaying or threatening a knife as a deadly weapon.

On 15 August 2011, the State filed a motion requesting that the trial court allow it to file a notice of a non-statutory aggravating factor under seal due to a potential conflict between N.C. Gen. Stat. § 15A-1340.16(a6), requiring the State to provide a defendant with written notice of its intent to prove an aggravating factor, and N.C. Gen. Stat. § 130A-143, which prohibits the public disclosure of the identity of persons with certain communicable diseases that are subject to the reporting requirements of N.C. Gen. Stat. § 130A-143. The parties appeared before the trial court on 17 August 2011 to address the State's motion, as well as other issues. The trial court closed the proceedings at the request of the State and with the consent of Defendant. The trial court then heard the State's motion to file notice of an aggravating factor under seal. The State sought to assert as a non-statutory aggravating factor the fact that Defendant committed the sexual offense against Stacey knowing that he was HIV positive and could transmit the AIDS virus to Stacey, causing serious bodily injury or death. According to the State, it could not file the statutorily required written notice due to the provisions of N.C. Gen. Stat. § 130A-143, which prohibit the disclosure of the identity of persons with certain communicable diseases, including HIV/AIDS. The defense objected to the State's request to submit the aggravating factor on the basis that the 30-day notice requirement had expired. The court opined that it did not "necessarily" see a conflict between the statute requiring notice of aggravating factors to be filed and the statute prohibiting the disclosure of certain medical information given the exception provided in N.C. Gen. Stat. § 130A-143(6) allowing for the information to be disclosed by court order.

However, the court granted the State's motion to file the notice under seal and noted Defendant's objection.

Although the case was set to be tried on 29 August 2011, the State moved to continue the case due to potential discovery issues. During a pre-trial hearing on 10 September 2013, Defendant waived his right to have the trial proceedings closed. Defendant's case came on for trial during the 16 September 2013 Criminal Session of Buncombe County Superior Court. The jury returned guilty verdicts on all charges. The State then sought to proceed on the non-statutory aggravating factor and Defendant objected. The trial court overruled Defendant's objections and allowed the State to present evidence of the aggravating factor to the jury. The jury returned a unanimous verdict against Defendant with respect to the aggravating factor. The jury also found Defendant guilty of attaining habitual felon status. On 20 September 2013, the trial court entered judgments against Defendant sentencing him in the aggravated range to life imprisonment without parole for his conviction of first degree sexual offense[2]; to a consecutive term of 146 to 185 months imprisonment for his conviction of first degree kidnapping; and a second consecutive term of 146 to 185 months imprisonment for his convictions of robbery with a dangerous weapon, breaking and entering, assault with a deadly weapon, and attaining habitual felon status. Defendant gave notice of appeal to this Court.

II. Legal Analysis

A. Non-Statutory Aggravating Factor

[1] It his first argument on appeal, Defendant contends that the trial court erred in allowing the State to proceed on a non-statutory aggravating factor when it was not alleged in the indictment, as required by N.C. Gen. Stat. § 15A-1340.16(a4). The State concedes that it was required by N.C. Gen. Stat. § 15A-1340.16(a4) to include the non-statutory aggravating factor in the indictment. However, the State contends that the trial court did not err in allowing the State to proceed on the aggravating factor, as the State was statutorily prohibited by the provisions of N.C. Gen. Stat. § 130A-143 from complying with N.C. Gen. Stat. § 15A-1340.16(a4). Although we commend the State's attempt to protect Defendant's privacy and comply with its understanding of the requirements of N.C. Gen. Stat. § 130A-143, we do not agree with its methodology.

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2. We note that the judgment entered by the trial court indicates that the court made no written findings because the sentence was in the presumptive range. However, the court sentenced Defendant to life imprisonment without the possibility of parole on the conviction of first degree sexual offense, a B1 felony. Pursuant to the applicable sentencing chart, this sentence is only available if the court is sentencing in the aggravated range.

The legislature enumerated twenty-eight specific aggravating factors that could, if proven beyond a reasonable doubt, allow a court to sentence a defendant in the aggravated range. N.C. Gen. Stat. §§ 15A-1340.16(a) & (d). Additionally, N.C. Gen. Stat. § 15A-1340.16 includes a catchall provision for "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20). Pursuant to N.C. Gen. Stat. § 15A-1340.16(a4), aggravating factors under subdivision (d) "need not be included in an indictment or other charging instrument"; however, any non-statutory "aggravating factor alleged under subdivision (d)(20) . . . shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924." In *State v. Ross*, 216 N.C. App. 337, 350-51, 720 S.E.2d 403, 411-12 (2011), *disc. review denied*, 366 N.C. 400, 735 S.E.2d 174 (2012), this Court reversed the defendant's judgment and remanded it for resentencing when the State "simply served [the] defendant with notice of its intent to prove the existence of" non-statutory aggravating factors but did not include them in an indictment. Although N.C. Gen. Stat. § 15A-1340.16(a4) and this Court's holding in *Ross* make it clear that the failure to include a non-statutory aggravating factor renders it unavailable for sentencing purposes, the State contends that its noncompliance with this statutory mandate should be excused because conflicting statutory provisions prevented it from following proper procedure.

The statute upon which the State relies provides, in pertinent part, that "information and records, whether publicly or privately maintained, that identify a person who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential" and "shall not be released or made public." N.C. Gen. Stat. § 130A-143. According to the State, alleging in an indictment that Defendant has a reportable communicable disease would violate the provisions of N.C. Gen. Stat. § 130A-143. We disagree.

This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records, N.C. Gen. Stat. § 132-1.4(k); *see also State v. West*, 293 N.C. 18, 32, 235 S.E.2d 150, 158 (1977), and as such, may generally be made available upon request by a citizen. N.C. Gen. Stat. § 132-1(b). However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State

could have sought to seal the indictment. N.C. Gen. Stat. § 132-1.4(k) (providing that an indictment is a "public records and may be withheld only when sealed by court order"). It is perplexing to this Court that the State obtained permission from the trial court to file notice of its intent to pursue an aggravating factor under seal but did not attempt to do so for the indictment.

This Court could speculate as to methods by which the State could have unequivocally complied with both statutes but that is not our role. The plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires the non-statutory aggravating factor to be included in the indictment and the State's failure to do so rendered it unusable by the State in its prosecution. Considering the plain language of N.C. Gen. Stat. § 15A-1340.16(a4), this Court's holding in *Ross*, and in the absence of authority to the contrary, we conclude that simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor and it was error for the trial court to so allow.

B. Sentencing for Armed Robbery and Assault with a Deadly Weapon

[2] Defendant next argues that the trial court erred when it entered judgment and sentenced Defendant for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. The State contends that Defendant has not properly preserved this issue for appeal. This Court has recently noted:

> As a general rule, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations, internal quotation marks, and brackets omitted) (declining to review the defendant's double jeopardy argument because he failed to raise it at trial). Furthermore, our appellate rules require a party to make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1).

State v. Mulder, __ N.C. App. __, __, 755 S.E.2d 98, 101 (2014) (alterations in original). The defendant in *Mulder* argued that judgment should have been arrested on one of his charges because it was a lesser-included offense of another crime for which he was convicted. *Id.* at __, 755 S.E.2d at 100. The State argued that the defendant should be denied appellate review because the issue was being raised for the first time on

appeal. *Id.* at __, 755 S.E.2d at 101. Relying on Supreme Court precedent, the defendant contended that the issue was reviewable as it related to a fatal error appearing on the face of the record. *Id.* This Court, however, held that the defendant's "double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record." *Id.* The issue was nonetheless reviewed by this Court pursuant to Rule 2 of our Rules of Appellate Procedure.

Defendant here has not requested that this Court exercise our discretion under Rule 2 to review this issue. However, we elect to do so on our on motion. *See id.* (noting that "[t]he decision to review an unpreserved argument relating to double jeopardy is entirely discretionary"). We do not think it is of significance that Defendant did not couch his argument specifically as being based on his right against double jeopardy. We recognize that "[t]he argument advanced by [D]efendant has been presented under various titles: double jeopardy, lesser-included offense, an element of the offense, multiple punishment for the same offense, merged offenses, etc.," and "choose to avoid any lengthy discussion of the appropriate title, as it is the principle of law rather than the characterization of the issue that is important." *State v. Gardner*, 315 N.C. 444, 451 340 S.E.2d 701, 707 (1986).

In the present case, Defendant was convicted and sentenced for both robbery with a dangerous weapon and assault with a deadly weapon. While Defendant argues that these convictions arose out of the same conduct, a careful review of the record supports a contrary conclusion. Stacey testified that Defendant threatened her with a knife and took her money. He then began to make sexual comments to her and started to remove her clothing. His acts were interrupted when the police knocked on the apartment door. Defendant then forced Stacey into the bathroom and held a knife to her throat and threatened to kill her. Thus, we find that there was sufficient evidence for the jury to find that the acts necessary to convict Defendant of robbery with a dangerous weapon, as charged in the indictment, concluded before Defendant committed the acts which constituted the offense of assault with a deadly weapon, as alleged in a separate indictment and therefore support separate convictions and sentences for the two offenses. Accordingly, we find no error in the trial court's judgment.

III. Conclusion

For the reasons set forth above, this Court concludes that the trial court erred in submitting the aggravating factor to the jury and applying it

in sentencing Defendant on his conviction of first degree sexual offense. We therefore must reverse and remand for resentencing.

REVERSED AND REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

STATE OF NORTH CAROLINA
v.
SHAWN ADRIAN PENDERGRAFT

No. COA14-39

Filed 31 December 2014

1. **Indictment and Information—facial invalidity—raised first on appeal—statutory language**

Although defendant never challenged the sufficiency of a false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal and will be reviewed de novo. An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court, but an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute.

2. **False Pretenses—indictment—sufficiency of allegation—real estate—false representation of right to occupy**

Defendant's contention in a false pretenses case that the indictment failed to allege a specific false representation lacked merit. The indictment sufficiently alleged that defendant obtained real property by falsely representing that he was lawfully entitled to occupy it, thus alleging more than mere entry into a building.

3. **False Pretenses—indictment—sufficiency of allegation—false representation and causation**

A false pretenses indictment sufficiently alleged the existence of a causal connection between any false representation by defendant and the attempt to obtain real property. The facts alleged in the indictment were sufficient to imply causation, since they were obviously calculated to produce the result sought to be achieved.

4. False Pretenses—sufficiency of evidence—real property—adverse possession

The trial court did not err by denying defendant's motion to dismiss a false pretenses charge involving real property for insufficient evidence. Defendant contended that the undisputed evidence showed that he honestly but mistakenly believed that he could obtain title to the property by adverse possession; however, the mere fact that defendant attempted to adversely possess the property does not insulate him from criminal liability if the evidence otherwise shows his guilt of obtaining property by false pretenses. Defendant made multiple representations intended to further his plan to occupy and obtain title to the property, and the knowing falsity of these representations shows that Defendant made them with an intent to deceive.

5. Appeal and Error—appealability—criminal judgment vacated—no explanation—not double jeopardy—not reviewed on merits

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a felonious breaking or entering charge arising from defendant's attempt to obtain vacant property by adverse possession. The trial court arrested judgment; given that the trial court did not explain its decision to arrest judgment and that judgment does not appear to have been arrested to avoid double jeopardy, the trial court's decision effectively vacated defendant's felonious breaking or entering conviction and deprived the Court of Appeals of the ability to review defendant's challenge to conviction on the merits.

6. False Pretenses—instruction—adverse possession—intent—ignorance of law

In a prosecution for obtaining real property by false pretenses, the trial court did not err by instructing the jury that ignorance or mistake of law would not serve to obviate defendant's guilt or by not instructing the jury that the State was required to prove that defendant did not intend to adversely possess property. The law of adverse possession does not have any bearing on the issue of defendant's guilt of obtaining property by false pretenses.

7. False Pretenses—instructions—burden of proof

The trial court instructed the jury on obtaining real property by false pretenses in a manner consistent with North Carolina Supreme Court precedent and the North Carolina Pattern Jury Instructions,

and placed upon the State the burden of proving that defendant acted with the necessary intent to deceive upon the State.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 19 July 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

W. Michael Spivey for Defendant.

ERVIN, Judge.

Defendant Shawn A. Pendergraft appeals from a judgment entered based upon his conviction for obtaining property by false pretenses and from his conviction of felonious breaking or entering in a case in which the trial court arrested judgment. On appeal, Defendant argues that the trial court lacked jurisdiction to enter judgment against him based upon his conviction for obtaining property by false pretenses, that the trial court erroneously denied his motions to dismiss the felonious breaking or entering and obtaining property by false pretenses charges for insufficiency of the evidence, and that the trial court erroneously refused to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not attempt to obtain ownership of the property in question by adverse possession, erroneously instructed the jury that ignorance of the law and a mistake of law did not preclude a finding of guilt, and erroneously instructed the jury in such a manner as to place the burden of proof on the intent issue upon Defendant rather than upon the State. 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 or about 27 January 2011, DLJ Mortgage Capital, Inc., acquired title to a tract of property located at 1208 Graedon Drive in Raleigh through foreclosure. On 5 July 2011, Defendant filed a deed purporting to convey the same tract of property from ONCE International Land

Trust to ONCE International Land Trust. In addition, Defendant filed a "Common Law Lien" that purported to place a $1,200,000 lien upon the property and asserted that the lien could not be removed unless the party seeking to do so came into court with "clean hands" and proved ownership of the property. Finally, Defendant filed a "Notice" asserting that the property was the "private property of ONCE International Land Trust." Defendant signed each of these documents in the capacity as Trustee for ONCE.

In early July 2011, Lee St. Peter, a real estate broker who served as DLJ's property manager and as listing agent for the Graedon Drive property, was informed by another real estate agent that someone was occupying another house that Mr. St. Peter had listed for sale in a different part of Raleigh. When he checked the real estate records maintained by the Wake County Register of Deeds for information concerning the house about which he had received the tip, Mr. St. Peter discovered the documents that Defendant had filed with respect to the Graedon Drive property.

Upon making this discovery, Mr. St. Peter went to the Graedon Drive property and found that the house was unoccupied and in good condition. On 10 July 2011, Mr. St. Peter wrote a note to Mike Sanders of Select Portfolio Servicing, an asset management company that managed the Graedon Drive property for DLJ, for the purpose of informing Mr. Sanders that he believed that someone was pretending to own the Graedon Drive property for the purpose of selling or leasing it without having the authority to do so.

On 7 August 2011, Defendant moved into the house located on the Graedon Drive property. At the time that he entered the house, Defendant removed the doorknob and the Realtor's lockbox.[1] On the following day, Mr. St. Peter stopped by the property to confirm that a recent roof repair had been done correctly and that no leaks were occurring. Upon arriving at the property, Mr. St. Peter observed that a U-Haul van was parked in the driveway and observed, after walking up to the front of the house, that the Realtor's lockbox had been removed and that the front door knob had been changed.

1. A "Realtor's lockbox" is a container that is placed on the front door of the relevant structure and contains a key that can be used to enter the premises. In the event that a real estate agent wishes to show a particular piece of property, he or she contacts a call center, identifies himself or herself as a real estate agent, and provides an identification code. After confirming the agent's status, the call center provides the agent with the combination to the lockbox, thereby enabling the agent to obtain access to the property that he or she wishes to show.

After walking around the house to investigate, Mr. St. Peter returned to the front of the house, where he encountered Defendant on the sidewalk. When Mr. St. Peter asked Defendant what he was doing on the property, Defendant replied that he had "bought [the property] directly from the bank through an investment company" and that his ownership of the property was evidenced by some documents that he had in his hand. Mr. St. Peter declined to look at the papers that Defendant offered to show him and told Defendant that he was calling the Sheriff's Office.

After speaking with someone at the Sheriff's Office, Mr. St. Peter contacted Mr. Sanders for the purpose of informing him that someone was now occupying the property and inquiring of him as to whether anything had transpired that would have given Defendant the right to be on the property. In response, Mr. Sanders stated that Defendant should not be on the property.

Deputy Kevin Moore of the Wake County Sheriff's Office responded to Mr. St. Peter's call. Upon Deputy Moore's arrival, Mr. St. Peter informed Deputy Moore that no one was supposed to be in the house and that the locks had been changed. At that point, Deputy Moore checked the real estate database maintained by the Wake County Revenue Department for the purpose of ascertaining the identity of the individual or entity listed as the owner of the property and spoke with Mr. Sanders for the purpose of confirming that the property was supposed to be unoccupied. After engaging in these investigative activities, Deputy Moore approached Defendant, who handed a deed and other documents to Deputy Moore and explained to Deputy Moore that Defendant was named as the grantee on the deed and had the right to be there on the basis of the doctrine of adverse possession. At that point, Deputy Moore and Mr. St. Peter agreed to give Defendant 24 hours within which to vacate the property.

On the following day, Deputy Moore returned to the property. At that time, Defendant continued to occupy the house and refused to unlock the door. Although Deputy Moore left the property after failing to gain access to it, he returned with a locksmith and additional deputies. After gaining entry using an unlocked side door, Deputy Moore came into the house and placed Defendant under arrest.

B. Procedural History

On 9 August 2011, a warrant for arrest was issued charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. On 11 October

2011, the Wake County grand jury returned a bill of indictment charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. The charges against Defendant came on for trial before the trial court and a jury at the 15 July 2013 criminal session of the Wake County Superior Court. At the close of all of the evidence, the State voluntarily dismissed the second degree trespass charge. On 18 July 2013, the jury returned verdicts convicting Defendant of felonious breaking or entering and obtaining property worth more than $100,000 by false pretenses. The trial court arrested judgment with respect to Defendant's conviction for felonious breaking or entering and entered a judgment sentencing Defendant to a term of 44 to 62 months imprisonment based upon his conviction for obtaining property worth more than $100,000 by false pretenses. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Jurisdictional Claim

In his first challenge to the trial court's judgments, Defendant contends that the trial court lacked jurisdiction over the false pretenses charge because the indictment charging him with the commission of that offense was fatally defective. More specifically, Defendant contends that the indictment purporting to charge him with obtaining property worth more than $100,000 by false pretenses failed to allege either that Defendant had made a false representation or that there was a causal connection between any false representation that Defendant might have made and Defendant's ability to obtain the property in question. Defendant's contentions lack merit.

1. Standard of Review

[1] Although Defendant never challenged the sufficiency of the false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal. *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001). This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation marks and citations omitted).

2. Applicable Legal Principles

An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court. *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). In light of that general principle, "an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

N.C. Gen. Stat. § 14-100 provides, in pertinent part, that:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any . . . property . . . with intent to cheat or defraud any person of such . . . property . . . such person shall be guilty of a felony: . . . Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such . . . property . . . by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the . . . property . . . and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

As a result, the elements of the crime of obtaining property by false pretenses are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286.

3. Validity of Indictment

a. False Representation

[2] In his first challenge to the validity of the false pretenses indictment, Defendant contends that the indictment failed to allege that Defendant made a false representation. We disagree.

"[T]o sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation." *State v. Braswell*, __ N.C. App. __, __, 738 S.E.2d 229, 233 (2013) (citing *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983)). The false representation may consist of an action or conduct rather than necessarily being made by spoken words. *State v. Ledwell*, 171 N.C. App. 314, 319, 614 S.E.2d 562, 566 (2005), *cert. denied*, __ N.C. __, 699 S.E.2d 639 (2010).

The indictment returned against Defendant in this case for the purpose of charging him with obtaining property by false pretenses alleges, in pertinent part, that:

> on or about July 5, 2011 through August 9, 2011, in Wake County the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain a house located at 1208 Graedon Drive, Raleigh, NC, having a value of $836,918.00 from DLJ Mortgage Capital Inc., by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: The defendant moved into the house located at 1208 Graedon Drive, Raleigh, NC with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent. This act was done in violation of [N.C. Gen. Stat. § 14-100].

As Defendant notes, the false pretenses indictment does not explicitly charge Defendant with having made any particular false representation.

This Court has previously upheld the sufficiency of an indictment charging the defendant with obtaining property by false pretenses which, while failing to explicitly state the false representation that the defendant allegedly made, did sufficiently apprise the defendant about the nature of the false representation that he allegedly made.[2] In *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), the indictment alleged, in part, that "THIS PROPERTY WAS OBTAINED BY MEANS

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2. Although our dissenting colleague emphasizes the allegations concerning Defendant's acts contained in the indictment, the actual requirement set forth in our prior decisions is that "the indictment must state the alleged false representation." *Braswell*, __ N.C. App. at __, 738 S.E.2d at 233. Thus, we believe that the important portion of our decision in *Perkins* is the holding that a sufficient allegation that the defendant in a false pretenses case made the required false representation can be inferred from the language of the indictment even if it is not directly stated.

OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM." *Id.* at 215, 638 S.E.2d at 595. In upholding the sufficiency of this allegation, we stated that, "[b]y alleging that defendant used a card that was issued in the name of another person, that was wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards." *Id.*

A careful study of the record reveals that the false pretenses indictment returned against Defendant in this case sufficiently apprised Defendant that he had been accused of falsely representing that he owned the Graedon Drive property as part of an attempt to fraudulently obtain ownership or possession **of** it.[3] More specifically, the false pretenses indictment returned against Defendant alleges that he wrongfully obtained the Graedon Drive property by "mov[ing] into the house . . . with the intent to fraudulently convert the property to his own." The act of moving into a residence or occupying a particular tract of property is, under ordinary circumstances, tantamount to an assertion that the person owns or is lawfully entitled to occupy the premises. However, that implied assertion becomes fraudulent in nature in the event that the person who moves into the home or occupies the property while taking steps to falsely effectuate his claim of ownership or possession knows that he is not lawfully entitled to do so.[4] As a result, since the indictment sufficiently alleges that Defendant obtained the Gradeon Drive

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3. According to the record, Defendant made this representation in a number of ways, including his reliance upon false documents in his discussions with investigating officers.

4 According to our dissenting colleague, a decision to uphold the validity of the indictment at issue in this case would suffice to render anyone committing a theft or trespass guilty of obtaining property by false pretenses. The difference between a theft or trespass and a false pretense is, however, that the latter, but not the former, involves a false representation. *State v. Hines*, 36 N.C. App. 33, 42, 243 S.E.2d 782, 787 (stating that "the essence of the crime is the intentional false pretense") (citation omitted), *disc. review denied*, 295 N.C. 262, 245 S.E.2d 779 (1978); *State v. Cummings*, 346 N.C. 291, 326, 488 S.E.2d 550, 571 (1997) (stating that a larceny conviction requires "'proof that defendant (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently'") (quoting *State v. White*, 332 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)), *cert. denied*, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998)); *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (stating that "[i]t is 'elementary that trespass is a wrongful invasion of the possession of another'") (quoting *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 415, 160 S.E.2d 482, 493 (1968)). Although we might agree with our dissenting colleague's argument, assuming that the taking of property like

property by falsely representing that he was lawfully entitled to occupy it, the indictment alleges more than mere entry into a building, so that Defendant's contention that the indictment fails to allege that he made a specific false representation lacks merit.

b. Causal Connection

[3] In addition, Defendant argues that the false pretenses indictment that was returned against him failed to allege the existence of a causal connection between any false representation by Defendant and the attempt to obtain property. Once again, we do not find Defendant's challenge to the validity of the false pretenses indictment persuasive.

As Defendant asserts, a valid false pretenses indictment must allege sufficient facts to show the existence of a causal connection between the false representation and the defendant's ability to obtain or the defendant's attempt to obtain property from another. *Cronin*, 299 N.C. at 236, 262 S.E.2d at 282 (1980). On the other hand, "it [is] not necessary to allege specifically that the victim was in fact deceived by the false pretense when the facts alleged in the bill of indictment are sufficient to suggest that the surrender of something of value was the natural and probable result of the false pretense." *Id.* at 237, 262 S.E.2d at 282 (citing *State v. Hinson*, 17 N.C. App. 25, 27, 193 S.E.2d 415, 416 (1972)), *cert. denied*, 282 N.C. 583, 194 S.E.2d 151, *cert. denied*, 412 U.S. 931, 93 S. Ct. 2762, 37 L. Ed. 2d 159 (1973)). In addition, this Court has stated that "no particular form of allegation is required; an allegation that the money or property was obtained 'by means of a false pretense' is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation." *State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (quoting *State v. Dale*, 218 N.C. 625, 12 S.E.2d 556 (1940)), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

In this case, the false pretenses indictment alleged that the Defendant "did knowingly and designedly with the intent to cheat and defraud, obtain [the Graedon Drive property] . . . by means of a false pretense which was calculated to deceive and did deceive." The facts alleged in

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that at issue here could support a larceny conviction, *State v. Wilfong*, 101 N.C. App. 221, 222, 398 S.E.2d 668, 669 (1990) (noting that "[t]here must be a taking and carrying away of the personal property of another to complete the crime of larceny") (citation omitted), in the event that the indictment simply alleged the taking of or entry onto the property of another, the present indictment alleges both a taking or entry and the existence of an intent to defraud of the type commonly characteristic of the crime of obtaining property by false pretense. As a result, the indictment at issue here does more than allege a mere taking of or entry onto the property of another.

the indictment are "sufficient to imply causation, since they are obviously calculated to produce the result" sought to be achieved, *Hinson*, 17 N.C. App. at 27, 193 S.E.2d at 416, given that Defendant's conduct in moving into the Graedon Drive home and falsely representing to own or be entitled to possess the property made it likely that Defendant would be allowed to occupy and, possibly, even obtain title to the property. As a result, neither of Defendant's challenges to the false pretenses indictment have merit.

B. Sufficiency of the Evidence of False Pretenses

[4] Secondly, Defendant contends that the trial court erred by denying his motion to dismiss the false pretenses charge for insufficiency of the evidence. More specifically, Defendant contends that the undisputed evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the Graedon Drive property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. We do not find Defendant's contention persuasive.

An appeal from the denial of a motion to dismiss based upon the insufficiency of the evidence presents a question of law concerning whether the record contains substantial evidence of each essential element of the offense charged, or a lesser included offense, and of defendant's being the perpetrator of the offense, *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982), with "substantial evidence" being "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In examining the sufficiency of the record to support a conviction, the evidence must be viewed in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652. "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." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (quotation marks and citations omitted).

As Defendant appears to acknowledge, adverse possession has not been recognized as an affirmative defense to a criminal charge in this jurisdiction. Although a person who is able to establish the elements of adverse possession does, in fact, become the owner of the relevant tract of property, nothing of which we are aware in any way insulates the person attempting to adversely possess a tract of property from the consequences of his otherwise unlawful conduct, including criminal

prosecution for obtaining property by false pretenses. The ultimate thrust of Defendant's challenge to the sufficiency of the evidence to support his false pretenses conviction is, purely and simply, an assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position that is tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge. As a result of the fact that no such defense has previously been recognized in this jurisdiction and the fact that recognizing such a defense would have significant public policy implications,[5] we believe that any decision to recognize an attempt to adversely possess a tract of property as a defense to a false pretenses charge should be made by the General Assembly rather than by this Court. As a result, we conclude, contrary to Defendant's contention, that the mere fact that Defendant attempted to adversely possess the Graedon Drive property does not insulate him from criminal liability in the event that the evidence otherwise shows his guilt of obtaining property by false pretenses.

A careful examination of the record provides ample justification for the jury's decision to convict Defendant of obtaining property by false pretenses. Defendant clearly intended to occupy and, eventually, own the Gradeon Drive property. In order to achieve that end, Defendant moved into and occupied the Graedon Drive property which, as we have already noted, constituted an implicit false representation to the effect that Defendant had a valid claim to the property. In addition, the record shows that Defendant falsely stated to Mr. St. Peter that he had "bought [the property] directly from the bank through an investment company" and that his right to possess the property was evidenced by certain documents that he tendered to Mr. St. Peter. Furthermore, Defendant filed a fraudulent deed in the Wake County registry purporting to transfer title to the Gradeon Drive property to ONCE. In addition to showing that Defendant made multiple representations intended to further his plan to occupy and obtain title to the Gradeon Drive property, the knowing falsity of these representations shows that Defendant made them with an intent to deceive. Finally, given that the evidence suffices to demonstrate that the victim relied on the false representation in the event that the victim suspected that the representation was false,

5. In denying Defendant's dismissal motion, the trial court stated, among other things, that "what you're suggesting is and what you have suggested through the evidence is using adverse possession, a criminal Defendant can go downstairs to the Register of Deeds, file some phony document, go to my house, walk through the front door, camp out, set up shop, do whatever

see State v. Simpson, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716-17, *aff'd*, 357 N.C. 652, 588 S.E.2d 466 (2003) (holding that when the victim, a pawn shop owner, testified that he was suspicious that certain cameras brought into the pawn shop by the defendant had been stolen, the jury could reasonably conclude that the victim had, in fact, been deceived), the fact that Mr. St. Peter called Mr. Sanders to see if Defendant did, in fact, have the right to occupy the Graedon Drive property on the theory that, "[h]ypothetically, it could have occurred," sufficed to demonstrate that Mr. St. Peter was, in fact, deceived by Defendant's representations. As a result, the record contained ample support for the jury's decision to convict Defendant of obtaining property by false pretenses.

C. Sufficiency of the Evidence of Breaking or Entering

[5] Thirdly, Defendant argues that the trial court erred by denying his motion to dismiss the felonious breaking or entering charge for insufficiency of the evidence. More specifically, Defendant argues that the undisputed record evidence failed to show that he intended to commit a felony or any larceny at the time that he entered the Graedon Drive residence. Defendant is not entitled to any relief on appeal based upon this argument.

As we have already noted, the trial court arrested judgment in the case in which Defendant was convicted of felonious breaking or entering. A decision to arrest judgment can have one of two effects, with the first being to vacate the underlying judgment and the second being to withhold the entry of judgment based on a valid jury verdict. *State v. Reeves*, 218 N.C. App. 570, 575, 721 S.E.2d 317, 321 (2012) (citing *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990)). Judgment is arrested in the first of these two instances "because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment," with the effect of a decision to arrest judgment in this instance being to vacate the defendant's conviction and preclude the entry of a final judgment which is subject to review on appeal. *Id.* at 575-76, 721 S.E.2d at 321-22 (citations omitted). On the other hand, judgment is arrested in the second of these two instances for the purpose of addressing double jeopardy or other concerns, such as a situation in which the defendant has been convicted of committing a predicate felony in a case in which he or she has also been convicted of first degree murder on the basis of the felony murder rule, *see Pakulski*, 326 N.C. at 441, 390 S.E.2d at 133 (stating that the trial court properly arrested judgment with respect to "the offenses of armed robbery and felonious breaking or entering, as these offenses formed the offenses upon which the convictions of felony murder were predicated") (quotation marks

and citation omitted), or convicted of a charge used to enhance punishment for a related offense. *See Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (finding that "the additional conviction of reckless driving was arrested because it was used to enhance the DWI") (internal quotation marks omitted). In the second of these two situations, the underlying guilty verdict remains intact so that judgment can be entered based on that verdict in the event that (1) the conviction for the murder or related charge is overturned in subsequent proceedings and (2) the verdict with respect to which judgment has been arrested is not disturbed on appeal. *Pakulski*, 326 N.C. at 439-40, 390 S.E.2d at 132 (stating that "the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed on appeal"). In the event that the trial court arrests judgment for the first of these two reasons, we lack the authority to review any challenge that Defendant might seek to lodge against the underlying conviction on appeal given that the underlying conviction has been vacated. *Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (stating that a trial court's decision to arrest judgment based on a defective indictment or fatal defect on the face of the record, which has the effect of vacating the defendant's conviction on that charge, does not result in the entry of final judgment that is subject to appellate review). As a result, our initial task in reviewing Defendant's challenge to his conviction for felonious breaking or entering is to determine the basis for the trial court's decision to arrest judgment in that case.

A careful examination of the record developed at Defendant's trial indicates that the trial court did not explain the reasoning underlying its decision to arrest judgment in the breaking or entering case. In such circumstances, this Court and the Supreme Court have provided us with guidance in determining into which of the two categories delineated above a particular decision to arrest judgment should be placed. Although "[t]he legal effect of arrest of judgment is to vacate the verdict and judgment," *State v. Morrow*, 31 N.C. App. 592, 593, 230 S.E.2d 182, 183 (1976) (citing *State v. Covington*, 267 N.C. 292, 296, 148 S.E.2d 138, 142 (1966)); *see also State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983) (stating that "[t]he legal effect of arresting judgment is to vacate the verdict and sentence," so that "[t]he State may proceed against the defendant if it so desires, upon new and sufficient bills of indictment") (citing *State v. Benton*, 275 N.C. 378, 382, 167 S.E.2d 775, 778 (1969)), a limited exception to this general rule precludes the State from obtaining and proceeding upon a new charge in the event that the trial court arrests judgment with respect to a particular conviction

based upon double jeopardy-related concerns. *See State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E.2d 381, 384 (1983) (stating the principle that, "[i]n cases in which a defendant is convicted of two offenses in violation of the double jeopardy bar, judgment must be arrested upon one of the convictions"), *overruled on other grounds in State v. Hurst*, 320 N.C. 589, 591, 359 S.E.2d 776, 777 (1987), *overruled on other grounds in State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988); *Pakulski*, 326 N.C. at 439-40, 390 S.E.2d at 132 (noting the general rule that an arrest of judgment vacates the verdict while recognizing the exception for arrests of judgment necessary "to avoid a double jeopardy problem"). In the event that a trial court arrests judgment without stating an express purpose for having done so, the arrested judgment will operate to vacate the defendant's conviction with respect to that charge. *See State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980) (stating that, "[g]enerally, a judgment is arrested because of insufficiency in the indictment or some fatal defect appearing on the face of the record" and assuming that judgment was arrested on those grounds given that "no reason for the arrest of judgment appear[ed] in the record on appeal").[6] As a result, in the absence of some indication that the trial court's decision to arrest judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgment is to vacate the underlying conviction and preclude subsequent appellate review.

After carefully reviewing the record, we see no indication that the trial court's decision to vacate the judgment in the felonious breaking or entering case rested upon double jeopardy-related considerations. The felonious breaking or entering for which Defendant was convicted was simply not a predicate or basis for Defendant's false pretenses conviction. Thus, given that the trial court did not explain its decision to arrest judgment in the case in which Defendant was convicted of felonious breaking or entering and given that judgment does not appear to have been arrested in that case to avoid double jeopardy-related concerns, the trial court's decision to arrest judgment has the effect of vacating Defendant's felonious breaking or entering conviction and deprives us

6. Similarly, in *State v. Casey*, 195 N.C. App. 460, 673 S.E.2d 168, 2009 N.C. App. LEXIS 144 (unpublished), *disc. review denied*, 363 N.C. 584, 682 S.E.2d 704 (2009), we treated the trial court's decision to arrest judgment as resulting from a flaw appearing on the face of the record given that the trial court provided no explanation for its decision. *Casey*, 2009 N.C. App. LEXIS 144 at *14. Although *Casey*, as an unpublished decision, is not binding on this Court, the result reached in that decision is consistent with the analysis that we have utilized in addressing Defendant's challenge to this felonious breaking or entering conviction.

of the ability to review Defendant's challenge to his felonious breaking or entering conviction on the merits. As a result, Defendant is not entitled to any relief from his felonious breaking or entering conviction on the basis of the argument advanced in his brief.

D. Jury Instructions

Finally, Defendant contends that the trial court erred by refusing to instruct the jury in accordance with his written request for instructions, by instructing the jury that ignorance of the law or mistake of law were not defenses to the crime of obtaining property by false pretenses, and by instructing the jury concerning the issue of his guilt of obtaining property by false pretenses in such a way as to shift the burden of proof with respect to the issue away from the State and onto himself. Defendant is not entitled to relief from the trial court's judgment based upon these instruction-related arguments.

1. Adverse Possession and Mistake of Law

[6] In his first challenge to the trial court's instructions, Defendant contends that the trial court erred by refusing to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not intend to gain ownership of property by adverse possession and by instructing the jury, instead, about the elements of adverse possession accompanied by an instruction that ignorance or a mistake of law did not operate to excuse unlawful conduct. More specifically, Defendant argues that, in the event that the jury concluded that he intended to adversely possess the Graedon Drive property, then he lacked the intent to deceive necessary for guilt of obtaining property by false pretenses and that the trial court erred by failing to instruct the jury to that effect. We do not find Defendant's argument persuasive.

At trial, Defendant requested the trial court to instruct the jury that the State bore the burden of proving beyond a reasonable doubt that he was not seeking to adversely possess the Graedon Drive property.[7] Although the trial court declined to instruct the jury in accordance with Defendant's request, it did discuss the law of adverse possession while coupling this instruction with the statement that "[i]gnorance or mistake of law will not excuse an act in violation of the criminal laws."

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7. In his request, Defendant asked the trial court to instruct the jury that, "[w]hen evidence has been offered that tends to show that the alleged offenses were in an attempt to adversely possess property and you find that the defendant was in fact attempting to adversely possess property, the defendant would not be guilty of any crime," with "[t]he burden [being] on the [S]tate to prove its case beyond a reasonable doubt and in so doing disprove the defendant's assertion of attempting to adversely possess the property."

A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005). "A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (citations omitted), *cert. denied*, 519 U.S. 875, 117 S. Ct. 196, 126 L. Ed. 2d 133 (1996). "[W]hen a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995), *cert. denied*, 516 U.S. 1129, 116 S. Ct. 948, 133 L. Ed. 2d 872 (1996). "[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). "[A] trial court's failure to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby." *State v. Muhammad*, 186 N.C. App. 355, 361, 651 S.E.2d 569, 574 (2007), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008).

As we have previously determined, an intent to adversely possess a tract of property is not a recognized defense to a criminal act in North Carolina. For that reason, the law of adverse possession does not, contrary to Defendant's contention, have any bearing on the issue of Defendant's guilt of obtaining property by false pretenses. For that reason, the trial court did not err by failing to instruct the jury that the State was required to prove that Defendant did not intend to adversely possess the Graedon Drive property beyond a reasonable doubt in order to return a verdict of guilty or by instructing the jury that ignorance of the law or a mistake of law would not serve to obviate Defendant's guilt of that offense. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

2. Intent-Related Burden of Proof

[7] Secondly, Defendant contends that the trial court impermissibly shifted the burden of proving that he lacked the intent necessary for guilt of the offense of obtaining property by false pretenses from the State to himself. Once again, we do not find Defendant's argument persuasive.

The trial court instructed the jury with respect to the issue of Defendant's guilt of obtaining property by false pretenses in a manner consistent with the Supreme Court's decision in *Cronin* and the North Carolina Pattern Jury Instructions as follows:

The Defendant has been charged with obtaining property worth -- obtaining property worth more than $100,000 by -- or more by false pretenses. For you to find the Defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.

First, that the Defendant made a representation to another.

Second, that this representation was false.

Third, that the representation was calculated and intended to deceive.

Fourth, that the victim was, in fact, deceived by this representation.

Fifth, that the Defendant thereby obtained or attempted to obtain property from the victim.

And, sixth, that the property was worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the Defendant made a representation and that this representation was false, that this representation -- representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, that the defendant thereby attempted or -- excuse me -- the – the defendant thereby obtained or attempted to obtain property from the victim and that the property was worth $100,000 or more, it would be your duty to return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses.

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses, but you must determine whether he is guilty of obtaining property by false pretenses.

Obtaining property by false pretenses differs from obtaining property worth $100,000 or more by false pretenses in that the value of the property need not be worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the defendant made a representation, that this representation was false, that this

> representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, and the defendant thereby obtained or attempted to obtain property from the victim, it would be your duty to return a verdict of guilty of obtaining property by false pretenses.
>
> 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.

See N.C.P.I.-Crim. 219.10A; *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286. As we understand them, the trial court's instructions clearly placed the burden of proving that Defendant acted with the necessary intent to deceive upon the State. Although Defendant asserts that the trial court's decision to instruct the jury that ignorance and mistake of law did not excuse otherwise criminal conduct had the effect of shifting the burden of proof with respect to the intent issue, a decision to accept that argument would require us to also accept Defendant's contention that an intent to adversely possess property operates to preclude a conviction for obtaining property by false pretenses, a step that we have declined to take. With that exception, Defendant has failed to identify any language in the trial court's jury instructions that had the effect of shifting the burden of proof with respect to the intent issue from the State to Defendant, and nothing that has that effect is apparent to us based on our review of the trial court's instructions. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

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.

AFFIRMED.

Judge McCULLOUGH concurs.

DILLON, Judge, concurring in part and dissenting in part.

I concur with the majority's holding with respect to Defendant's challenge to the felonious breaking or entering judgment. However, I respectfully dissent from the holding finding no error in Defendant's conviction for obtaining property by false pretenses. Specifically, I believe that the indictment is fatally defective because it fails to allege

any false representation, an essential element of that crime.[1] *State v. Braswell*, ___ N.C. App. ___, ___, 738 S.E.2d 229, 233 (2013) (holding that "the indictment must state the alleged false representation").

The only action by Defendant alleged in the indictment is that he "moved into the house[.]" Otherwise, the indictment alleges his *intent* "to fraudulently convert the property to his own[,]" this intent being a separate element which also must be alleged. *State v. Moore*, 38 N.C. App. 239, 241, 247 S.E.2d 670, 672, *disc. review denied*, 295 N.C. 736, 248 S.E.2d 866 (1978) (holding an indictment to be fatally defective which fails to allege that the defendant acted with "the intent to defraud"). However, the only action alleged in the indictment — that Defendant moved into the house — is essentially just another way of stating that he "obtained" the property. The allegation does not identify "the false representation" *used* to obtain the property. If obtaining property were equivalent to obtaining that property by means of a false pretense, *every* larceny would constitute obtaining property by false pretenses.[2]

The majority cites *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), for the proposition that the required false representation can be inferred from the *actions* alleged in an indictment. I agree with this general proposition. However, the action alleged in the present indictment falls far short of the language approved by this Court in *Perkins*.

The indictment in *Perkins* alleged that the defendant's actions consisted of obtaining "beer and cigarettes" *by purchasing them with a stolen credit card. Id.* at 215, 638 S.E.2d at 595. On appeal, we held that though the indictment did not allege that the defendant made an explicit statement, it "adequately described [her] actions" to "apprise[] [her] that she was [being] accused of falsely representing herself as an authorized user of the [stolen] cards." *Id.* at 215, 638 S.E.2d at 595-96. In reaching this conclusion, we cited our Supreme Court's holding in *State v. Parker*,

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1. As described by our Supreme Court, "[t]he gist of obtaining property by false pretenses is the false representation of a subsisting fact [or future event] intended to and which does deceive one from whom the property is obtained." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983).

2. Though "trespass" is typically a word used to describe the unlawful possession of real property, our Supreme Court has described larceny - the unlawful taking of personal property - as a type of "trespass." *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). In *Bowers*, the Court stated that this type of trespass can be either "actual" or "constructive." *Id.* "Actual" trespass occurs where the taking does not involve "some trick or artifice," whereas "constructive" trespass occurs where the taking involves deceit. *Id.* In the present case, the indictment only alleges actions akin to an "actual" trespass – Defendant moved into and physically possessed the house – and no deceit or falsehood.

354 N.C. 268, 553 S.E.2d 885 (2001), that a "false pretense need not come through spoken words, but instead may be by act or conduct." *Id.* at 215, 638 S.E.2d at 595.

Unlike the actions alleged in *Perkins*, no intent that Defendant obtained possession of the house by means of a false representation is readily inferable from the action alleged here – that Defendant "moved into the house." I do not believe the General Assembly intended that a defendant who unlawfully obtains property *by whatever means* would be criminally liable under G.S. 14-100 for *ob*taining that property by false pretenses simply based on an allegation that he took or *re*tained possession of it, which is what was alleged here. Neither party nor the majority cite — nor has my research uncovered — any case where G.S. 14-100 has been applied to a defendant who merely continues to trespass on land or continues to possess and use stolen property, where the property was not otherwise obtained by means of a false pretense. *Perkins*, on the other hand, involved a somewhat routine application of G.S. 14-100, clearly intended by the General Assembly, whereby a defendant *ob*tained the possession of property (beer and cigarettes) *from someone else* by deceit. The present case would be more analogous to *Perkins* if there had been an allegation in the indictment that Defendant obtained possession of the house through some deceit rather than by simply moving in or if Defendant had obtained *some other property*, such as *rent money* from a prospective tenant, by falsely representing himself as the owner of the house.

The State advanced an alternate theory at trial that — rather than the property being *the house itself* which Defendant "obtained" by moving in, as alleged in the indictment — the property involved was *the continued possession of* or *the clear title to the house* that Defendant was "attempting to obtain." However, even based on this alternate theory, the mere allegation in the indictment that he moved into the house still fails to identify any false representation by which he attempted to obtain this property.

In any event, I do not believe that the General Assembly intended that a defendant becomes criminally liable under G.S. 14-100 based on the mere continuing trespass to property that he wrongfully obtained by whatever means, even where his intent was — to use the words of the indictment – "to convert the property to his own," whether temporarily or permanently, based on an adverse possession/statute of limitations defense. *See*, *e.g.*, N.C. Gen. Stat. § 1-52(4) (2013) (three-year statute of limitation to bring an action to recover property wrongfully converted). To be sure, the intent of many who criminally trespass on

real property or steal personal property is to convert the property to their own, even if only for a short time. However, having this intent does not elevate the mere trespass to a crime of obtaining property by false pretenses. Otherwise, everyone who trespassed on land, for no matter how long, would be criminally liable for violating G.S. 14-100. Similarly, a defendant caught driving a stolen car would also be subject to criminal liability under the statute based on an indictment which alleged that the defendant "drove the car with the fraudulent intent of converting the car to his own use," based on a theory that "the property" was *not* the car itself but *rather* the temporary or permanent continued use of the car, and "the false representation" was that the defendant claimed ownership to the car, which could be inferred merely from his act of driving it. Thus, while Defendant's actions alleged in the indictment are sufficient to allege a criminal act, I do not believe they allege the crime of obtaining property by false pretenses.

STATE OF NORTH CAROLINA
v.
MAT DALLAS PIERCE

No. COA14-613

Filed 31 December 2014

1. Evidence—expert testimony—lack of physical evidence consistent with claims of sexual abuse

In a prosecution for sexual offenses committed by defendant against his two daughters, the trial court did not commit plain error by allowing the nurse who performed the forensic physical exam of one of the girls to state her opinion that the lack of physical evidence of sexual abuse was consistent with the girl's assertion that she had been sexually abused. While the nurse's opinion regarding the victim's credibility would have been impermissible, her opinion that her findings were consistent with, not contradictory to, the victim's account was permissible.

2. Evidence—prior crimes or bad acts—sexual abuse—sufficiently similar—time lapse explained by incarceration

In a prosecution for sexual offenses committed by defendant against his daughters, the trial court did not err by admitting testimony from several witnesses regarding previous instances of sexual

abuse by defendant. The prior instances of sexual abuse, which occurred between ten and twenty years before the trial, were sufficiently similar to the present offenses, and lapses in time between instances could be explained by defendant's incarceration and lack of access to a victim. The strong evidence of a common plan outweighed any danger of unfair prejudice.

3. Indecent Liberties—multiple sexual acts in same encounter—multiple counts

The trial court did not err by denying defendant's motion to dismiss one count of indecent liberties with a child. The State presented evidence that defendant had sex with his girlfriend in the presence of his daughter, performed oral sex on his daughter, and watched as his girlfriend performed oral sex on his daughter. Even though these actions occurred during a single encounter, they constituted more than one sexual act and therefore supported defendant's conviction for more than one count of indecent liberties with a child.

4. Sexual Offenses—with a child—motion to dismiss—insufficient evidence as to elements, locations, and time—conviction vacated

The trial court erred by denying defendant's motion to dismiss one count of sexual offense with a child. Defendant was charged with numerous sexual offenses of varying elements, locations, and time periods. Although the victim testified that defendant sexually assaulted her more than ten times and that he performed a sexual act on her in Caldwell County, there was no evidence as to each element of the offense occurring at the time and place alleged in the indictment. The Court of Appeals vacated the conviction, which had been consolidated for judgment with other convictions, and remanded for resentencing.

Appeal by defendant from judgments entered 18 October 2013 by Judge C. Thomas Edwards in Burke County Superior Court. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Mat Dallas Pierce appeals his Burke County convictions of indecent liberties with a child, rape of a child, and sexual offense with a child by an adult. Defendant also appeals his Caldwell County convictions of first degree sexual offense and two counts of indecent liberties with a child. The victim of the Burke County indecent liberties offense is defendant's daughter "Maggie." The victim of the remaining offenses is defendant's daughter "Melissa."[1]

On appeal, defendant primarily argues that the trial court erred in denying his motion to dismiss two of the charges involving Melissa: one count of indecent liberties occurring in Caldwell County and one count of sexual offense with a child occurring in Burke County. With respect to the Caldwell County charges, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. Defendant argues that this evidence only supports one count of indecent liberties with a child. We disagree. Pursuant to *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties. Accordingly, we hold that the evidence presented by the State is sufficient to support defendant's two convictions for indecent liberties.

With respect to the Burke County sexual offense charge, we agree with defendant that the State failed to present substantial evidence that a sexual act as defined by N.C. Gen. Stat. § 14-27.4A (2013) occurred between defendant and Melissa in Burke County. The only evidence presented by the State regarding a sexual act that occurred in Burke County -- testimony by Melissa that defendant placed his finger inside her vagina while alone in their kitchen in Burke County -- was not admitted as substantive evidence. The State presented specific evidence that defendant performed oral sex on Melissa -- a sexual act under the statute -- but that act occurred in Caldwell, not Burke, County. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of N.C. Gen. Stat. § 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. This evidence is insufficient to support the Burke County sexual offense conviction.

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1. For ease of reading and to protect the privacy of the minor children, we use pseudonyms throughout this opinion. We also use the pseudonyms "Laura," "Lisa," "Abby," "Nina," and "Cathy" to identify the 404(b) witnesses.

Accordingly, we hold that the trial court erred in denying defendant's motion to dismiss the Burke County sexual offense with a child charge and remand for resentencing on the Burke County offenses. Because we find defendant's remaining arguments unpersuasive, we hold that defendant received a trial free of prejudicial error on the remaining charges.

Facts

The State's evidence tended to show the following facts. Melissa and Maggie are twin daughters of defendant. In 2009, when the girls were 10 years old, they lived with defendant, their mother, and their brother in a yellow house in Burke County, North Carolina. In the fall of 2009, after school had started, but before Christmas, defendant took Melissa into the kitchen of the yellow house, pulled down her pants, and "put his penis on [her] vagina [and] started moving back and forth." On a different occasion, defendant had vaginal intercourse with Melissa while they were in the basement of the yellow house. Defendant had vaginal intercourse with Melissa more than five times.

Sometime in January or February of 2010, defendant, Melissa, and defendant's girlfriend, "Laura," spent the night at the house of defendant's nephew, Mikey, in Caldwell County. Melissa slept on a bed while defendant and Laura slept on a couch in the same room. During the night, Melissa was awakened by defendant and Laura having sex. Defendant asked Melissa to join them and told her to go over to the couch. Defendant took off Melissa's pants and started licking her vagina. He then asked Laura to perform oral sex on Melissa, and she complied.

When asked if defendant ever put anything other than his mouth or penis on her vagina Melissa testified "yes."[2] On redirect examination, Melissa responded affirmatively to the State's questions whether defendant "sexually assaulted" her more times than she had described to the jury, whether "it happen[ed] more than ten times" and whether "[o]nce it started, . . . it continue[d]." Defendant told Melissa not to tell anyone about the sexual conduct because if she did, he would go back to prison.

Maggie testified that when she was home sick from school and no one else was in the house, defendant touched her vagina with his hand

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2. Melissa testified that one time when she was home alone with defendant in their kitchen, defendant put his hand down her pants and placed his finger on the outside of her vagina. On a different occasion, defendant was helping Melissa with her homework in the kitchen and he put his hand down her pants and his finger inside her vagina. However, this testimony was not admitted as substantive evidence because the State failed to disclose these specific incidents during discovery.

underneath her clothes. Defendant touched her vagina, both over and under her clothes, more than five times. On one occasion, defendant was helping Maggie with her homework in the kitchen and he touched her inside her pants.

With respect to Maggie, defendant was indicted in Burke County for indecent liberties with a child. With respect to Melissa, defendant was indicted in Burke County for rape of a child by an adult and sexual offense with a child by an adult, and in Caldwell County, for rape of a child by an adult, sexual offense with a child, and two counts of taking indecent liberties with a child. The Caldwell County cases were transferred to Burke County for trial.

The cases came on for trial on 15 October 2013. At the conclusion of the evidence, the trial court dismissed the Caldwell County rape charge. The jury found defendant guilty of the remaining charges. The trial court consolidated the Burke County charges for judgment and sentenced defendant to a presumptive-range term of 350 to 429 months imprisonment. The trial court consolidated the Caldwell County charges for judgment and sentenced defendant to a presumptive-range term of 386 to 473 months imprisonment. The sentences were to run concurrently.[3] Defendant timely appealed the judgments to this Court.

I

[1] Defendant first argues that the trial court erred in permitting Elizabeth Osbahr, the nurse who performed a forensic physical examination of Melissa, to state her opinion that her medical findings were consistent with Melissa's assertion that she had been sexually abused. Because defendant did not object to the testimony at trial, we review for plain error.

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

3. Although it appears from the transcript that the trial judge may have intended for the sentences to run consecutively, neither judgment specified that the sentence was to run at the expiration of the other sentence.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

In a prosecution for a sexual offense involving a child victim, absent physical evidence of sexual abuse, expert opinion that sexual abuse has in fact occurred constitutes an impermissible opinion regarding the victim's credibility and is inadmissible. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789.

In this case, Nurse Osbahr was tendered without objection as an expert in her field as a pediatric nurse practitioner. She testified that she performed a physical examination of Melissa after observing a social worker's interview of Melissa. She walked through the steps that she takes in conducting a physical examination and explained that in girls that were going through puberty, it was very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to Melissa, Nurse Osbahr testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked:

> Q Now, you watched her interview there at the Children's Advocacy Center. Were your medical findings consistent with her disclosure in the interview?
>
> A They were.

Defendant contends that Nurse Osbahr's "second opinion -- i.e., that her medical findings with respect to [Melissa] were 'consistent with her *disclosure*' (emphasis added) -- vouched for [Melissa's] credibility." However, our Supreme Court has addressed similar testimony and found it to be admissible. In *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) ("*Aguallo II*"),[4] a pediatrician testified that the results of the victim's physical examination were consistent with the victim's pre-examination statement that she had been sexually abused. On appeal, the Supreme Court rejected the defendant's argument that the pediatrician's testimony was a comment on the victim's truthfulness or the guilt or innocence of the defendant, explaining:

4. *Aguallo II* is the defendant's appeal from his second trial after having been granted a new trial in *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986) ("*Aguallo I*").

> Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

Id.

Likewise, here, Nurse Osbahr did not testify as to whether Melissa's account of what happened to her was true. Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, Melissa's account. Nurse Osbahr gave this testimony after laying a proper foundation by explaining her credentials, including her experience and knowledge of the profiles of sexually abused children, and by explaining the examination procedure she used with Melissa. Her testimony amounted to an opinion that the lack of physical findings of sexual abuse was consistent with the profiles of other similarly developed children who had been sexually abused. Such testimony is admissible under both *Stancil* and *Aguallo II*. *See also State v. May*, ___ N.C. App. ___, ___, 749 S.E.2d 483, 492 (2013) (holding expert testimony that victim showed no signs of sexual assault was admissible where expert did not testify that sexual abuse had in fact occurred, and expert merely testified as to her examination procedures, her experience and knowledge of the profiles of sexually abused children, and whether the victim's symptoms were consistent with sexual abuse), *disc. review allowed*, 367 N.C. 293, 753 S.E.2d 663 (2014); *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987) (finding no error in admission of physician's opinion that victim's symptoms were consistent with sexual abuse).

Defendant, however, cites *Aguallo I*, *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Driver*, 162 N.C. App. 360, 590 S.E.2d 477, 2004 WL 77831, 2004 N.C. App. LEXIS 131 (2004) (unpublished), in support of his argument that Nurse Osbahr's testimony is inadmissible. The testimony of the experts in these cases, however, is materially different from Nurse Osbahr's testimony. In *Aguallo I*, the examining

physician testified that the child victim was "believable." 318 N.C. at 599, 350 S.E.2d at 81. In *Trent*, the examining physician testified that he believed that the victim had in fact been sexually abused. 320 N.C. at 613, 359 S.E.2d at 465. Similarly, in *Driver*, the examining physician testified that "[her] opinion at the completion of our evaluation was that with reasonable medical certainty the patient had experienced and received the medical diagnosis of sexual abuse." 2004 WL 77831 at *1, 2004 N.C. App. LEXIS 131 at *3. Although the physician in *Driver* testified that the exam was consistent with the victim's disclosure, she further asserted that "[d]ue to [the victim's] highly detailed and consistent disclosure, we believe that sexual abuse is probable." *Id.* Thus, the testimony in each of these cases, unlike the testimony of Nurse Osbahr, amounted to an opinion regarding the truthfulness of the victim and the guilt of the defendant. Accordingly, we hold that defendant has failed to demonstrate that the trial court committed plain error in admitting the testimony of Nurse Osbahr.

II

[2] Defendant next argues that the trial court erred in admitting testimony from several witnesses concerning previous instances of sexual abuse by defendant under Rules 404(b) and 403 of the Rules of Evidence. This Court "review[s] de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

The State contends, citing *State v. Ray*, 364 N.C. 272, 277-78, 697 S.E.2d 319, 322 (2010), that plain error review applies because defendant failed to preserve this issue by not objecting to the 404(b) witnesses in the presence of the jury. Defendant concedes that objections were not made in the presence of the jury, but argues that pursuant to *State v. Hazelwood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007), the objections were sufficiently contemporaneous to preserve this issue for appellate review. We need not determine whether plain error review applies because even assuming, without deciding, that defendant's objections were sufficient, we hold that the testimony was admissible.

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This Rule is a "general rule of *inclusion* of relevant evidence

of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

"Though it is a rule of inclusion, Rule 404(b) is still 'constrained by the requirements of similarity and temporal proximity.' " *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quoting *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them," but the similarities need not "rise to the level of the unique and bizarre." *Id.* (internal quotation marks omitted).

In this case, the testimony of "Cathy" constituted the earliest evidence of sexual abuse by defendant. Cathy testified regarding numerous instances of sexual abuse by defendant from approximately 1988 until 1994, when Cathy was between the ages of eight and 15. During that time, defendant was married to Cathy's aunt. When Cathy was eight years old, defendant touched her vagina while she was staying at defendant's home and sleeping with her cousins in their bedroom. Defendant first had sexual intercourse with Cathy when she was 11 years old, and had anal intercourse with her when she was in sixth grade. She estimated that defendant had sex with her over 30 times. One time, defendant and Cathy's aunt took her to a motel where defendant had sex with Cathy and her aunt in one another's presence. Charges were filed against defendant in 1994 for his conduct with Cathy, and he was convicted of indecent liberties with a child in 1996.

"Lisa" was the next Rule 404(b) witness. In 1999, defendant was released from prison and began dating and living with Lisa's mother, "Abby." Defendant lived with Lisa and Abby from 1999 until 2003 or 2004, when Lisa was between the ages of three and eight years old. Lisa testified that defendant had her sleep in the living room, even though she had a bedroom. One night, Lisa was sleeping in the living room and woke up as defendant was licking her vagina. Defendant also put his finger in her vagina and tried to get Lisa to perform oral sex. Lisa estimated that this happened more than 10 times and did not stop until defendant went to prison on drug charges around 2004. Lisa did not tell her mother about the abuse because defendant threatened to kill her family if she did.

Abby's testimony corroborated the accounts of Cathy and Lisa. Abby testified that she began dating defendant in 1999 after he was released

from prison and that he told her that he went to prison for sleeping with Cathy when she was 15 years old. In 2004, Abby learned that defendant had molested Lisa. While in prison, defendant telephoned Abby as a part of a 12-step program and admitted that he started touching Lisa when she was four years old and that he touched her vaginal area while she sat in his lap, and he rubbed his penis between her legs. When defendant was released from prison in 2009, he visited Abby and Lisa at a family Easter gathering and apologized to them for what he had done.

Nina, defendant's oldest daughter, also corroborated the testimony of Cathy and Lisa. She testified that defendant went to jail the first time for having sex with Cathy when she was 15 years old and that Cathy was sold to defendant for drugs or money. She stated that in 2003, while defendant was in prison, he admitted to her that he rubbed Lisa's vagina as she sat on his lap. Defendant later admitted to Nina that he rubbed his penis on Lisa's vagina, ejaculated on her belly, and put his penis in her face and on her lips.

Finally, Laura, defendant's girlfriend after he was released from prison in 2009, testified as to events occurring between defendant and Melissa in 2009 and 2010. Laura testified regarding the night in Caldwell County when defendant forced Laura to perform oral sex on Melissa while he watched. She also testified that one time when they were staying at a friend's house in Burke County, defendant refused to let Melissa sleep in the living room on the couch and made her sleep in the bed with him and Laura. That night, Laura witnessed defendant rub his penis between Melissa's legs -- an act defendant referred to as "slip-legging."

Defendant argues that the testimony regarding what happened to Cathy and Lisa is too remote in time to fall within Rule 404(b). We disagree. With respect to temporal proximity of other acts of sexual abuse, our Supreme Court has explained:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (internal citation omitted). Moreover, "[t]emporal proximity is not eroded when the remoteness in time can be reasonably explained" such

as by lack of access to a victim or by the defendant's incarceration. *State v. Barnett*, ___ N.C. App. ___, ___, 734 S.E.2d 130, 134 (2012), *disc. review denied*, 366 N.C. 587, 739 S.E.2d 844 (2013).

Although the sexual abuse of Cathy and Lisa occurred between 10 and 20 years prior to trial, the lapses of time between the instances of sexual misconduct involving Cathy, Lisa, Melissa, and Maggie can be explained by defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to Cathy and Lisa and what happened to Melissa and Maggie. At the time of the sexual misconduct, each victim was a minor female who was either the daughter or the niece of defendant's spouse or live-in girlfriend. The abuse frequently occurred at defendant's residence, at night, and while others slept nearby. Defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that defendant engaged in a pattern of conduct of sexual abuse over a long period of time.

Accordingly, we hold that the evidence of past instances of sexual abuse of Cathy and Lisa meets Rule 404(b)'s requirements of similarity and temporal proximity. *See State v. Register*, 206 N.C. App. 629, 641, 698 S.E.2d 464, 473 (2010) (holding that evidence that defendant had sexually abused other children 14, 21, and 27 years prior to the start of defendant's alleged sexual abuse of victim was evidence of a common plan and thus was admissible as other bad acts evidence, despite the remoteness in time of the first incident; evidence indicated that defendant was married to victims' mothers or aunt, that the sexual abuse occurred when the children were prepubescent, that, at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and that the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed).

Defendant makes no specific argument as to why Laura's testimony is inadmissible other than to note that she "testified about her own sexual conduct with [Melissa] and some other (uncharged) conduct of defendant with [Melissa]." Laura's sexual conduct with Melissa was at the behest of defendant and in his presence, and it corroborated Melissa's testimony regarding what occurred that night in Caldwell County. Further, the uncharged conduct of defendant, which he called "slip-legging," is the same act that Melissa testified defendant did to her in the yellow house in Burke County. Thus, Laura's testimony involved substantially similar acts by defendant against the same victim and within the same time period. Accordingly, we hold that Laura's testimony also falls under Rule 404(b).

Having determined that the evidence is admissible under Rule 404(b), we now review the trial court's Rule 403 determination for abuse of discretion. Here, the trial judge first heard the testimony of the 404(b) witnesses outside the presence of the jury and then heard arguments before ruling on admissibility of each witness. As to Nina, defendant's daughter, the trial court excluded testimony regarding an incident when Nina was 18 years old and defendant bought her ecstasy and another incident when defendant asked Nina to "show him her monkey" because it was not sufficiently similar to the charged crimes. The trial court also excluded testimony of Laura regarding Cathy and Cathy's mother because Laura's testimony did not disclose enough information for the court to determine at that time if those events were temporally related. The trial judge's exclusion of this evidence indicates that he carefully weighed the evidence in making his rulings. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (noting that "[t]he judge excluded testimony about one incident that did not share sufficient similarity to the charged actions, thus indicating his careful consideration of the evidence").

Furthermore, " 'a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury.' " *Id.*, 726 S.E.2d at 160 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)). The trial court instructed the jury to only consider the testimony for the purpose of showing defendant's motive, knowledge, intent, plan, or scheme, and not as substantive evidence of the crimes charged. This limiting instruction diminished the danger of unfair prejudice to defendant.

Given the similarities in the accounts of the 404(b) witnesses to those of Melissa and Maggie and the persistence of defendant's conduct with similar victims over a long period of time, we hold that the trial court could reasonably conclude that the testimony of the 404(b) witnesses provided strong evidence of a common plan that outweighed any unfair prejudice to defendant. *See Register*, 206 N.C. App. at 641, 698 S.E.2d at 473 (holding that trial court did not abuse its discretion in concluding that testimony showing pattern of sexually abusive behavior by defendant over period of 31 years constituted strong evidence of common plan that outweighed any unfair prejudice to defendant).

III

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss two of the offenses involving Melissa: one count of indecent liberties with a child in Caldwell County and the Burke County

charge of sexual offense with a child by an adult. "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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "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). " '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 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919).

With respect to the Caldwell County charges, defendant concedes that the evidence that defendant performed oral sex on Melissa at Mikey's house in Caldwell County supports a conviction for sexual offense and indecent liberties, but he argues that a second indecent liberties conviction is not supported by the evidence. We disagree.

"A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2013). "[I]t is not necessary that there be a touching of the child by the defendant in order to constitute an indecent

liberty within the meaning of N.C.G.S. 14–202.1." *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981).

For example, in *State v. Ainsworth*, 109 N.C. App. 136, 147, 426 S.E.2d 410, 417 (1993), this Court held that there was sufficient evidence to support a conviction of indecent liberties where the defendant had sex with another woman in the presence of her child and then watched her son have sex with the woman. Additionally, "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38 (upholding defendant's convictions of three counts of indecent liberties for touching and sucking victim's breasts, performing oral sex on her, and having sexual intercourse with her).

In this case, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then watched as his girlfriend performed oral sex on Melissa. Although these actions occurred during a single encounter, they constitute more than one sexual act and, under *James*, support defendant's conviction of more than one count of indecent liberties.

[4] Defendant next argues that there is insufficient evidence of a sexual offense occurring in Burke County. We agree. "A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A(a). A " '[s]exual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2013).

Here, Melissa testified as to two specific incidents where a sexual act occurred between defendant and Melissa: (1) defendant placed his fingers inside her vagina while they were alone in the kitchen in her house in Burke County, and (2) defendant performed oral sex on Melissa at Mikey's house in Caldwell County. Neither of these incidents constitutes substantial evidence that would support the Burke County sexual offense. The evidence regarding the kitchen incident was not admitted as substantive evidence because the State had failed to disclose it in discovery. Therefore, consistent with the trial court's limiting instruction, this evidence may only be considered for the limited purpose of establishing defendant's motive, knowledge, or common plan for the crimes charged. While the evidence of oral sex occurring in Caldwell County

was admitted as substantive evidence, it does not support a conviction for a sexual offense occurring in Burke County.

The State, however, points to Melissa's testimony that defendant "sexually assaulted" her more than 10 times and that once it began, it continued. The State argues, citing *State v. Bullock*, 178 N.C. App. 460, 472, 631 S.E.2d 868, 876 (2006), that this testimony, when considered with Melissa's testimony that defendant performed a sexual act on her in Caldwell County, is substantial evidence that a sexual act occurred in Burke County.

In *Bullock*, this Court addressed the issue "whether the State is required to present evidence of specific and unique details of each charge to the jury, or whether a count can be submitted to the jury based upon the victim's testimony that repeated incidents occurred over a period of time." *Id.* There, defendant was convicted of 11 counts of rape. *Id.* at 464, 631 S.E.2d at 872. The victim gave specific testimony regarding the first act of sexual intercourse, and then testified that defendant had sex with her "'more than two times a week'" during an 11-month period of time. *Id.* at 463, 631 S.E.2d at 871. In holding that this generic testimony was sufficient to support the defendant's convictions of 10 additional counts of rape, the Court explained:

> While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event.

Id. at 473, 631 S.E.2d at 877.

Here, unlike in *Bullock*, defendant was charged with various offenses that required proof of different elements, locations, and time periods. Instead of testifying specifically which act occurred more than one time, Melissa testified generally that defendant "sexually assaulted" her more than 10 times. It is unclear from the testimony whether this statement referred to acts amounting to vaginal intercourse, sexual acts within the meaning of the statute, or indecent liberties with a child.

We decline to extend *Bullock* to cases where, as here, there was no substantive evidence admitted as to each element of the offense occurring at the time and location alleged in the indictment, and it is unclear from the transcript whether the generic testimony that the victim was "sexually assaulted" multiple times encompasses the specific

offense at issue. *Compare State v. Khouri*, 214 N.C. App. 389, 391, 716 S.E.2d 1, 4 (2011) (holding that State submitted substantial evidence to support charges of sexual offense where State presented evidence that defendant initiated acts of touching and oral sex with victim and "[victim] continued performing oral sex on defendant a few times a week"), *disc. review denied*, 356 N.C. 546, 742 S.E.2d 176 (2012). Therefore, we hold that defendant's Burke County sexual offense conviction must be vacated.

We note that this conviction was consolidated with the Burke County offenses of rape of a child and indecent liberties. Even though both the rape and the sexual offense crimes are B1 felonies, our Supreme Court has held 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 entry of judgment and resentencing on the Burke County offenses.

No error in part; vacated and remanded in part.

Judges STROUD and BELL concur.

STATE OF NORTH CAROLINA
v.
JIMMY SCOTT SISK

No. COA14-738

Filed 31 December 2014

Motor Vehicles—habitual impaired driving—results of blood test volunteered—right to be readvised of implied consent rights not triggered

The trial court did not err in a habitual impaired driving case by admitting the results of defendant's blood test into evidence. Defendant, without any prompting, volunteered to submit to a blood test. Thus, defendant's statutory right to be readvised of his implied consent rights was not triggered.

Appeal by defendant from judgment entered 22 November 2013 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 5 November 2014.

Roy Cooper, Attorney General, by Neil Dalton, Special Deputy Attorney General, for the State.

Leslie C. Rawls for defendant-appellant.

DAVIS, Judge.

Jimmy Scott Sisk ("Defendant") appeals from his convictions for habitual impaired driving and attaining the status of an habitual felon. On appeal, he contends that the trial court erred by admitting the results of his blood test into evidence. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State's evidence at trial tended to establish the following facts: At approximately 5:10 p.m. on 20 October 2012, Trooper Ben Sanders ("Trooper Sanders") of the North Carolina Highway Patrol was on duty driving his marked patrol vehicle southbound on N.C. Highway 10 in Cleveland County. Defendant was driving a motor home in the opposite direction. Trooper Sanders observed Defendant's vehicle veer into Trooper Sanders' lane and then swerve back into Defendant's original

lane. Trooper Sanders turned his patrol car around in pursuit and activated his blue lights and siren.

Trooper Sanders drove for some distance before he caught up with Defendant's vehicle. Defendant then abruptly turned into a convenience store parking lot and drove through a carwash stall, causing minor damage to both the stall and the motor home. Trooper Sanders followed Defendant and then exited his patrol car. As Trooper Sanders approached Defendant's vehicle, Defendant exited the driver's side door and then stumbled back against the motor home. Trooper Sanders noticed that Defendant smelled strongly of alcohol, his speech was slurred, and he was unsteady on his feet. Trooper Sanders also observed several open beer cans on the front floorboard of the motor home. Defendant was arrested for driving while impaired.

Defendant was then transported to the intoxilyzer room of the Cleveland County Law Enforcement Center where Trooper Sanders read and gave Defendant a copy of his implied consent rights. Defendant acknowledged his awareness of his rights and "stated that he would not take a breath test, but that he would give a blood test[.]" Approximately 23 minutes later, Trooper Sanders asked Defendant to give a breath sample, and Defendant refused. Trooper Sanders then told Defendant that he would be transported to the hospital for a blood test, and Defendant said "[o]kay."

At the Cleveland County Hospital emergency room, Defendant was placed in a waiting room, where he laid down on a gurney and fell asleep. When the technician came in, Defendant was awakened and informed that his blood was about to be drawn. Defendant made no comment or objection but "offered his arm out, and [the technician] took a blood sample from his left arm." The test results showed that Defendant's blood alcohol level was .16.

On 13 November 2012, Defendant was indicted for habitual impaired driving and attaining the status of an habitual felon. On 15 November 2013, Defendant filed a pretrial motion to suppress the results of his blood test. The trial court denied Defendant's motion.

A jury trial was held in Cleveland County Superior Court on 19 November 2013. At trial, the blood test results were admitted over Defendant's objection. The jury convicted Defendant of both charges. The trial court sentenced Defendant to 117 to 153 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court erred in admitting his blood test results into evidence. Specifically, Defendant contends that Trooper Sanders' failure to readvise him of his implied consent rights before the blood draw violated both N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1(b5). We disagree.

Because Defendant objected to the introduction of the evidence at trial, this issue is preserved for appellate review. *See* N.C.R. App. P. 10(a)(1) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). "The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citation omitted), *appeal dismissed and disc. review denie*d, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, 558 U.S. 865, 175 L.E.2d 111 (2009).

N.C. Gen. Stat. § 20-16.2(a) states, in pertinent part, as follows:

> (a) Basis for Officer to Require Chemical Analysis; Notification of Rights. — Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> . . . .

> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

N.C. Gen. Stat. § 20-16.2(a) (2013).

N.C. Gen. Stat. § 20-139.1(b5) states, in pertinent part, that

> [a] person may be requested . . . to submit to a chemical analysis of the person's blood . . . in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer. . . . If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).

N.C. Gen. Stat. § 20-139.1(b5) (2013).

On appeal, Defendant does not dispute the fact that he told Trooper Sanders in the intoxilizer room that he was willing to submit to a blood test. Nor does he claim that he objected to the blood draw at the hospital. Instead, he argues that Trooper Sanders was required under N.C. Gen. Stat. § 20-139.1(b5) to readvise him of his implied consent rights prior to the blood draw. In making this argument, Defendant relies on our decision in *State v. Williams*, __ N.C. App. __, 759 S.E.2d 350, *disc. review denied*, __ N.C. __, 762 S.E.2d 201 (2014). We believe his reliance on *Williams* is misplaced.

In *Williams*, the defendant was arrested and charged with driving while impaired. He was taken to the sheriff's office where he was read and given a copy of his implied consent rights, which he acknowledged and signed. *Id.* at __, 759 S.E.2d at 351. An officer subsequently asked the defendant to submit to a breath test, which he refused. The officer then requested that a blood testing kit be brought in for the defendant. The officer gave the defendant a consent form for the blood test — which the defendant signed — but failed to readvise the defendant of his implied consent rights with respect to the blood test. A paramedic then proceeded to draw the defendant's blood. *Id.*

The defendant filed a motion to suppress the results of his blood test, which was granted by the trial court. *Id.* On appeal, this Court affirmed, holding that the blood test results were inadmissible because

of the officer's failure to readvise the defendant of his rights prior to the blood draw. *Id.* at __, 759 S.E.2d at 354. In reaching this conclusion, we noted that "[w]here a defendant refuses to take a breath test . . . the State may then seek to administer a different type of chemical analysis such as a blood test pursuant to [N.C. Gen. Stat. § 20-139.1(b5).]" *Id.* at __, 759 S.E.2d at 353. However, we concluded that "the State was required, pursuant to the mandates of [N.C. Gen. Stat.] § 20–16.2(a) and as reiterated by [N.C. Gen. Stat.] § 20-139.1(b5), to re-advise defendant of his implied consent rights before requesting he take a blood test." *Id.* at __, 759 S.E.2d at 354.

We believe that *Williams* is distinguishable from the present case. Here, unlike in *Williams*, Defendant — without any prompting — *volunteered* to submit to a blood test. Because the prospect of Defendant submitting to a blood test originated with Defendant — as opposed to originating with Trooper Sanders — we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered. *See* N.C. Gen. Stat. § 20-139.1(b5) ("If a subsequent chemical analysis is *requested* pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a)." (emphasis added)). Therefore, we conclude that the trial court did not err in admitting evidence of the results of Defendant's blood test. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
CRYSTAL SITOSKY

No. COA14-639

Filed 31 December 2014

1. Appeal and Error—appellate jurisdiction—notice of appeal—writ of certiorari

The trial court dismissed defendant's writ of certiorari requesting appellate review because her notice of appeal was deemed insufficient to confer jurisdiction. Defendant's notice of appeal listed the file numbers of the judgments she sought to appeal, the Court of Appeals was the only court with jurisdiction to hear defendant's appeal, and the State did not suggest that it was misled by either of the errors in the notice of appeal.

2. Probation and Parole—erroneous revocation of probation and activation of suspended sentence—gap in statutory provision

The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 07 CRS 60072-74. Defendant, who committed the offenses prior to 1 December 2009 but had her revocation hearing after 1 December 2009, was not covered by either statutory provision N.C.G.S. § 15A-1344(d) or § 15A-1344(g) authorizing the tolling of probation periods for pending criminal charges.

3. Probation and Parole—erroneous revocation of probation and activation of suspended sentence—based on violations neither admitted nor proven

The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 10 CRS 53201-03 based, in part, on probation violations that were neither admitted by defendant nor proven by the State at the probation hearing. The case was remanded for further proceedings.

Appeal by defendant from judgments entered 5 March 2014 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 21 October 2014.

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

Staples S. Hughes, Appellate Defender, by Jason Christopher Yoder, for defendant-appellant.

DAVIS, Judge.

Crystal Sitosky ("Defendant") appeals from the trial court's judgments revoking her probation and activating her suspended sentences in file numbers 07 CRS 60072-74 and 10 CRS 53201-03. On appeal, she argues that the trial court (1) lacked jurisdiction to revoke her probation in file numbers 07 CRS 60072-74; and (2) erred in revoking her probation in file numbers 10 CRS 53201-03. After careful review, we vacate the trial court's judgments and remand for further proceedings.

Factual Background

On 10 July 2008, Defendant pled guilty to three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 5 to 6 months imprisonment, suspended the sentences, and placed Defendant on supervised probation for a period of 36 months. On 22 September 2011, Defendant pled guilty to one count of attempted trafficking in heroin and three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 6 to 8 months imprisonment for the obtaining a controlled substance by fraud or forgery offenses and 90 to 117 months imprisonment following the expiration of the above sentences for the attempted trafficking in heroin offense. The trial court then suspended these sentences and placed Defendant on supervised probation for 36 months.

Defendant's probation officer filed violation reports on 3 May 2013, 18 June 2013, 26 November 2013, and 10 January 2014, alleging that Defendant had violated various conditions of her probation. The 3 May 2013 violation reports alleged that Defendant had been charged with driving while license revoked, simple possession of a Schedule II controlled substance, simple possession of a Schedule IV controlled substance, and maintaining a vehicle or dwelling place for the purpose of keeping or selling a controlled substance. The 18 June 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 7 June 2013. The 26 November 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 21 November 2013. Finally, the 10 January 2014 violation reports alleged that Defendant had been charged with multiple counts of (1) driving with expired registration and

expired inspection; (2) driving while license revoked; (3) misdemeanor larceny; and (4) obtaining property by false pretenses.

A hearing on the alleged probation violations was held in New Hanover County Superior Court on 5 March 2014. At the hearing, Defendant admitted to three of the alleged probation violations: (1) testing positive for opiates on 7 June 2013; (2) testing positive for opiates on 21 November 2013; and (3) being charged with and convicted on 27 February 2014 of one count of driving while license revoked. Defendant did not admit to any of the other violations alleged in the violation reports, and the State presented no evidence regarding these remaining alleged violations. The trial court revoked Defendant's probation and activated her suspended sentences. Defendant appealed to this Court.

Analysis

I. Appellate Jurisdiction

[1] Defendant has filed a petition for writ of certiorari requesting appellate review in the event that her notice of appeal is deemed insufficient to confer jurisdiction upon this Court. The record shows that Defendant filed a handwritten letter indicating her intent to appeal but failed to serve a copy of the letter on the State as required by Rule 4(a) of the North Carolina Rules of Appellate Procedure. Defendant's trial counsel also filed a notice of appeal on Defendant's behalf, which was served on the State. This notice of appeal, however, failed to designate the court to which the appeal was being taken and listed the incorrect date for the judgments being appealed. We do not believe that either of these errors are fatal to Defendant's appeal.

We have previously held that a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant's flawed notice of appeal. *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620 ("Here, defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court. The State does not suggest that it was in any way misled by the notice of appeal. Accordingly, defendant's . . . mistake in failing to name this Court in his notice of appeal do[es] not warrant dismissal."), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013).

We have also deemed a defendant's notice of appeal sufficient to confer jurisdiction upon this Court when, despite an error in designating

the judgment, the notice of appeal as a whole indicates the defendant's intent to appeal from a specific judgment. *See State v. Rouse*, ___ N.C. App. ___, ___ , 757 S.E.2d 690, 692 (2014) ("A mistake in designating the judgment should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." (citation, quotation marks, brackets, ellipses, and emphasis omitted)).

Here, because (1) Defendant's notice of appeal lists the file numbers of the judgments she seeks to appeal; (2) this Court is the only court with jurisdiction to hear Defendant's appeal; and (3) the State has not suggested that it was misled by either of the errors in her notice of appeal, we conclude that a dismissal of Defendant's appeal is not warranted. We therefore dismiss Defendant's petition for writ of certiorari and proceed to address the merits of the appeal.

II. Revocation of Probation

A. File Numbers 07 CRS 60072-74

[2] Defendant first alleges that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74. We agree.

In file numbers 07 CRS 60072-74, Defendant was placed on 36 months of supervised probation on 10 July 2008 for offenses she committed in June and July of 2007. The State contends that Defendant remained on probation for these offenses at the time of the 5 March 2014 revocation hearing because her probationary period was tolled each time she acquired new criminal charges until those new charges were resolved.

It is true that the tolling provision of N.C. Gen. Stat. § 15A-1344(d) — which provided that "[t]he probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation" — previously applied to Defendant's probation in file numbers 07 CRS 60072-74. However, in 2009, the General Assembly repealed this provision for "hearings held on or after December 1, 2009." 2009 N.C. Sess. Laws 667, 679, ch. 372, § 20. While an amended tolling provision was then added to subsection (g)[1] of N.C. Gen. Stat. § 15A-1344, the

1. While not relevant to our decision in this case, we note that N.C. Gen. Stat. § 15A-1344(g) was later repealed by the General Assembly in 2011. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3.

State concedes, as it must, that the amended provision does not apply to Defendant because N.C. Gen. Stat. § 15A-1344(g) took effect on "1 December 2009 and applies to offenses committed on or after that date." *See id.* at 675, 679, ch. 372, §§ 11(b), 20. Consequently, because Defendant's underlying offenses were committed in June and July of 2007, N.C. Gen. Stat. § 15A-1344(g) is clearly inapplicable to her.

The State does assert, however, that Defendant's probationary period in file numbers 07 CRS 60072-74 was covered by the tolling provision of N.C. Gen. Stat. § 15A-1344(d) despite the fact that the effective date for the repeal of that provision was for hearings held on or after 1 December 2009 and Defendant's revocation hearing was held on 5 March 2014 — approximately four and a half years after this effective date. In making this argument, the State essentially relies not on the text of the session law repealing the tolling provision of N.C. Gen. Stat. § 15A-1344(d) but rather upon its belief that the General Assembly "did not intend to eliminate the tolling provision for defendants who committed offenses before 1 December 2009." However, it is well established that in determining the intent of the General Assembly, we must first examine the plain language of the statutory provisions at issue. *See State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) ("The primary indicator of legislative intent is statutory language . . . ."). "When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (citation and quotation marks omitted). If the language is clear, we must give the provision its plain meaning. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.").

Here, the session law at issue — Chapter 372 of the 2009 North Carolina Session Laws — plainly states that Section 11(a), the section of the session law that repeals the tolling provision in N.C. Gen. Stat. § 15A-1344(d), "applies to *hearings held* on or after December 1, 2009." 2009 N.C. Sess. Laws 667, 679, ch. 372, § 20 (emphasis added). It then goes on to state that "[t]he remainder of this act [which included the newly enacted subpart (g) of N.C. Gen. Stat. § 15A-1344] becomes effective December 1, 2009, and applies to *offenses committed* on or after that date." *Id.* (emphasis added). As such, the General Assembly specifically articulated a clear effective date for the section of the session law removing the tolling provision from N.C. Gen. Stat. § 15A-1344(d), and

we are obligated to give effect to this unambiguously stated effective date. *See Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) ("[W]hen the language of a statute is clear and unambiguous, it must be given effect . . . ." (citation and quotation marks omitted)).

In urging us to reach a contrary result, the State is, in essence, asking this Court to rewrite the effective date set out in the session law in order to accomplish what it contends must have been the desire of the General Assembly in enacting these statutory amendments. This we are not at liberty to do. *See id.* (explaining that our appellate courts have "no power to amend an Act of the General Assembly" and "will not engage in judicial construction merely to assume a legislative role and rectify what [a party] argue[s] is an absurd result" (citation and quotation marks omitted)).[2]

Indeed, we note that on at least one other occasion this Court has identified a gap in coverage arising out of the designated effective dates of statutory provisions affecting probation. In *State v. Nolen*, ___ N.C. App. ___, ___, 743 S.E.2d 729 (2013), we explained that the recent enactment of the Justice Reinvestment Act ("the Act") had significantly reduced the trial court's authority to revoke probation for probation violations by limiting revocation-eligible violations to three types of conduct, one of which was absconding supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a), a newly added statutory condition of probation. *Id.* at ___, 743 S.E.2d at 730. According to the effective dates of the Act, the recently limited revocation authority of trial courts took effect on 1 December 2011 and applied to all probation violations occurring on or after that date, but the provision of the Act actually establishing absconding as a statutory probation violation applied only to probationers who had committed the underlying offenses resulting in their probation on or after 1 December 2011. *See id.* at ___, 743 S.E.2d at 731.

As a result, we held that a gap was created by the Act such that a subset of the persons on probation in North Carolina — including the defendant in *Nolen* — was subject to the Act's new limitations on the power of trial courts to revoke probation (based on the date of their alleged probation violations) yet could not have their probation revoked

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2. While we recognize that in construing and interpreting statutes, our courts endeavor to "adopt an interpretation which will avoid . . . bizarre consequences," *State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005), we do so only where the statute at issue is susceptible to more than one permissible interpretation. Here, however, this session law lends itself to only one rational interpretation as it clearly articulates a specific effective date and, as such, leaves no room for judicial construction.

for absconding because they were not subject to the prohibition against absconding as a condition of their probation (based on their offense date). *Id.* at ___, 743 S.E.2d at 731.

Likewise, in the present case, based on the plain language of Chapter 372 of the 2009 North Carolina Session Laws, we conclude that Defendant, who committed her offenses in file numbers 07 CRS 60072-74 *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009*, was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges. As a result, we have no choice but to conclude that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74.

B. File Numbers 10 CRS 53201-03

[3] Defendant next argues that the trial court erred in revoking her probation in file numbers 10 CRS 53201-03 because it based the revocation, in part, on probation violations that were neither admitted by Defendant nor proven by the State at the probation hearing. We agree.

In file numbers 10 CRS 53201-03, Defendant was placed on 36 months of supervised probation on 22 September 2011 for offenses she committed in February and March of 2010. At the 5 March 2014 revocation hearing, Defendant admitted to three violations of the conditions of her probation: (1) testing positive for opiates on 7 June 2013 as alleged in paragraph 1 of the violation reports filed on 18 June 2013; (2) testing positive for opiates on 21 November 2013 as alleged in paragraph 1 of the violation reports filed on 26 November 2013; and (3) committing the crime of driving while license revoked in file number 13 CRS 7669 as alleged in paragraph 1 of the violation reports filed on 10 January 2014.

Our review of the transcript of the revocation hearing reveals that Defendant did not admit to — and no evidence was offered by the State regarding — the remaining alleged probation violations. Nevertheless, the trial court's judgments revoking Defendant's probation incorrectly state that she admitted to *all* of the violations alleged in paragraphs 1 and 2 of the 13 May 2013 violation reports, paragraph 1 of the 18 June 2013 violation reports, paragraph 1 of the 26 November 2013 violation reports, and paragraphs 1 and 2 of the 10 January 2014 violation reports.

We recognize that Defendant's admission to driving while license revoked, standing alone, could have served as a sufficient basis for the trial court to revoke her probation in file numbers 10 CRS 53201-03.

Although driving while license revoked is currently a Class 3 misdemeanor, it was classified as a Class 1 misdemeanor at the time she committed this offense on 6 August 2013. *See* N.C. Gen. Stat. § 20-28 (2011); 2013 Sess. Laws 995, 1305, ch. 360, § 18B.14(f) (amending N.C. Gen. Stat. § 20-28(a), effective 1 December 2013, to classify driving while license revoked as Class 3 misdemeanor instead of Class 1 misdemeanor "unless the person's license was originally revoked for an impaired driving offense, in which case the person is guilty of a Class 1 misdemeanor").

Thus, the trial court could have properly revoked Defendant's probation in file numbers 10 CRS 53201-03 on the basis that she committed a new crime[3] in violation of the conditions of her probation. *See* N.C. Gen. Stat. § 15A-1344(a),(d) (authorizing trial court to revoke probation if probationer commits new crime in any jurisdiction so long as probation is not revoked "solely for conviction of a Class 3 misdemeanor").

However, the judgments in this case do not provide us with a basis to determine whether the trial court would have decided to revoke Defendant's probation on the basis of her admission to committing the new crime of driving while license revoked in the absence of the other alleged violations that it mistakenly found that Defendant had admitted. We note that the trial court did not mark the box on the judgment forms specifying that each violation "in and of itself" would be a sufficient basis for revocation. Thus, we must remand for further proceedings so that the trial court can determine whether the revocation of Defendant's probation is appropriate in file numbers 10 CRS 53201-03.

Conclusion

For the reasons stated above, we vacate the trial court's judgments revoking Defendant's probation in file numbers 07 CRS 60072-74 and 10 CRS 53201-03 and remand for further proceedings consistent with this opinion in file numbers 10 CRS 53201-03.

VACATED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.

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3. While testing positive for illegal drugs is a violation of a condition of probation, we have held that a positive drug test does not constitute sufficient evidence, standing alone, to support a possessory offense. *State v. Harris*, 178 N.C. App. 723, 632 S.E.2d 534 (2006), *aff'd*, 361 N.C. 400, 646 S.E.2d 526 (2007). Thus, driving while license revoked would constitute the commission of a "new crime" while on probation but testing positive for narcotics, without more, would not.

STEELE v. BOWDEN

[238 N.C. App. 566 (2014)]

ANTONIO STEELE, Plaintiff
v.
TAMMY BOWDEN, ALAMANCE TOWING & RECOVERY, JOHN DOE I, d/b/a ALAMANCE TOWING & RECOVERY, and JOHN DOE II, Defendants

No. COA14-573

Filed 31 December 2014

1. Estoppel—collateral estoppel—previous order not a final judgment or entered in a separate action

The trial court did not violate the principle of collateral estoppel by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. Because the order denying the motion for judgment on the pleadings neither constituted a final judgment nor was entered in a separate action, there was no error.

2. Pleadings—summary judgment—granted after motion for judgment on pleadings denied—not improper overruling of another judge

The trial court did not improperly overrule another judge by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. A denial of a motion for judgment on the pleadings does not preclude summary judgment, which considers matters outside the pleadings. While both parties referenced facts outside the pleadings at the hearing for the motion on the pleadings, the trial court did not review any evidentiary materials when considering the motion. For this reason, the motion on the pleadings was not converted to a motion for summary judgment.

3. Conversion—summary judgment—defendant towed vehicle from co-owner without consent

The trial court did not err by granting summary judgment on plaintiff's claim for conversion where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. There was no genuine issue of material fact regarding whether defendant was entitled to "repossess" the vehicle because the forecasted evidence tended to show that defendant forcibly took possession without plaintiff's consent. These actions did not fall near the "shadowy line" limiting how far

a tenant in common may go in exercising control without creating a claim for conversion.

4. Trespass—personal property—summary judgment—defendant towed vehicle from co-owner without consent—sold vehicle to satisfy lien

The trial court did not err by granting summary judgment on plaintiff's claim for trespass to personal property where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. Defendant forcibly took the vehicle from plaintiff without his consent and allowed it to be sold to satisfy a lien, thereby preventing plaintiff from recovering the vehicle. Even assuming defendant would have been entitled to take the vehicle based upon a prior agreement with plaintiff, summary judgment nonetheless was proper because defendant failed to forecast any evidence of such an agreement at the hearing.

5. Pleadings—summary judgment hearing—defendant not permitted to give oral testimony—defendant offered no other evidentiary materials

The trial court did not abuse its discretion by declining to allow plaintiff to give sworn oral testimony at a summary judgment hearing or by declining to consider her unsworn oral statements. Because defendant did not present any affidavits, depositions, or other evidentiary materials at the hearing, her oral testimony would have impermissibly constituted more than "supplementary" evidence to serve as a "small link" between other evidence.

6. Unjust Enrichment—failure to submit jury instructions—reimbursement for payments on loaned vehicle

In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, the trial court erred by failing to instruct the jury to consider defendant's counterclaim seeking reimbursement for payments she made on the loan for the vehicle. Even though defendant's answer did not specifically designate a counterclaim, her answer nonetheless properly pled a counterclaim for unjust enrichment by alleging that she as co-signer had paid the balance of the automobile loan and that plaintiff now owed her reimbursement for the amount paid. The Court of Appeals vacated the judgment as to this issue and remanded for a trial on the counterclaim.

7. Appeal and Error—failure to preserve issues—failure to object—failure to cite authority—failure to introduce evidence

In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, several of defendant's arguments before the Court of Appeals were not properly preserved for appeal. Defendant's challenges concerning the jury instructions and special interrogatories submitted to the jury were not properly before the Court of Appeals because defendant failed to object at trial. In addition, defendant's argument regarding damages was viewed as abandoned because defendant failed to cite any authority in support of her argument. Last, defendant's argument regarding the trial court's decision on a motion in limine was not preserved because the plaintiff did not attempt to introduce the evidence at trial.

Judge ELMORE dissenting, in part, concurring, in part.

Appeal by defendant from order entered 29 October 2013 and judgment entered 12 November 2013 by Judge James T. Bryan in Orange County District Court. Heard in the Court of Appeals 22 October 2014.

Barry Nakell for Plaintiff.

Perry, Perry & Perry, P.A., by Maria T. Singleton, for Defendant.

ERVIN, Judge.

Defendant Tammy Bowden appeals from an order granting partial summary judgment in favor of Plaintiff Antonio Steele with respect to the conversion and trespass to personal property claims that he asserted against Defendant and from a judgment awarding Plaintiff a total of $10,570 in compensatory and punitive damages. On appeal, Defendant argues that the trial court erred by granting partial summary judgment in Plaintiff's favor with respect to his conversion and trespass to personal property claims on various procedural and substantive grounds, depriving her of the right to give sworn oral testimony at the summary judgment hearing, refusing to accept the oral statements that she made in open court in opposition to Plaintiff's summary judgment motion as evidence, refusing to submit the issues raised by her counterclaim to the jury, impermissibly presenting the jury with an "alternative verdict" form, incorrectly instructing the jury concerning the law applicable to

conversion and trespass to personal property claims, submitting the issue of punitive damages to the jury absent evidence that Defendant had acted maliciously, allowing the jury to award damages to Plaintiff despite the absence of sufficient evidence of the value of the vehicle in question, and granting Plaintiff's motion *in limine* seeking the exclusion of documents that should have been admitted into evidence. After carefully considering Defendant's challenges to the trial court's order and judgment in light of the record and the applicable law, we conclude that the trial court's order and judgment should be affirmed in part, that the trial court's judgment should be reversed in part, and that this case should be remanded to the Orange County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

Plaintiff and Defendant were married in 2004 and divorced in 2009. In January 2005, the two of them purchased a 2002 Ford Expedition that was financed using a loan that had been obtained from Santander Consumer USA. Defendant co-signed the loan with Plaintiff and the vehicle obtained as a result of the making of the loan was titled to both parties.

In the course of the process by which they parted company, the parties' entered an oral agreement under which Plaintiff would retain the vehicle, make timely payment as required by the loan agreement, and have Defendant's name removed from both the title to the vehicle and the loan agreement. Pursuant to this agreement, Plaintiff retained possession of the vehicle and made all of the remaining loan payments except for the final one. However, Plaintiff did not obtain the removal of Defendant's name from the title and the loan agreement or make all of the payments under the loan in a timely manner. As a result, an unpaid balance of $1,989.23 existed at the time that the loan should have been paid off.

Plaintiff continued to make payments against the outstanding balance under the loan after the date by which the full amount should have been paid in a total amount of $1,374.64, effectively leaving an outstanding balance of $694.62 due and owing under the loan agreement. Before Plaintiff completed the payment process, Defendant made the final payment by means of a check drawn on 28 March 2011 in the amount of $699.62. According to Defendant, Santander contacted her when Plaintiff failed to make timely payment under the loan and she eventually made the final payment herself in order to protect her access to credit.

After having made the final loan payment, Defendant attempted to "repossess" the vehicle from Plaintiff in March 2011 by hiring a towing company to remove the vehicle from Plaintiff's property. Plaintiff thwarted this attempted "repossession" by spotting the approaching tow truck and driving away at a high rate of speed. However, Plaintiff hit a curb and damaged the vehicle in the course of thwarting the "repossession." Defendant made a second attempt to "repossess" the vehicle in March or April 2011 and succeeded in obtaining possession of the vehicle on that occasion. Defendant claimed that she had made these efforts to "repossess" the vehicle in order to encourage Plaintiff to reimburse her for the amount of the final loan payment.

After obtaining possession of the vehicle, Defendant had an auto mechanic repair the damage that had occurred during the first "repossession" attempt. However, Defendant was unable to pay the mechanic for the required repairs. As a result, the vehicle was sold as part of the process of enforcing a repairman's lien.

B. Procedural History

On 11 July 2012, Plaintiff filed a complaint against Defendant, John Doe I doing business as Alamance Towing and Recovery, and John Doe II in which he asserted claims for conversion and assault and requested an award of compensatory and punitive damages. On 20 September 2012, Defendant filed an answer in which she denied the material allegations of Plaintiff's complaint, asserted that she had a legal right to take possession of the vehicle arising from Plaintiff's failure to make required loan payments, and requesting "reimbursement" for the amount of the loan balance.

On 16 November 2012, Plaintiff filed a motion seeking the entry of judgment on the pleadings. Judge Lunsford Long entered an order denying Plaintiff's motion for judgment on the pleadings on 9 January 2013. On 25 June 2013, Judge Beverly A. Scarlett entered an order allowing Plaintiff to amend his complaint to add a claim for trespass to real property. On 5 September 2013, Plaintiff filed a motion seeking the entry of partial summary judgment in his favor with respect to the issue of liability. On 29 October 2013, the trial court entered an order granting Plaintiff's motion with respect to the conversion and trespass to personal property claims and ordering that the amount of damages to which Defendant was entitled on the basis of his claims for conversion and trespass to personal property be determined by a jury. On the same

date, Plaintiff voluntarily dismissed his claims against Alamance Towing and Recovery and John Doe II.[1]

This case came on for trial before the trial court and a jury at the 29 October 2013 civil session of the Orange County District Court. At the beginning of the trial, the trial court recognized that Plaintiff had withdrawn his assault claim. On 30 October 2013, the jury returned a verdict awarding $10,320 in compensatory damages for Defendant's conversion of or trespass to the vehicle and $250 in punitive damages. The trial court entered a final judgment based on the jury's verdict on 12 November 2013. Defendant noted an appeal to this Court from the trial court's order and judgment.

II. Substantive Legal Analysis

A. Summary Judgment Order

In her brief, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his conversion and trespass to personal property claims. More specifically, Defendant contends that the granting of Plaintiff's summary judgment motion was precluded by Judge Long's refusal to enter judgment on the pleadings in Plaintiff's favor and that the record discloses the existence of genuine issues of material fact concerning the extent to which Defendant was entitled to forcibly take the vehicle from Plaintiff's possession sufficient to require a jury trial with respect to the issue of her liability for conversion and trespass to personal property. Defendant's contentions are without merit.

1. 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 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)). "A 'genuine issue' is one that can be maintained by substantial evidence. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

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1. As a result of the fact that Alamance Towing and Recovery was also named as John Doe I, the voluntary dismissal removed all of the defendants named in the complaint and amended complaint from this case except Defendant.

2. Defendant's Challenges to the Summary Judgment Order

a. Collateral Estoppel and Overruling Prior Order

[1] As an initial matter, Defendant contends that the trial court lacked the authority to grant summary judgment with respect to Plaintiff's claims on the grounds that those claims had previously been argued and adjudicated before a different trial judge in violation of the principle of collateral estoppel and the rule that one judge cannot overrule another judge of equal authority. In support of this contention, Defendant notes that Judge Long denied Plaintiff's motion for judgment on the pleadings with respect to Plaintiff's substantive claims by means of an order entered on 9 January 2013. Defendant's contention lacks merit.

"[A] claim cannot be barred by *res judicata* or collateral estoppel unless it was litigated to final judgment in a prior action." *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 601, 614 S.E.2d 268, 273 (2005). In view of the fact that Judge Long's order denying Plaintiff's motion for judgment on the pleadings was neither entered in a separate action or constituted a final judgment, that order does not have collateral estoppel effect.

[2] Defendant's claim that Judge Bryan improperly overruled Judge Long is devoid of merit as well. "It is well established that one [district] court judge may not ordinarily modify, overrule, or change the judgment or order of another [district] court judge previously entered in the same case." *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007). In considering a motion for judgment on the pleadings, the trial court is required to look to the face of the pleadings to determine whether the movant is entitled to judgment as a matter of law, with all of the factual allegations in the nonmovant's pleadings being deemed to have been admitted except to the extent that they are legally impossible or not admissible in evidence. *Governor's Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003). "By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matters outside the pleadings." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). Thus, "the denial of a motion [for judgment on the pleadings], which merely challenges the sufficiency of the [pleadings], does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint." *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 694, 179 S.E.2d 885, 887, *cert. denied*, 279 N.C.

348, 182 S.E.2d 580 (1971). As a result, Judge Bryan's decision to grant summary judgment in Plaintiff's favor did not constitute the overruling of Judge Long's order denying Plaintiff's motion for judgment on the pleadings.

In apparent recognition of this potential defect in her argument, Defendant contends that the argument that Plaintiff made in support of his judgment on the pleadings relied on information that was not contained in the pleadings, thereby converting Plaintiff's motion for judgment on the pleadings into one for summary judgment. *See Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007) (stating that "a motion [lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is converted to one for summary judgment if matters outside the pleading are presented to and not excluded by the court") (internal quotation marks omitted). "Ordinarily, if . . . the trial court considers matters outside the pleading[s], the motion shall be treated as one for summary judgment and disposed of as provided in [N.C. Gen. Stat. § 1A-1,] Rule 56." However, in the event that "the matters outside the pleading[s] considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the [motion] into one for summary judgment." *Governor's Club*, 152 N.C. App. at 245-46, 567 S.E.2d at 785 (internal quotation marks and citations omitted).

At the hearing held for the purpose of considering Plaintiff's motion for judgment on the pleadings, both parties made reference to facts not contained in the pleadings or in their oral arguments. However, the trial court was not presented with, and did not review, any evidentiary materials such as affidavits, deposition transcripts, or documents, in the course of deciding whether to grant or deny Plaintiff's motion for judgment on the pleadings. For that reason, the trial court's ruling denying Plaintiff's motion for judgment on the pleadings did, in fact, represent a ruling made with respect to a motion for judgment on the pleadings rather than with respect to a motion for summary judgment. As a result, the trial court was not precluded from granting Plaintiff's summary judgment motion for either of the reasons stated in Defendant's brief.

b. Conversion Claim

[3] Secondly, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his conversion claim. More specifically, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiff with respect to his conversion claim on the grounds that the record disclosed the existence of

genuine issues of material fact concerning the extent to which Defendant had a lawful right to "repossess" the vehicle. Defendant's contention lacks merit.

"[C]onversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986). "[T]wo essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., Inc.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). In cases involving personal property owned jointly by multiple individuals as tenants in common, "where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him and exercises a dominion over it, either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion." *Bullman v. Edney*, 232 N.C. 465, 468, 61 S.E.2d 338, 340 (1950).

A careful review of the record convinces us that Defendant has not forecast any evidence that, if accepted as true, would support a decision in her favor with respect to Plaintiff's conversion claim. Simply put, all of the evidence presented for the trial court's consideration at the summary judgment hearing tends to show that Defendant, who owned the vehicle in question jointly with Plaintiff as tenants in common, took forcible possession of that vehicle from Plaintiff without Plaintiff's consent. Although "it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion," *Waller v. Bowling*, 108 N.C. 289, 295, 12 S.E. 990, 992 (1891), Defendant has not identified the existence of any facts that would have authorized her to forcibly "repossess" the vehicle, and none are apparent on the face of the record. Simply put, while Defendant may have had a legal or equitable interest in the vehicle, Defendant has not cited any authority indicating that she had the right to forcibly take that vehicle from Plaintiff given his status as a co-owner. As a result, since the undisputed evidence contained in the record establishes that Defendant's conduct did not involve actions near the "shadowy line" referenced in *Waller*, the trial court did not err by granting summary judgment in Plaintiff's favor with respect to his conversion claim.

c. Trespass to Personal Property Claim

[4] Similarly, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his trespass to personal property claim. Once again, Defendant contends that the record reflects the existence of genuine issues of material fact concerning the extent to which she had a right to "repossess" the vehicle. Defendant's argument is unpersuasive.

"A successful action for trespass to chattels requires the party bringing the action to demonstrate that she had either actual or constructive possession of the personalty or goods in question at the time of the trespass, and that there was an unauthorized, unlawful interference or dispossession of the property." *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (internal citation omitted). "The key to assessing possession under a trespass to chattel claim is determining if there is a right to present possession whenever so desired or a right to immediate possession." *Id.* Moreover, "[i]n a trespass action a defendant may assert that the entry was lawful or under legal right as an affirmative defense." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 628, 588 S.E.2d 871, 874 (2003). As a result, given that Plaintiff had actual possession of the vehicle at the time that it was taken, the ultimate question raised by Plaintiff's trespass to personal property claim is whether "there was an unauthorized, unlawful interference or dispossession of the property." *Fordham*, 351 N.C. at 155, 521 S.E.2d at 704.

In her brief, Defendant argues that, as a co-owner of the vehicle, she had the authority to take possession of the vehicle from Plaintiff. As an initial matter we must note that, instead of pointing to the existence of a disputed factual issue, Defendant's argument is nothing more or less than a statement of what she believes the legal effect of the essentially undisputed facts to be. In light of that fact, the proper course for us to take in the event that we were to accept Defendant's argument as persuasive would be for us to reverse the trial court's judgment and remand this case for the entry of judgment in Defendant's favor rather than to order a new trial. Thus, the ultimate issue raised by Defendant's argument is one of law rather than one of fact.

As we have already noted, a claim for conversion is available in the event that "the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him and exercises a dominion over it." *Bullman*, 232 N.C. at 468, 61 S.E.2d at 340. Although the principle set forth in *Bullman* was enunciated in the context of a conversion claim, we are unable to see why a different rule should be

applicable in trespass to personal property cases. As the Supreme Court has stated in the landlord-tenant context, our laws, instead of permitting someone "to take the law into [her] own hands," require that a "remedy . . . be sought through those peaceful agencies which a civilized community provides to all its members." *Spinks v. Taylor*, 303 N.C. 256, 262, 278 S.E.2d 501, 505 (1981). In the event that we were to accept Defendant's implicit assertion that the principle enunciated in *Bullman* did not apply in trespass to personal property cases, "it must necessarily follow as a logical sequence, that so much [force] may be used as shall be necessary to overcome resistance, even to the taking of human life," *Spinks*, 303 N.C. at 263, 278 S.E.2d at 505, in the course of the private "repossession" of an item of personal property, resulting in an untenable situation in which the parties would be allowed to engage in an escalating cycle of violence during which each co-owner would be entitled to forcibly take the jointly owned property from the other co-owner in turn. As a result, instead of allowing one co-owner to forcibly seize property from another co-owner, we believe that a co-owner of jointly owned property "may not [take possession] against the will of the [other owner]," with "an objection by the [other owner being sufficient to] elevate[] the [retaking] to a forceful one," leaving "the [co-owner's] sole legal recourse [to be] to the courts." *Id.* at 263, 278 S.E.2d at 505.

The mere taking of an item of jointly held property, standing alone, is not sufficient to support the maintenance of an action for trespass to personal property. Instead, since "[o]ne tenant in common of a personal chattel has as much right to the possession of it as the other," "one tenant in common cannot maintain [an action for] trespass or trover against his cotenant without showing that the cotenant has destroyed the joint property." *Lucas v. Wasson*, 14 N.C. 398, 399 (1832); *see also Rice v. Bennington County Sav. Bank*, 93 Vt. 493, 503, 108 A. 708, 712 (1920) (stating that "[a] joint tenant of personal property has such title thereto that he may maintain an action against a co-tenant who sells or destroys the same.") (citing *Lucas*, 14 N.C. at 398). However, since Defendant allowed the vehicle to be sold for the purpose of satisfying a lien, "such a disposition of it [was] made as to prevent [Plaintiff] from recovering it." *Thompson v. Silverthorne*, 142 N.C. 12, 14, 54 S.E. 782, 782 (1906) (quoting *Grim v. Wicker*, 80 N.C. 343, 344 (1879))[2]. As a result, Plaintiff was

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2. Aside from the fact that Defendant, rather than Plaintiff, sent the vehicle for repairs and incurred responsibility for paying the resulting bill, Defendant never argued in her brief that Plaintiff's ability to redeem the vehicle precluded the maintenance of a claim for trespass to personal property. *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

entitled to maintain a claim for trespass to personal property against Defendant despite Defendant's status as co-owner of the vehicle.

Although Defendant contends that she was entitled to "repossess" the vehicle based upon an agreement that she had reached with Plaintiff, her assertion to that effect does not justify a decision to overturn the trial court's award of summary judgment in Plaintiff's favor. Assuming, without in any way deciding, that such an oral agreement between the parties would be enforceable, Defendant's assertions relating to this alleged agreement do not suffice to preclude the entry of summary judgment in Plaintiff's favor with respect to the trespass to personal property claim given the absence of any evidence tending to show that such an agreement ever existed.

According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C. App. 215, 217, 293 S.E.2d 215, 216-17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835; *see also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (providing that, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). A careful review of the record has persuaded us that Defendant adduced no facts at the summary judgment hearing tending to show the existence of an agreement of the sort upon which she seeks to rely in opposition to Plaintiff's motion. Instead, Defendant simply relied on her assertion that Plaintiff "defaulted on payments on the 2002 Ford Expedition and the finance company contacted her for the balance of the loan since Plaintiff . . . had defaulted." Thus, given the complete absence of any evidence tending to show the existence of an agreement like the one upon which Defendant has attempted to rely, the trial court did not err by granting Plaintiff's request for an award of summary judgment in his favor with respect to his trespass to personal property claim. As a result, Defendant is not entitled to relief from the trial court's summary judgment order on the basis of this contention.

B. Defendant's Other Claims

1. Oral Testimony at Summary Judgment Hearing

[5] In her brief, Defendant contends that the trial court erred by depriving her of the right to give sworn oral testimony at the summary judgment hearing and by refusing to accept the statements that she made in open court in opposition to Plaintiff's summary judgment motion as evidence. Defendant's argument is unpersuasive.

As a general proposition, evidence is presented at a hearing convened to address the merits of a summary judgment motion "through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128, *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003). Although "[o]ral testimony at a hearing on a motion for summary judgment may be offered," "the trial court is only to rely on such testimony in a supplementary capacity, to provide a 'small link' of required evidence, but not as the main evidentiary body of the hearing." *Id.* at 296, 577 S.E.2d at 129. In addition, the extent to which oral testimony is admitted at a summary judgment hearing is a matter within the trial court's discretion. *Pearce Young Angel Co. v. Don Becker Enterprises, Inc.*, 43 N.C. App. 690, 692, 260 S.E.2d 104, 105 (1979). "Generally, 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." *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (internal quotation marks and citation omitted).

As the record clearly reflects, Defendant did not submit any affidavits, depositions, or other evidentiary materials in opposition to Plaintiff's request for the entry of summary judgment in his favor.[3] Had the trial court allowed Defendant to present oral testimony at the hearing, Defendant's testimony would not have constituted "supplementary" evidence for the purpose of "provid[ing] a 'small link' of required evidence." *Strickland*, 156 N.C. App. at 296, 577 S.E.2d at 129. Instead, Defendant's testimony would have constituted Defendant's entire showing in response to Plaintiff's summary judgment motion. In light of this set of circumstances, we are unable to say that the trial court abused its discretion by denying Defendant's request that she be allowed to

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3. Plaintiff did, however, submit Defendant's deposition for the trial court's consideration at the summary judgment hearing.

offer oral testimony at the summary judgment hearing or by failing to consider Defendant's unsworn oral statements as evidence and do not believe that Defendant is entitled to relief from the trial court's summary judgment order on the basis of this contention.

2. Counterclaim

[6] Secondly, Defendant contends that the trial court erred by failing to instruct the jury to address the merits of her counterclaim, in which she sought reimbursement from Plaintiff for the payments that she had made on the vehicle-related loan. Defendant's contention has merit.[4]

> The trial court is required to submit to the jury those issues raised by the pleadings and supported by the evidence. An issue is supported by the evidence when there is substantial evidence, considered in the light most favorable to the non-movant, in support of that issue. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In re Estate of Ferguson, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (internal quotation marks and citations omitted). A litigant is entitled to relief on appeal when the trial court's refusal to submit an issue for the jury's consideration results in the creation of a bar to the litigant's recovery. *See Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 351 (1971) (holding that the issue of whether the defendant's willful and wanton conduct was sufficient to preclude the rejection of the plaintiff's personal injury claim on contributory negligence grounds).

As an initial matter, we must determine whether Defendant properly pled a counterclaim seeking reimbursement for the payments that she made in connection with the vehicle-related loan in her responsive pleading. According to N.C. Gen. Stat. § 1A-1, Rule 8(a), a pleading that attempts to assert a counterclaim must contain (1) "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions

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4. Although Plaintiff contends that the jury heard Defendant's contention that she was entitled to be reimbursed for the amount of the final loan payment and effectively considered this claim in the course of rendering its verdict for that reason, we are unable to accept this contention as valid given that careful scrutiny of the trial court's instructions reveals that the jury was never told that it could consider Defendant's reimbursement claim or adjust the amount of damages to be awarded to Plaintiff to reflect the fact that Defendant made the final payment. As a result, we are not persuaded by Plaintiff's argument that Defendant's reimbursement claim is adequately reflected in the jury's verdict.

or occurrences, intended to be proved showing that the pleader is entitled to relief" and (2) "[a] demand for judgment for the relief to which he deems himself entitled." N.C. Gen. Stat. § 1A-1, Rule 8(a). The fact that the defendant may have failed to explicitly indicate that he or she is asserting a counterclaim is irrelevant, since N.C. Gen. Stat. § 1A-1, Rule 8(c), provides that, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." *See also Hunt v. Hunt*, 117 N.C. App. 280, 283, 450 S.E.2d 558, 561 (1994).

A careful review of the record establishes that Defendant's answer asserted a counterclaim that complied with the provisions of N.C. Gen. Stat. § 1A-1, Rule 8(a), given that it alleged that "Defendant had to pay the balance of the loan as the co-signer in the amount of approximately $1,000 in which the Plaintiff now owes the Defendant" and requested "[r]eimbursement in the amount in excess of $5,000 for loan balance, harassment, mental anguish, malicious damages." Although Defendant did not specifically designate this set of statements as a counterclaim, we believe that considerations of simple "justice require[] that the trial court treat the defendant's pleadings as a[n attempt to assert a] counterclaim," *Hunt*, 117 N.C. App. at 283, 450 S.E.2d at 561, and that the trial court erred by apparently reaching a contrary conclusion.

In addition to having sufficiently pled the facts upon which she relied in support of her counterclaim and request for an award of relief, Defendant's allegations alleged a valid basis for the recovery of damages.

> Unjust enrichment is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. [A] person who has been unjustly enriched at the expense of another is required to make restitution to the other. A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.

Hinson v. United Financial Services, Inc., 123 N.C. App. 469, 473, 473 S.E.2d 382, 385, *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996) (internal quotation marks and citations omitted). The measure of damages for unjust enrichment is the reasonable value of the goods and services that the claimant provided to the other party. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). In view of the fact that Defendant has alleged that she paid off the balance of the loan relating to the vehicle and that Plaintiff had not reimbursed her for the

payments that she had made, Defendant has pled facts that, if believed, tend to show that Plaintiff had been "unjustly enriched at [Defendant's] expense," *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385, and that Defendant should be reimbursed for the $699.62 that she paid in connection with the vehicle-related loan.

Finally, Defendant adduced sufficient evidence at trial to support the submission of her unjust enrichment claim to the jury.[5] According to Plaintiff's Exhibit No. 5, Defendant wrote a check on 28 March 2011 in the amount of $699.62 to "Santander Consumer USA Inc.," and indicated on the memo line that this check "Paid" "Acct #1750283" "in Full." According to Plaintiff's Exhibit No. 6, which was the payment history associated with Account No. 1750283, a final payment in the amount of $699.62 was made to Santander by means of a check bearing the same number as that shown on Plaintiff's Exhibit No. 5. In view of the fact that these two exhibits, standing alone, tend to show that Defendant paid off the vehicle-related loan and the fact that the parties do not appear to dispute that, under the domestic settlement between the parties, Plaintiff had primary responsibility for paying off the vehicle-related loan, the trial court erred by refusing to submit Defendant's counterclaim for the jury's consideration. As a result, the lower court's judgment should be vacated to the extent that it constitutes a rejection of Defendant's counterclaim and this case should be remanded to the Orange County District Court for a trial on the issues raised by Defendant's counterclaim.

3. Other Issues

[7] Finally, Defendant has raised a number of other issues in her brief that merit passing attention. First, Defendant has challenged the form of the special interrogatories that were submitted to the jury and the manner in which the trial court instructed the jury concerning various issues. However, Defendant failed to object to either the verdict sheet or the jury instructions before the trial court. N.C. R. App. P. 10(a)(1) (stating 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") and N.C. R. App. P. 10(a)(2) ("[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented

5. Defendant has not asserted in her brief that she presented sufficient evidence to support a claim for "harassment, mental anguish, and malicious damages" and we believe that her assessment of the state of the evidentiary record concerning that set of issues is correct.

on appeal unless the party objects thereto before the jury retires to consider its verdict"). In addition, although Defendant appears to be attempting to challenge the jury's compensatory and punitive damages award, she merely makes a passing reference to this set of issues in her brief without citing any authority in support of her position. N.C. R. App. P. 28(b)(6) (stating that any issue "in support of which no reason or argument is stated, will be taken as abandoned"). Finally, Defendant challenges the trial court's decision, in ruling on a motion *in limine*, to preclude the admission of documents arising from a bankruptcy petition filed by Plaintiff on 22 November 2011. However, Plaintiff did not attempt to introduce the documents at trial after the trial court granted Plaintiff's motion *in limine*. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 620, 504 S.E.2d 102, 105 (1998) (stating that "[a] party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to . . . attempt to introduce the evidence at the trial") (quotation marks and citation omitted). As a result, since none of these arguments have been properly preserved for purposes of appellate review, they provide no basis for a decision to overturn the trial court's order or judgment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, although the trial court erroneously refused to allow the jury to consider Defendant's counterclaim, it did not err by holding Defendant liable for conversion and trespass to personal property and awarding compensatory and punitive damages to Plaintiff based on those claims. As a result, we affirm the trial court's judgment in part, reverse the trial court's judgment in part, and remand this case to the Alamance County District Court for a trial on the issues raised by Defendant's counterclaim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Judge BRYANT concurs.

Judge ELMORE dissents in part and concurs in part.

ELMORE, Judge, dissenting, in part, concurring, in part.

Because I believe the trial court erred in granting partial summary judgment in plaintiff's favor on grounds that the record does not disclose the existence of a genuine issue of material fact concerning the

extent, if any, to which defendant was authorized to repossess the 2002 Ford Expedition, I respectfully dissent.

A. 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)). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

B. Defendant's Challenges to the Summary Judgment Order

I. Conversion Claim

Defendant argues that the trial court erred in entering the 29 October order granting defendant's motion for partial summary judgment on the claim of conversion. I agree, because the evidence suggests that a genuine issue of material fact concerning the extent to which defendant had a lawful right to repossess the vehicle is present in the record.

"The tort of conversion is well defined as an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the . . . exclusion of an owner's rights." *Vaseleniuck Engine Dev., LLC v. Sabertooth Motorcycles, LLC*, ___ N.C. App. ___, ___, 727 S.E.2d 308, 310 (2012) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). In cases involving tenants in common of chattel "where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him, and exercises a dominion over it either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion." *Bullman v. Edney*, 232 N.C. 465, 468, 61 S.E.2d 338, 340 (1950). However, "it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion." *Waller v. Bowling*, 108 N.C. 289, 295, 12 S.E. 990, 992 (1891).

The crux of defendant's argument is that the facts of the instant case give rise to a genuine issue of material fact as to whether defendant's possession of the vehicle was unauthorized. Again, I agree. Here, the

liability for plaintiff's claim of conversion hinges on whether defendant's possession of the vehicle was authorized or unauthorized under these particular circumstances.

The record discloses that pursuant to an alleged oral agreement between the parties, plaintiff was to retain possession of the vehicle, make timely loan payments, and remove defendant's name from the vehicle's title.[1] However, plaintiff did not comply with the terms of the parties' agreement because he neither removed plaintiff's name from the vehicle's title nor did he make all loan payments in a timely fashion. Defendant alleges that she often received calls from creditors regarding overdue payments on the car loan. Thus, it was plaintiff who purportedly elected to keep defendant's name on the vehicle's title and plaintiff who allegedly failed to make timely loan payments. There is evidence in the record to suggest that when defendant took possession of the vehicle, it was titled in her name and she had made the final loan payment. Based on this evidence, there exists in this case a question of whether defendant came into possession of the automobile rightfully despite the record evidence that plaintiff did not surrender the vehicle to defendant voluntarily.

It appears that the trial court determined on its own accord that defendant had no right to the possession of the vehicle. However, in ruling on plaintiff's motion for partial summary judgment, it was the trial court's duty to determine whether a genuine issue of material fact existed, not to determine the facts so that no issue existed. In the instant case, the trial court interpreted the facts as it saw fit.

Defendant has convinced me that a genuine issue of material fact existed regarding whether she had valid ownership of the vehicle such that her possession was authorized. Accordingly, I am of the opinion that the trial court erred in granting plaintiff's motion for summary judgment on the claim of conversion.

C. Trespass to Personal Property

Defendant argues that the trial court erred by granting summary judgment in plaintiff's favor with respect to his trespass to personal property claim. I agree with defendant that the record reflects the existence of a genuine issue of material fact concerning whether there was an unauthorized, unlawful interference or dispossession of the personal property.

1. I do not hold that an oral agreement exists or that it is likewise enforceable. I merely recognize that defendant has alleged that such an agreement was entered by the parties.

A successful action for trespass to chattel requires the party bringing the action to demonstrate that "[(1)] he had either actual or constructive possession of the personalty or goods in question at the time of the trespass, and [(2)] that there was an unauthorized, unlawful interference or dispossession of the property." *Kirschbaum v. McLaurin Parking Co.*, 188 N.C. App. 782, 786-87, 656 S.E.2d 683, 686 (2008) (citation and quotation omitted). "The key to assessing possession under a trespass to chattel claim is determining if there is a right to present possession whenever so desired . . . or a right to immediate actual possession." *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (citation omitted).

The question before the trial court was whether "there was an unauthorized, unlawful interference or dispossession of the property." *Id.* I recognize that the mere taking of an item of jointly held property, standing alone, is insufficient to support an action for trespass to chattel. Instead, there must be a showing that a co-tenant who was in unlawful possession of the personal property also destroyed the joint property or placed it beyond recovery by means of legal process. *Doyle v. Bush*, 171 N.C. 10, 86 S.E. 165, 166 (1915) (citations omitted). On these facts, I do not believe that defendant's conduct of allowing the vehicle to be sold for the purposes of satisfying a mechanic's lien necessarily was sufficient to show that defendant destroyed the personal property for purposes of this claim. This is because, as discussed above, I am not convinced that defendant did not have an equal right of possession of the vehicle given her status as co-owner on these facts.

In addition, there is evidence in the record that plaintiff was afforded the opportunity to recover the vehicle from the auto mechanic after it had been repaired, but he elected not to do so. This raises a question of whether plaintiff was in fact dispossessed of the personal property. Moreover, in November 2011, plaintiff filed for bankruptcy and listed the vehicle as an item of joint personal property that was currently in defendant's possession. He claimed that the vehicle was valued at $3,940 and sought an exemption for half of that value. Given this, it appears that plaintiff likely did not consider the vehicle to be destroyed, but instead he considered it to be in defendant's lawful possession. I am of the opinion that there is a genuine issue of material fact as to whether there was an unauthorized, unlawful interference or dispossession of the personal property. Therefore, I conclude that the trial court erred in granting plaintiff's motion for summary judgment on plaintiff's trespass to personal property claim.

In sum, because I believe the trial court erred in granting summary judgment in favor of plaintiff with respect to his conversion and trespass to personal property claims, I respectfully dissent from the majority's decision to affirm the trial court's judgment in plaintiff's favor. I would reverse the trial court's order and remand for further proceedings. I concur in all other aspects of the majority's opinion.

TSG FINISHING, LLC, Plaintiff
v.
KEITH BOLLINGER, Defendant

NO. COA14-623

Filed 31 December 2014

1. **Appeal and Error—interlocutory orders—denial of preliminary injunction—violation of non-compete agreement—misappropriation of trade secrets**

The merits of an appeal from the denial of a preliminary injunction were reached, even though the order was interlocutory, in an action involving a non-compete agreement and the potential misappropriation of trade secrets. Plaintiff was able to show that a substantial right could be lost without immediate appellate review.

2. **Trade Secrets—misappropriation—likelihood of success on the merits**

The trial court erred by concluding that plaintiff had not demonstrated a likelihood of success on the merits of plaintiff's claim for trade secret misappropriation. Although general processes are too vague to receive protection, plaintiff sought to protect specific knowledge of each discrete step in the process and presented sufficient evidence on its specific trade secrets to warrant protection. Additionally, plaintiff presented prima facie evidence of misappropriation.

3. **Employer and Employee—non-compete agreement—preliminary injunction—likelihood of success on merits**

The trial court erred when ruling on a motion for a preliminary injunction by concluding that plaintiff failed to present a likelihood of success on the merits of its claim for breach of a non-compete agreement governed by Pennsylvania law. The non-compete was

validly assigned to plaintiff through a bankruptcy reorganization, the agreement was reasonable to protect TSG's legitimate business interests, and the equities weighed in favor of enforcement under the facts.

4. Injunctions—preliminary—irreparable loss—likelihood demonstrated

In an action for violation of a non-compete agreement and misappropriation of trade secrets, plaintiff demonstrated that it was likely to suffer irreparable loss unless a preliminary injunction was issued where plaintiff was at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry.

Appeal by plaintiff from order entered 20 February 2014 by Judge Calvin E. Murphy in Catawba County Superior Court. Heard in the Court of Appeals 3 November 2014.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

Patrick, Harper & Dixon, LLP, by Michael P. Thomas, for defendant-appellee.

HUNTER, Robert C., Judge.

TSG Finishing, LLC ("plaintiff" or "TSG") appeals from an order denying its motion for a preliminary injunction aimed at preventing its former employee, Keith Bollinger ("defendant"), from breaching a non-competition and confidentiality agreement ("the non-compete agreement") and misappropriating TSG's trade secrets. On appeal, plaintiff contends that the trial court erred by denying its motion for a preliminary injunction because: (1) it has demonstrated a likelihood of success on the merits of its claims for breach of contract and misappropriation of trade secrets; and (2) it would suffer irreparable harm without issuance of the preliminary injunction.

After careful review, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

Background

TSG is in the business of fabric finishing. It has three plants in Catawba County, North Carolina. Rather than manufacturing

fabrics, TSG applies chemical coatings to achieve whichever result is desired by the customer, such as coloring, stiffening, deodorizing, and abrasion resistance.

Defendant began working in the field of fabric finishing for Geltman Corporation after graduating from high school in 1982. He has no formal education beyond high school. TSG, Incorporated ("TSG, Inc.")[1] acquired Geltman in 1992, and defendant stayed on to work for TSG, Inc. By the late 1990's, defendant was promoted to Quality Control Manager.

Defendant was responsible for assessing a customer's finishing needs and developing a finishing protocol for that customer. Defendant also helped in the creation of a "style data card" for each customer. The style data cards contained information on each step of the finishing process, such as: (1) the chemical finish compound, 70 percent of which was proprietary to TSG; (2) "cup weight" density; (3) needle punch technique; (4) type of machine needed for the needle punch technique; (5) speed of needle punch; (6) types of needles used; (7) needle punch depths; (8) method of compound application; (9) speed of compound application; (10) blade size; (11) fabric tension; and (12) temperature and type of drying required.

Defendant testified during deposition that some of these factors required trial and error to achieve a customer's desired result. For example, on one of the style data cards used to explain defendant's work-related duties during the deposition, defendant had marked a number of changes to the various factors listed and signed his initials to the changes. He testified that he changed the data entered by the customer because subsequent testing revealed different and more efficient methods to achieve the result. He also testified that the results of the trials he conducted and the knowledge he gained regarding how to achieve these results were not known outside of TSG. Michael Goldman, the Director of Operations at TSG, filed an affidavit in which he asserted that some of the customer projects that defendant worked on required over a year's worth of trial and error to achieve a customer's desired result.

TSG expends great effort to keep its customer and finishing information confidential. Specifically, it uses a code system in its communications with customers that allows the customer to identify the type of finish it wants, but does not reveal the chemicals or processes involved in creating that finish. TSG has confidentiality agreements in place with many of its customers. Third parties must sign confidentiality agreements and

1. As will be discussed below, plaintiff is a wholly owned subsidiary of TSG, Inc.

receive a temporary identification badge when visiting TSG's facilities. TSG's computers are password protected, with additional passwords being required to access the company's production information.

In 2007, TSG, Inc. and defendant entered into a non-disclosure and non-compete agreement. In exchange for an annual increase in compensation of $1,300.00 and a $3,500.00 signing bonus, defendant agreed not to disclose TSG, Inc.'s confidential or proprietary trade secrets and further assented to employment restrictions after his tenure at the company ended.

TSG, Inc. filed for bankruptcy in 2009. By a plan approved by the United States Bankruptcy Court on 1 May 2011, TSG, Inc. transferred its interests to plaintiff, a wholly owned operating subsidy of TSG, Inc., which remained in operation. According to defendant, every aspect of his day-to-day job remained the same after bankruptcy reorganization.

In July 2013, defendant and a direct competitor of TSG, American Custom Finishing, LLC ("ACF"), began negotiations regarding defendant's potential to leave TSG and work for ACF. According to TSG, defendant resigned from his position on 21 November 2013 and announced that he was leaving to become plant manager for ACF at a plant five miles away from TSG. Defendant claims that he gave TSG two weeks' notice on 21 November 2013 but was terminated immediately and escorted off of the premises. Defendant began working for ACF the following Monday, on 25 November 2013. During his deposition, defendant testified that TSG and ACF shared certain customers, and that defendant is responsible for performing similar customer evaluations for ACF as he did at TSG.

TSG filed suit against defendant on 16 January 2014, alleging claims for breach of contract, misappropriation of trade secrets, and unfair and deceptive practices. TSG also moved for a preliminary injunction to prevent defendant from breaching the non-compete and misappropriating TSG's trade secrets. A confidential hearing was held on plaintiff's motion, and by order entered 20 February 2014, the trial court denied the motion for preliminary injunction. Plaintiff filed timely notice of appeal.

Grounds for Appellate Review

[1] We must first address the interlocutory nature of plaintiff's appeal. Orders granting or denying preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives

the appellant of a substantial right which he would lose absent review prior to final determination." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004) (citations and internal quotation marks omitted).

> [W]here time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, [where a] case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). Citing the rule in *A.E.P. Indus., Inc.*, this Court has held that "the same reasoning applies to agreements between an employer and employee regarding protection of the employer's alleged trade secrets." *Horner Intern. Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 855 (2014). Accordingly, because both a non-compete and the potential misappropriation of trade secrets are implicated by this case, we conclude that plaintiff has succeeded in demonstrating how a substantial right may be lost without immediate appellate review; thus, we will reach the merits of the appeal.

Discussion

I. Misappropriation of Trade Secrets

[2] Plaintiff first argues that the trial court erred by concluding that it has not demonstrated a likelihood of success on the merits of its claim for trade secret misappropriation. After careful review, we agree.

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It 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.

A.E.P. Indus., Inc., 308 N.C. at 401, 302 S.E.2d at 759-60 (citations and internal quotation marks omitted). The standard of review from a denial

of a preliminary injunction is "essentially *de novo*," *VisionAIR*, *Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362, wherein this Court is not bound by the factual findings of the trial court, but may review and weigh the evidence and find facts for itself, *A.E.P. Indus.*, *Inc.*, 308 N.C. at 402, 302 S.E.2d at 760. "Nevertheless[,] a trial court's ruling on a motion for preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR*, *Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362.

The Trade Secrets Protection Act ("TSPA") allows for a private cause of action where a plaintiff can prove the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. §§ 66-152(1), -153 (2013).

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2013). To determine what information should be treated as a trade secret for the purposes of protection under the TSPA, the Court should consider the following factors:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
>
> (3) the extent of measures taken to guard secrecy of the information;
>
> (4) the value of the information to business and its competitors;

> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003).

"[A]ctual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation[.]" N.C. Gen. Stat. § 66-154(a) (2013).

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155 (2013).

Here, the trial court determined that plaintiff failed to demonstrate likelihood of success on the merits of its misappropriation of trade secrets claim for the following reasons: (1) plaintiff asserted that its finishing process "as a whole" was the trade secret for which it sought protection, and under the holding of *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003), general processes are too vague to receive TSPA protection; and (2) defendant's familiarity with customer preferences was "more akin to general knowledge and skill acquired on the job than any trade secret maintained by [p]laintiff." For the following reasons, we disagree with the trial court's conclusions.

First, contrary to the trial court's assessment of the preliminary injunction hearing, plaintiff did not "continually assert" that it was the "combination of [the] components," or the "process as a whole," for which it sought protection. Although TSG's Chief Executive Officer Jack Rosenstein ("Rosenstein") did say that the entire equation of processes was a trade secret in and of itself, he also testified that the particular steps in the process were also trade secrets. As an example, Rosenstein highlighted the needle punch technique on a style data card that defendant had worked on during his time at TSG. The customer initially requested that the fabric be put through the needle punch machine one

time at a specific setting. Through trial and error, defendant discovered that the customer's desired result could not be accomplished by running the needle punch machine one time at this setting, so he changed the process after experimenting with varying settings. Rosenstein testified the needle punch research for this client, in addition to the similar types of experimentation done to various processes throughout the finish equation, were trade secrets. Specifically, he testified as follows:

> [ROSENSTEIN]: That's all part of the trade secrets. That's all part of what [defendant], in his own mind when he's looking at a new fabric, needs to determine – which Latex should be used, what density needs to be used, whether it needs to be needle punched or not and then within that which – which needle punch, what depth of penetration – exactly what the parameters are. Then he needs to determine what range it needs to go on, what speed needs to be run, what the finish is. . . .
>
> Q: And so each one of those variables impacts the other variables in the equation?
>
> [ROSENSTEIN]: Yes.

Therefore, it was not just the process as a whole, but the specific knowledge defendant gained as to each discrete step in the process, that TSG sought to protect.

Based on *Analog Devices, Inc.*, the trial court concluded that plaintiff had failed to "put forward enough facts to support trade secret protection over the process as a whole or any particular component such that the [trial court] would be justified in granting the injunction sought." However, the *Analog Devices, Inc.* Court upheld the denial of a preliminary injunction in part because the differences between the defendant's former and new employers "render[ed] the alleged trade secrets largely non-transferable." *Analog Devices, Inc.*, 157 N.C. App. at 467, 579 S.E.2d at 453. Furthermore, the Court determined that the plaintiff did not carry its burden of producing evidence specifically identifying the trade secrets it sought to protect. *Id.* at 469, 579 S.E.2d at 454. The evidence before the Court showed that some of the plaintiff's production techniques were "easily and readily reverse engineered," while others were "either generally known in the industry, are process dependent so as to preclude misappropriation, or are readily ascertainable by reverse engineering." *Id.* at 470, 579 S.E.2d at 454. Finally, regarding the processes used by the plaintiff, the Court found that there was substantial differences between the products of the two companies that would "require

new experimentation and development of new ways to effectively identify efforts that will lead to successful development." *Id.* Thus, the Court affirmed the trial court's denial of the preliminary injunction. *Id.* at 472, 579 S.E.2d at 455.

The facts of this case are readily distinguishable from *Analog Devices, Inc.*, and they demonstrate that TSG would likely prevail on the merits of its claim for misappropriation of trade secrets. Using the factors enunciated by *Area Landscaping, L.L.C.*, 160 N.C. App. at 525, 586 S.E.2d at 511, TSG presented sufficient evidence on its specific trade secrets to warrant protection. First, Rosenstein testified that the company spends $500,000.00 per year on research and development in order to create unique finishes and applications for his customers. Defendant testified that the results of his experimentation at TSG regarding specific process refinements were not known outside of TSG. Rosenstein also testified that defendant's work was not something that anyone else in the industry would know without years of trial and error by experienced technicians. Security measures were in place such that only top-level employees were familiar with the proprietary information defendant was in charge of developing. The trial court acknowledged in its order that TSG "maintains significant security measures over its finishing process." Indeed, TSG made its employees, customers, and facility visitors sign confidentiality forms to protect this information. Additionally, Rosenstein testified that defendant's disclosure of the trade secrets would give ACF the opportunity to save "untold amounts of hours, days, weeks, and months to come up with these finishes and these applications." Rosenstein testified that defendant could help ACF achieve their customers' desired results, which they sometimes shared with TSG, without spending the money on research and development that TSG invested. Defendant admitted as much in his deposition when he testified that he performs many of the same duties for ACF for some of the same customers that he formerly served at TSG. Therefore, unlike in *Analog Devices, Inc.*, there was significant evidence showing that TSG's trade secrets were transferrable to ACF. Over the past two decades, TSG invested millions of dollars to develop and protect the information defendant compiled through his years of employment. The director of operations at TSG testified in deposition that defendant would sometimes work for more than a year on a process in order to achieve a desired result. There is no indication in the record that these process are able to be "reverse engineered" like those in *Analog Devices, Inc.*, and it is undisputed that they are not generally known throughout the industry.

In sum, each of the factors identified by the *Area Landscaping, L.L.C.* Court weigh in plaintiff's favor. Plaintiff specifically identified the

production factors for which it claims trade secret protection. Defendant acknowledged during his deposition that he performed research and development for these factors during his time at TSG and was responsible for keeping customer- and fabric-specific proprietary information regarding these processes on the style data cards. Therefore, we conclude that plaintiff has carried its burden of presenting evidence sufficient to identify the specific trade secrets protected by the TSPA.

Additionally, we hold that plaintiff presented *prima facie* evidence of misappropriation of its trade secrets. "Direct evidence . . . is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence." *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658, 670 S.E.2d 321, 329 (2009). Defendant testified that he is being asked to perform similar duties for ACF that he did at TSG, including evaluating customer needs and organizing production processes. Defendant acknowledged that TSG and ACF share customers and that he is currently working with multiple customers for ACF that he served at TSG. Specifically, he admitted that he had done independent research and experimentation for TSG on the needle punch, finish, and heating processes for one specific customer that he now serves at ACF, and that he talks about the various components of the TSG style data cards with ACF management personnel. This is precisely the type of threatened misappropriation, if not actual misappropriation, that the TSPA aims to prevent through issuance of a preliminary injunction. *See* N.C. Gen. Stat. § 66-154(a) (2013) ("[A]ctual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ."); *see also Horner Intern. Co.*, __ N.C. App. at __, 754 S.E.2d at 859 ("Courts have upheld grants of a preliminary injunction where plaintiffs have presented some evidence that former employees have or necessarily will use trade secrets.").

Based on the foregoing, we conclude that plaintiff demonstrated a likelihood of success on the merits of his claim for trade secret misappropriation.

II. Breach of Contract

[3] Plaintiff next argues that the trial court erred by concluding that it failed to present a likelihood of success on the merits of its claim for breach of the non-compete. We agree.

Due to a choice of law provision in the agreement, Pennsylvania law governs enforcement of the non-compete. "[R]estrictive covenants are

not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002). However, "restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent." *Id.* Thus, in assessing whether to enforce a non-compete agreement, Pennsylvania law requires the court to balance "the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balance[e] the result against the interest of the public." *Id.* at 920.

Here, the trial court rejected plaintiff's argument that the non-compete was enforceable for three reasons: (1) the agreement does not contain an explicit "assignability" clause that would allow defendant to be bound to the contract after bankruptcy reorganization, wherein all of the company's assets and contracts were transferred from TSG, Inc. to its subsidiaries; (2) even if there were an assignability clause, there is no indication in the record that the non-compete was actually assigned from TSG, Inc. to plaintiff; and (3) even if the court concluded that there was an effective assignment, the balancing of the equities would require the trial court to find the non-compete unenforceable.

First, defendant relies on *Hess* for the proposition that an explicit assignability clause was necessary for plaintiff to enforce the non-compete. In *Hess*, the Pennsylvania Supreme Court determined that employment contracts are "personal to the performance of both the employer and the employee." *Hess*, 808 A.2d at 922. Thus, if an employer with a valid non-compete in an employment contract is later acquired by a separate entity, it does not necessarily follow that "the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking." *Id.* Thus, the *Hess* Court held that "a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets." *Id.*

The situation in this case is not one where plaintiff was a "stranger to the original undertaking." Unlike the sale of assets between two companies at arms' length, like the transaction that took place in *Hess*, the assignment in this case took place in the context of a bankruptcy reorganization, where the same company policies and management were retained. Plaintiff is a wholly owned subsidiary of TSG, Inc., with whom

defendant entered into the non-compete. As Rosenstein testified at the hearing, "[i]t's not a new entity. . . . it's basically the same company it was." According to defendant, every aspect of his job remained unchanged after the assignment. Therefore, the facts here are more analogous to those cases where Pennsylvania courts have declined to make assignability provisions a requirement, such as with a stock sale or merger, because the contract rights are not given to a completely new entity. *See J.C. Ehrlich Co., Inc. v. Martin*, 979 A.2d 862, 865-66 (Pa. 2009) (holding that where an employee's obligations and duties did not change in any material way after a stock purchase, a non-compete agreement was enforceable by the company with whom the agreement was made without an explicit assignability clause). Accordingly, we reject the trial court's conclusion that the non-compete is unenforceable because it did not contain a specific assignability provision.

Second, we find that the trial court erred by concluding that there is insufficient evidence in the record of an assignment between TSG, Inc. and plaintiff. The Bankruptcy Court order makes implicit mention of plaintiff as an "operating subsidiary" and of the assignability of the non-compete as an "executory contract." Specifically, the order contains the following:

> As of the Effective Date, all Executory Contracts that are not designated to be rejected by the Debtor in the Plan Supplement shall be deemed assumed. Any assumed Executory Contract to which the Debtor is a party shall be, as of the Effective Date, deemed assumed by the Reorganized Debtor and assigned to the TSG Real Estate Subsidiary or the TSG Operating Subsidiary, as the case may be. Entry of this Order shall constitute, pursuant to Section 365 of the Bankruptcy Code, approval of the assumptions and assignments described herein as of the Effective Date. The Debtor shall not be required to obtain any third party consents to affect such assignment.

At the hearing, Rosenstein specifically testified that the non-compete between TSG, Inc. and defendant was assigned to plaintiff. We conclude that Rosenstein's testimony, in addition to the Bankruptcy Court's approval of the executory contract assignments in its order, was sufficient to find that the non-compete was assigned to plaintiff in the course of the bankruptcy reorganization.

Additionally, we believe that the restrictions imposed in the non-compete are reasonable. Under Pennsylvania law, the burden is on

the employee to show how a non-compete is unreasonable in order to prevent its enforcement. *John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1169 (Pa. 1977). The non-compete provided that upon termination, defendant would be prevented from participating in the field of "textile finishing" for two years in the prohibited territory, which was defined, in part, as all of North America. Specifically, the non-compete prevents defendant from:

> [E]ngaging, as an employee or contractor, in the performance of Textile Finishing, engaging in the manufacture of Textile Finishing machinery or equipment, including but not limited to a jobber, reseller, or dealers of used textile machinery or equipment or engaging in sales, marketing or managerial services for any individual or entity that competes with TSG directly or indirectly within the Prohibited Territory.

In contrast to unenforceable non-competes restricting "any work" competitive to the employer, *Zimmerman v. Unemployment Compensation Bd. Of Review*, 836 A.2d 1074, 1081 (2003), the non-compete here permissibly restricts defendant from engaging in the specific industrial practices that could harm the legitimate business interests TSG seeks to protect.

Furthermore, defendant has failed to carry his burden of demonstrating that the time and geographic restrictions are unreasonable and render the non-compete unenforceable. Pennsylvania courts have consistently enforced non-compete agreements restricting employment for two or more years. *See John G. Bryant Co., Inc.*, 369 A.2d at 1170 (holding that a three-year restriction was reasonably necessary for the protection of the employers to strengthen customer contact after a principal sales representative stopped working for the employer). Additionally, Pennsylvania courts have established a correlation between reasonableness of a geographic restriction and the employer's verifiable market. *See Volunteer Firemen's Ins. Servs., Inc. v. CIGNA Prop. & Cas. Ins. Agency*, 693 A.2d 1330, 1338 (Pa. Super. 1997). Specifically, Pennsylvania federal courts have upheld covenants restricting competition nationwide or throughout the region of North America, where appropriate. *See Quaker Chem. Corp. v. Varga*, 509 F.Supp.2d 469, 476 (E.D.Pa. 2007). TSG presented evidence that it serves customers throughout at least 38 states, in addition to Canada and Mexico. Defendant claims that TSG failed to explain how the geographic restrictions are reasonable, and also argues that the cases TSG cites in support of the time restriction are inapposite. However, the burden is not on TSG to establish that the

restrictions in the non-compete are reasonable; rather, the burden rests with defendant to show that they are unreasonable and that the contract he signed is unenforceable. *See John G. Bryant Co., Inc.*, 369 A.2d at 1169. Defendant has failed to carry that burden here.

Finally, we turn to the trial court's determination that the equities weighed against enforcing the non-compete. "Fundamental . . . to any enforcement determination is the threshold assessment that there is a legitimate interest of the employer to be protected as a condition precedent to the validity of a covenant not to compete." *Hess*, 808 A.2d at 920. "Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills." *Id.* "[T]he issue of enforceability is one to be determined on a case-by-case basis," *Missett v. Hub Intern. Pennsylvania, LLC*, 6 A.3d 530, 539 (Pa. Super. 2010), wherein the Court is to consider all relevant facts and circumstances, *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 734 (Pa. Super. 1995) (also noting that "[a] restrictive covenant found to be reasonable in one case may be unreasonable in others").

Among the important factors that Pennsylvania courts consider in assessing the enforceability of a non-compete are: (1) the circumstance under which the employment relationship was terminated; (2) the employee's skills and capacity; (3) the length of time of the previous employment; (4) the type of consideration paid to the employee; (5) the effect of restraint on the employee's life; and (6) circumstantial economic conditions. *See Brobston*, 667 A.2d at 737.

> It bears noting that there is a significant factual distinction between the hardship imposed by the enforcement of a restrictive covenant on an employee who voluntarily leaves his employer and that imposed upon an employee who is terminated for failing to do his job. The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer. . . . [O]nly when the novice has developed a certain expertise, which could possibly injure the employer if unleashed competitively, will the employer begin to think in terms of a restrictive covenant[.]

Id. at 735-36 (citation and quotation marks omitted).

Based on the record before us, we believe that these notions weigh in favor of enforcement of the non-compete. Defendant worked at TSG for 27 years and became one of its most trusted and skilled managers. Throughout his tenure he developed valuable expertise in the field of textile finishing through trial-and-error and industrial experimentation that was highly guarded by TSG and not known throughout the industry. In exchange for his assent to the non-compete, defendant was offered an annual increase of $1,300.00 to his regular salary and a signing bonus of $3,500.00; defendant considered TSG's offer for at least two weeks before eventually agreeing to the non-compete and accepting this increase in compensation. Rather than being terminated for poor work, defendant was specifically recruited and voluntarily left TSG to work for a direct competitor at a plant five miles away without giving prior notice or asking for a raise from TSG. ACF did not require defendant to provide a resume or interview for the position; defendant was hired after meeting with an ACF representative one time. Given that defendant possessed advanced expertise in the field of textile finishing and abruptly and voluntarily left his position at TSG after 27 years of service to work for a direct competitor, we find that he poses a significant competitive threat to TSG's legitimate business interests should the non-compete be unenforceable.

Despite these factors, defendant argues, and the trial court agreed, that enforcement of the non-compete essentially renders him unemployable for two years because he has "no experience outside of textile finishing, rudimentary computer skills, and no college education." We are unpersuaded. Defendant argued in his brief that ACF hired him for "his management skills in dealing with employees, human resources issues, equipment dealers, customer complaints and suppliers, not for any trade secrets or other confidential information which he might know from his time at TSG[.]" Skill in management and human resources is desirable in many fields, not just textile finishing. Although the non-compete does restrict defendant from working as an employee for any company that competes with TSG "in sales, marketing or managerial services," TSG's competitors only comprise a small subset of companies and industries where such skills are valuable. Defendant admitted that before leaving TSG for ACF, he did not look for other employment. TSG presented evidence of multiple job openings within 25 miles of Hickory, N.C., that were not competitive to TSG and listed experience in plant management and manufacturing as desirable traits. Therefore, we disagree with the trial court's conclusion that enforcement of the non-compete would effectively prevent defendant from attaining employment anywhere in North America.

We also find TSG's policy arguments in this case persuasive. TSG employs around 160 people. According to Rosenstein, the customers that defendant now serves at ACF could account for up to forty percent of TSG's business, and some of the customer relationships that TSG has had for many years are now "strained" due to defendant's transition from TSG to ACF. In weighing the equities, we are permitted to consider the effect that breach of a non-compete may have on an employer's protectable business interests. *Hess*, 808 A.2d at 920. Among these, we consider the potential harm done to other TSG employees should defendant be permitted to retain employment at ACF in contravention of the non-compete. The significant risk that defendant's actions pose to TSG's competitive advantage indirectly threaten the job security of many others who work for TSG. Thus, in balance, we find that the equities favor enforcement of the non-compete.

In sum, we hold that the non-compete was validly assigned to plaintiff through bankruptcy reorganization, the non-compete itself is reasonable to protect TSG's legitimate business interests, and the equities weigh in favor of enforcement under these facts. Therefore, because it is undisputed that defendant is in breach of the non-compete by working for ACF, a direct competitor of TSG, we hold that TSG has demonstrated a likelihood of success on the merits of its claim for breach of contract.

III. Irreparable Loss

[4] Having set out that TSG has demonstrated a likelihood of success on the merits of its claims, we must now turn to whether it has shown irreparable loss should the injunction fail to issue. *See A.E.P. Indus., Inc.*, 308 N.C. at 401, 302 S.E.2d at 759-60. This Court has recognized that "[i]ntimate knowledge of the business operations or personal association with customers provides an opportunity to [a] . . . former employee . . . to injure the business of the covenantee." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 178, 566 S.E.2d 851, 854 (2002) (internal quotation marks omitted). Both the *QSP, Inc.* and *A.E.P. Indus., Inc.* Courts have "emphasized that this potential harm warrants injunctive relief," *Id.* Specifically, in *QSP, Inc.*, the Court held that the plaintiff company was likely to sustain irreparable loss unless a preliminary injunction was issued where the evidence showed that: (1) the defendant violated a non-compete agreement by soliciting customers for a rival company, (2) the defendant misappropriated the plaintiff company's confidential information for the rival company, and (3) the plaintiff would continue to suffer injury should the defendant not be restrained from further violating a confidentiality and non-compete agreement. *QSP, Inc.*, 152 N.C. App. at 179, 566 S.E.2d at 854. Here, the evidence shows that: (1) defendant

has the opportunity to misappropriate the confidential information and trade secrets that he developed for TSG; (2) ACF could benefit by having defendant's knowledge of TSG's trade secrets because it could produce similar products without expending resources on research and development; (3) defendant performs similar work at ACF for some of the same customers that he served at TSG; (4) Rosenstein testified that those customers could amount to as much as forty percent of TSG's business; (5) TSG had relationships with these customers for decades; and (6) TSG's relationships with these customers became "strained" once defendant left TSG to work for ACF. Like in *QSP, Inc.*, it is clear here that TSG has demonstrated that it is likely to suffer irreparable loss unless the injunction is issued, because TSG is at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry. *See also John G. Bryant Co., Inc.*, 369 A.2d at 1167 ("[A non-compete] is designed to prevent a disturbance in the relationship that has been established between [the employer] and their accounts through prior dealings. It is the possible consequences of this unwarranted interference with customer relationships that is unascertainable and not capable of being fully compensated by money damages.").

Conclusion

For the foregoing reasons, we conclude that the trial court erred by denying plaintiff's motion to issue a preliminary injunction. Plaintiff has demonstrated a likelihood of success on the merits for its claims of trade secret misappropriation and breach of contract and has shown irreparable loss absent the issuance of the preliminary injunction. Accordingly, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge BELL concur.

BETTY D. WRIGHT, Plaintiff
v.
WAKEMED also known as WAKE COUNTY HOSPITAL SYSTEM, INC., GURVINDER SINGH DEOL, M.D., and JULIAN SMITH, PA-C, Defendants

No. COA14-695

Filed 31 December 2014

Medical Malpractice—motion to dismiss—sufficiency of evidence—res ipsa loquitur

The trial court did not err in a medical malpractice case by granting defendants' motion to dismiss based on plaintiff's failure to properly allege that she was entitled to relief on res ipsa loquitur grounds. Plaintiff explicitly alleged that she was injured in a specific manner by a specific act of negligence, a fact that bars her from any attempt to rely on the doctrine of res ipsa loquitur. Further, expert testimony would be necessary to establish the cause of the injury that plaintiff claimed to have suffered.

Appeal by plaintiff from order entered 12 March 2014 by Judge Beecher R. Gray in Vance County Superior Court. Heard in the Court of Appeals 19 November 2014.

Rogers and Rogers Lawyers, by Michael F. Rogers, for Plaintiff.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb, Crystal B. Mezzullo, and Andrew C. Buckner, for Defendants.

ERVIN, Judge.

Plaintiff Betty D. Wright appeals from an order granting Defendants' motion to dismiss Plaintiff's complaint. On appeal, Plaintiff contends that the trial court erred by allowing Defendants' dismissal motion on the grounds that Plaintiff's complaint was not certified as required by N.C. Gen. Stat. § 1A-1, Rule 9(j) despite the fact that Plaintiff had attempted to assert a medical malpractice claim against Defendants. After careful consideration of Plaintiff's 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 affirmed.

I. Factual Background

On 21 September 2010, Plaintiff was admitted to WakeMed hospital for spinal surgery. Following the procedure, Plaintiff was discharged by WakeMed's Surgical and Recovery ACUTE unit and transferred to the WakeMed REHAB unit on 28 September 2010.

At the time of the transfer, Plaintiff was provided with a document entitled "WakeMed REHAB Admission Orders; Admission Medication Orders," which contained a list of medications that had been prescribed for Plaintiff, including prescription and general medications that had not been included in a previous medication list prepared by WakeMed ACUTE for Plaintiff. More specifically, Defendants negligently directed that Xanax, Geodon and Lithium be included in the "Admission Medication Orders," resulting in the ingestion of these medications and an episode of somnolence and lethargy from which Plaintiff suffered for several days.

On 8 August 2013, Plaintiff filed a complaint seeking the recovery of damages for personal injury from Defendants in which Plaintiff alleged that she was entitled to prevail on a *res ipsa loquitur* theory. On 16 October 2013, Defendants filed an answer in which they denied the material allegations set out in Plaintiff's complaint and sought to have Plaintiff's complaint dismissed on a number of grounds, including a failure to state a claim upon which relief could be granted. After a hearing held on 3 March 2014 for the purpose of considering the issues raised by Defendants' dismissal motion, the trial court entered an order dismissing Plaintiff's complaint. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

In her sole challenge to the trial court's order, Plaintiff contends that the trial court erred by granting Defendant's dismissal motion. More specifically, Plaintiff contends that the trial court erred by failing to determine that she had properly alleged that she was entitled to relief on *res ipsa loquitur* grounds.[1] We do not find Plaintiff's argument persuasive.

A. Standard of Review

When ruling on a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), the trial court is required to determine "whether, as a

1. Although Plaintiff seems to suggest that she stated a claim for relief on "general negligence" as well as *res ipsa loquitur* grounds, she has not advanced any "general negligence" argument in her brief. As a result, our decision in this case will focus solely on whether Plaintiff's complaint stated a valid *res ipsa loquitur* claim.

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." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In the course of analyzing the sufficiency of the plaintiff's pleading, the complaint must be liberally construed and "should not be dismissed for failure to state a claim unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). "On appeal of a [] motion to dismiss [lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)], this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (internal quotation marks and citation omitted), *disc. review denied and appeal dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

B. Applicable Legal Principles

N.C. Gen. Stat. § 1A-1, Rule 9(j) provides, in pertinent part, that:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2) a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under [N.C. Gen. Stat. § 8C-1,] Rule 702 [] and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]
>
> . . . .
>
> (3) The pleading alleges facts establishing negligence under the existing common law doctrine of res ipsa loquitur.

As a result, given that Plaintiff's complaint lacks a certification in the form required by N.C. Gen. Stat. § 1A-1, Rule 9(j), the trial court correctly dismissed that pleading unless Plaintiff successfully asserted a claim based on the doctrine of *res ipsa loquitur*.

"*Res ipsa loquitur* (the thing speaks for itself) simply means that the facts of the occurrence itself warrant an inference of defendant's negligence, i.e., that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Sharp v. Wyse*, 317 N.C. 694, 697, 346 S.E.2d 485, 487 (1986) (quotation marks, citation, and emphasis omitted). "The doctrine of *res ipsa loquitur* applies when (1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident is under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Alston v. Granville Health System*, __ N.C. App. __, __, 727 S.E.2d 877, 879 (internal quotation marks and citation omitted), *disc. review dismissed*, 366 N.C. 247, 731 S.E.2d 421 (2012). Thus, in order to successfully assert a claim based on the doctrine of *res ipsa loquitur*, a "plaintiff must [be] able to show – without the assistance of expert testimony – that the injury was of a type not typically occurring in the absence of some negligence by defendant." *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (emphasis omitted). As a result of the fact that the doctrine of *res ipsa loquitur* only applies in the absence of direct proof of the cause of the plaintiff's injury, a plaintiff is not entitled to rely on it in the event that there is direct evidence of the reason that the plaintiff sustained the injury for which he or she seeks relief. *Robinson v. Duke University Health Systems, Inc.*, __ N.C. App. __, __, 747 S.E.2d 321, 330 (2013), *disc. review denied*, __ N.C. __, 755 S.E.2d 618 (2014).

In order for the doctrine of *res ipsa loquitur* "to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, __ N.C. App. __, __, 730 S.E.2d 840, 843 (2012). "Our Courts have consistently found that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Robinson*, __ N.C. App. at __, 747 S.E.2d at 329 (internal quotation marks and citation omitted). Nevertheless,

> where proper inferences may be drawn by ordinary men from approved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, where proper care is exercised.

Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).

C. Validity of Trial Court's Ruling

In granting Defendants' dismissal motion, the trial court stated that:

> 6. Under North Carolina law, the doctrine *Res Ipsa Loquitur* is limited to situations in which the plaintiff can show--without the assistance of expert medical testimony --that the plaintiff's injury was a result of a negligent act by the defendant(s) and that the injury would not have occurred in the absence of negligence or dereliction of a relevant duty on the part of the defendant(s). *Res Ipsa Loquitur* is not appropriate when the question of injury is peculiarly in the province of expert opinion.
>
> 7. The allegations in plaintiff's Complaint involve purported negligence in medication reconciliation and in the administration of certain medications which the Complaint alleges caused the plaintiff to become somnolent and lethargic. Purported negligence as to these issues cannot be inferred absent expert testimony and, as such, the doctrine of *res ipsa loquitur* does not apply under North Carolina law.

Plaintiff's contention that she has stated a claim for relief on the basis of the doctrine of *res ipsa loquitur* fails for multiple reasons.

In her complaint, Plaintiff has alleged that the injuries for which she seeks redress were sustained as the result of an explicitly delineated series of events. More specifically, Plaintiff has alleged that her injuries resulted from the ingestion of specific medications that she should not have received and that her ingestion of these medications resulted from the fact that medications that she had not been prescribed were included on the materials that accompanied her transfer from WakeMed ACUTE to WakedMed REHAB. In support of this assertion, Plaintiff produced a list of the medications that were originally prescribed for her and "Admission Medications Orders" signed by Dr. Deol showing that Xanax, Geodon, and Lithium had been added to the list of medications that she had originally been instructed to take at or about the time of her transfer. As a result, Plaintiff has explicitly alleged that she was injured in a specific manner by a specific act of negligence, a fact that bars her from any attempt to rely on the doctrine of *res ipsa loquitur*.

In seeking to persuade us to reach a different result, Plaintiff contends that she had not alleged the existence of direct proof concerning the manner in which her injuries occurred given that the drugs that she

claims had been erroneously administered to her had metabolized and had left her body by the time of her discharge, thereby depriving her of scientific evidence of their presence in her body. We do not believe that this fact has any bearing on our analysis given that the issue raised by Plaintiff's claim is not whether Plaintiff actually ingested the medications in question, but rather how Plaintiff came to have ingested the medications and what impact their ingestion had on her. As we have already noted, Plaintiff alleged that a specific error that occurred during the transfer process resulted in the administration of these medications to her. Thus, the absence of chemical evidence that Plaintiff ingested the medications upon which her claim rests does not suffice to establish that Plaintiff is entitled to rely on the doctrine of *res ipsa loquitur*.

In addition, we do not believe that Plaintiff is entitled to rely on the doctrine of *res ipsa loquitur* in this case given that expert testimony would be necessary to establish the cause of the injury that Plaintiff claims to have suffered. In *Axelbank*, the plaintiff alleged that she had been injured as the result of the fact that the defendant negligently prescribed a particular medication for her and asserted that the existence of negligence on the part of the defendant could be established without the benefit of expert testimony, so that the plaintiff was entitled to proceed on a *res ipsa loquitur* theory. *Axelbank*, __ N.C. App. at __, 730 S.E.2d at 843. In rejecting the plaintiff's argument, this Court concluded that "a lay person would not be able to determine that plaintiff's injury was caused by Seroquel or be able to determine that Dr. Axelbank was negligent in prescribing the medication to plaintiff without the benefit of expert witness testimony." *Id.* In this case, as in *Axelbank*, a jury would not be able to determine whether Plaintiff's injury resulted from the ingestion of Xanax, Geodon, and Lithium without having the benefit of expert witness testimony, since a lay juror would not necessarily know what these medications are, how they affect the human body, and how they might be expected to affect Plaintiff specifically.

In Plaintiff's view, *Axelbank* has no bearing on the proper resolution of this case since *Axelbank* involved a situation in which the defendant allegedly prescribed the wrong medication while this case involves a situation in which errors were made in transferring a list of medications from one document to another. According to Plaintiff, one need not be a medical expert to know that the medication list was erroneously transferred and that this error constituted negligence. In making this argument, however, Plaintiff appears to confuse the meaning of "negligence" as used in the legal context with the meaning of the same word as used in common parlance. Although the inaccurate copying of a

medication list might be understood as a negligent act, that fact, standing alone, does not suffice to establish a valid negligence-based claim for the recovery of damages, which also requires proof that the negligent act on which the plaintiff's claim rests resulted in the injury for which the plaintiff seeks redress. *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009). Assuming, without in any way deciding, that Plaintiff can establish a deviation from the applicable standard of care by showing the existence of the copying error upon which she relies, Plaintiff cannot demonstrate that the injuries of which she complains resulted from this specific negligent act in the absence of expert testimony.[2] Simply put, since "the average juror [is] unfit to determine whether [P]laintiff's [somnolence and lethargy] would rarely occur in the absence of" the ingestion of Xanax, Geodon, and Lithium, *Schaffner v. Cumberland County Hosp. System*, *Inc.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985), *disc. reviews denied*, 316 N.C. 195, 341 S.E.2d 578-79 (1986), Plaintiff's attempt to distinguish our decision in *Axelbank* is not persuasive. As a result, since Plaintiff has not established that she successfully pled a claim against Defendants on the basis of the doctrine of *res ipsa loquitur*, the trial court correctly dismissed her complaint.

III. Conclusion

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

AFFIRMED.

Judges ELMORE and DAVIS concur.

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2. In addition, we note that, even if a lay person could be expected to understand the effect that the specific medications that Plaintiff claims to have negligently ingested would have on the human body, a successful plaintiff would still be required to obtain expert proof that her injuries resulted from the ingestion of these specific medications given that the "Admission Medication Orders" indicate that over a dozen medications had been prescribed for Plaintiff and that expert medical testimony would be necessary to explain the interactions among this collection of medications and whether the injuries that Plaintiff claims to have sustained could have resulted from the ingestion of one or more of these other medications.

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ADOPTION

Child born out of wedlock—failure of father to meet statutory support requirements—father's consent not required—The trial court did not err by concluding that the consent of plaintiff father was not required under N.C.G.S. § 48-3-601 for the adoption of his daughter, who was born out of wedlock. Plaintiff failed to meet the support requirements of N.C.G.S. § 48-3-601 because his parents provided for his needs and he had at least $1,000 in his bank account that he was free to spend, yet he did not provide any monetary or tangible support to the mother or child before the filing of the adoption petition. **In re Adoption of Robinson, 308.**

Child born out of wedlock—father's consent not required—as-applied constitutional challenge—insufficient actions after birth to develop relationship with child—The trial court did not violate plaintiff father's substantive due process rights under the state and federal constitutions by determining that his consent was not required for the adoption of his daughter, who was born out of wedlock. Although many of plaintiff's actions before the birth of his daughter were consistent with the desire to develop a relationship with her, his actions after the birth of the child were insufficient. Because plaintiff failed to take the opportunity to develop a relationship with his child, his parental rights under the Constitution were not "full blown," and Chapter 48 of the General Statutes was not unconstitutional as applied to him. **In re Adoption of Robinson, 308.**

APPEAL AND ERROR

Appealability—criminal judgment vacated—no explanation—not double jeopardy—not reviewed on merits—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a felonious breaking or entering charge arising from defendant's attempt to obtain vacant property by adverse possession. The trial court arrested judgment; given that the trial court did not explain its decision to arrest judgment and that judgment does not appear to have been arrested to avoid double jeopardy, the trial court's decision effectively vacated defendant's felonious breaking or entering conviction and deprived the Court of Appeals of the ability to review defendant's challenge to conviction on the merits. **State v. Pendergraft, 516.**

Appealability—writ of certiorari—unclear order date—Respondent juvenile's writ of certiorari was granted and the Court of Appeals considered his challenges to the trial court's order on the merits as a result of the fact that the date was unclear for when the orders that the juvenile sought to challenge on appeal were entered. The juvenile may have lost his right to seek appellate review of these orders through no fault of his own. **In re Z.T.W., 365.**

Appellate jurisdiction—notice of appeal—writ of certiorari—The trial court dismissed defendant's writ of certiorari requesting appellate review because her notice of appeal was deemed insufficient to confer jurisdiction. Defendant's notice of appeal listed the file numbers of the judgments she sought to appeal, the Court of Appeals was the only court with jurisdiction to hear defendant's appeal, and the State did not suggest that it was misled by either of the errors in the notice of appeal. **State v. Sitosky, 558.**

Failure to preserve issues—failure to object—failure to cite authority—failure to introduce evidence—In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, several of defendant's arguments before the Court of Appeals were not properly preserved for appeal.

APPEAL AND ERROR—Continued

Defendant's challenges concerning the jury instructions and special interrogatories submitted to the jury were not properly before the Court of Appeals because defendant failed to object at trial. In addition, defendant's argument regarding damages was viewed as abandoned because defendant failed to cite any authority in support of her argument. Last, defendant's argument regarding the trial court's decision on a motion in limine was not preserved because the plaintiff did not attempt to introduce the evidence at trial. **Steele v. Bowden, 566.**

Interlocutory orders—denial of preliminary injunction—violation of non-compete agreement—misappropriation of trade secrets—The merits of an appeal from the denial of a preliminary injunction were reached, even though the order was interlocutory, in an action involving a non-compete agreement and the potential misappropriation of trade secrets. Plaintiff was able to show that a substantial right could be lost without immediate appellate review. **TSG Finishing, LLC v. Bollinger, 586.**

Interlocutory orders—jurisdictional issue—final judgment and certification—Whether an appealed order is interlocutory presents a jurisdictional issue; here the Court of Appeals had jurisdiction because the trial court judgment was final on two of plaintiff's claims and the trial court certified that there was no just reason for delay. **Feltman v. City of Wilson, 246.**

Interlocutory orders—substantial right—counterclaims—risk of inconsistent verdicts—Although defendants conceded that their appeal in a breach of contract and judicial foreclosure case was from an interlocutory order, defendants showed that it affected a substantial right entitling them to immediate review since their counterclaims and plaintiff's claims shared a common factual issue such that separate litigation of these claims may result in inconsistent verdicts. **Wells Fargo Bank, N.A. v. Corneal, 192.**

Mootness—termination of parental rights—prior adoption determination—Respondent's appeal from an order terminating her parental rights was not moot where an appellate ruling finalized a prior adoption proceeding of the child, so that the termination of parental rights had no practical effect on the outcome. However, the termination order may have an effect in the future as to any other children plaintiff had or may have. **In re Baby Boy, 316.**

Order ceasing reunification efforts—appeal untimely—In an appeal of the trial court's order ceasing reunification efforts between respondent mother and her children, respondent's appeal was untimely and therefore dismissed. Although the 180-day period in N.C.G.S. 7B-1001(a)(5)(b) delayed the date from which notice of appeal could be taken, respondent waited more than ten months from the entry of the order to file her notice of appeal, exceeding the 210-day time limit. **In re A.R., 302.**

Petition for certiorari—insufficient—Defendant's petition for certiorari was denied because it did not meet the requirements of Rule 21 of the Rules of Appellate Procedure. Defendant merely stated that he had identified potentially meritorious issues to present to the Court of Appeals, including issues involving the judgment for attaining the status of habitual felon, but he did not explain what those issues were or address them. **State v. Crockett, 96.**

Preservation of issues—brief—arguments not pursued—abandoned—Although defendant noted an appeal from the denial of several post-trial motions,

APPEAL AND ERROR—Continued

the arguments in her brief were directed solely at the denial of her motion for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59. As a result, defendant's appeal from the denial of her other post-trial motions was deemed abandoned. **Lacey v. Kirk, 376.**

Preservation of issues—constitutional issue—failure to argue at trial— Although petitioner contended that the denial of his petition did not violate his substantive due process rights, this argument was waived because petitioner failed to raise it at trial. Even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 et seq. do not amount to a violation of due process. **In re Hall, 322.**

Preservation of issues—constitutional issues not considered for first time on appeal—Although defendant argued that the trial court violated her constitutional right to due process in a child custody case by failing to allow her a full opportunity to be heard at trial, this issue was dismissed because constitutional issues are not considered for the first time on appeal. Further, defendant failed to preserve her statutory argument that the trial court failed to control the presentation of evidence during trial in violation of N.C.G.S. § 1A-1, Rule 611. **Cox v. Cox, 22.**

Preservation of issues—failure to argue judicial bias—The trial court did not abuse its discretion in a child custody case by awarding joint custody to plaintiff father, by denying defendant mother's request to return to California, and by elevating intervenor grandmother to parental status based on alleged judicial bias. Defendant failed to preserve her argument of judicial bias because she has not argued that the trial court had any sort of personal bias or prejudice against her, nor did she move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor grandparent visitation order. **Cox v. Cox, 22.**

Standard of review—ejectment—federally subsidized housing—In cases involving federally subsidized housing, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible. The trial court's findings are binding on appeal if supported by competent evidence, while the trial court's conclusions are subject to de novo review. **E. Carolina Reg'l Hous. Auth. v. Lofton, 42.**

Unpublished opinion—persuasive authority—cited in published opinion— Even though unpublished opinions from the Court of Appeals do not constitute controlling legal authority, an unpublished case held that prior acts may provide support for and be incorporated by reference into orders renewing DVPOs. That reasoning was found to be persuasive here and was applied to the facts of this case. **Forehand v. Forehand, 270.**

ASSOCIATIONS

Homeowners—counterclaims—prescriptive easement—slander of title—trespass—issues of fact remaining—remanded to trial court—In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, there were issues of fact regarding the HOA's counterclaim for a prescriptive easement and plaintiffs' claims for slander of title and trespass. The COA remanded the matter to the trial court for determination of these claims. **LE Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n, Inc., 405.**

ASSOCIATIONS—Continued

Homeowners—ownership dispute—prior conveyance—disputed property not included—In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, the trial court erred by granting summary judgment in favor of the HOA. Although the HOA claimed that it acquired the land from the developer by deed in 1988, the documents referenced by the 1988 deeds showed that the oceanfront strip was not intended to be included in the conveyance. The HOA had no claim to the strip of land based on the 1988 deeds. **LE Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n, Inc., 405.**

ATTORNEY FEES

Alimony—within trial court's discretion—The trial court did not abuse its discretion by denying plaintiff wife's claim for attorney fees in an action for alimony. Under N.C.G.S. § 50-16.4, the decision to award attorney fees is within the trial court's discretion. Furthermore, the trial court found that plaintiff was not entitled to attorney fees because she did not act in good faith during the course of the litigation and acted contrary to the custody terms in the interim order. **Ellis v. Ellis, 239.**

Award reduced due to large punitive damages—improper—The trial court abused its discretion by reducing the amount of attorney fees it awarded to plaintiffs based on the fact that plaintiffs received a large punitive damages award. Plaintiffs did not challenge any of the trial court's findings of fact as lacking in sufficient evidentiary support. The use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorney fee award involved reliance upon a factor that has no reasonable bearing on a proper attorney fee award. **Lacey v. Kirk, 376.**

Underlying judgment upheld—award upheld—An award of attorney fees was upheld where the argument against the award was premised on the reversal of the underlying judgment, which was upheld. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

BANKS AND BANKING

Aiding and abetting—breach of fiduciary duty—insufficient specificity—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for aiding and abetting a breach of fiduciary duty. The only North Carolina case with precedential value recognizing such a cause of action, *Blow v. Shaughnessy*, 88 N.C. App. 484, was abrogated by the United States Supreme Court. Even assuming the cause of action existed in North Carolina, plaintiffs' complaint made only conclusory allegations and did not state the claim with sufficient specificity. **Bottom v. Bailey, 202.**

Bank Secrecy Act—no private cause of action—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of 31 U.S.C. § 5311, the Bank Secrecy Act, based on acts committed by one of its customers. While plaintiffs argued that the Act and related regulations required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes," the Act does not create a private cause of action. **Bottom v. Bailey, 202.**

Negligence—no duty of care owed to non-customer—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation

BANKS AND BANKING—Continued

Morgan Stanley for negligence based on acts committed by one of its customers. When a customer of Morgan Stanley perpetrated a check kiting scheme by writing checks between a HomeTrust Bank account that held plaintiffs' money and a Morgan Stanley account not owned by plaintiffs, Morgan Stanley did not owe plaintiffs a duty of care because plaintiffs were not its customers. **Bottom v. Bailey, 202.**

Withdrawal by fiduciary from principal's account—account not in principal's name—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of N.C.G.S. § 32-9 based on acts committed by one of its customers. N.C.G.S. § 32-9 applies when a fiduciary makes fraudulent withdrawals on the account of his or her principal. Because the Morgan Stanley account was not in plaintiffs' names, plaintiffs had no claim against Morgan Stanley under the statute. **Bottom v. Bailey, 202.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Guardian ad litem—appointed in assistance-only capacity—no abuse of discretion—In an appeal of the trial court's order awarding guardianship of respondent mother's children to paternal relatives, the trial court did not abuse its discretion by appointing her a guardian ad litem (GAL) in an assistance-only capacity. The fact that respondent suffered epileptic seizures and that the father exercised strong influence over her did not render her incompetent. The GAL testified that respondent was smart, reasonable, and understood the proceedings, and respondent testified that she had graduated from high school, paid her bills, managed her daily affairs, and was capable of making her own decisions. **In re A.R., 302.**

Permanency planning hearing—guardianship—best interest of the child—The trial court did not abuse its discretion in determining that guardianship with the foster parents was in the minor's best interest. Even though there was evidence that the mother had made improvements and the minor wanted to return to her, there was evidence supporting the conclusion that the foster parents would provide the best home for him. **In re L.M., 345.**

Permanency planning hearing—guardianship—verification of guardian—The trial court did not err by awarding guardianship of a minor to his foster father because there was evidence that the foster father understood the legal significance of guardianship. The foster father testified regarding the care he had provided to the minor and signed a form acknowledging that he would assume responsibility for him without the assistance of the Department of Social Services. **In re L.M., 345.**

Permanency planning hearing—guardianship—verification of guardian—The trial court erred by awarding guardianship of a minor to his foster mother because there was no evidence that the foster mother understood the legal significance of guardianship. The foster mother did not testify or sign a guardianship form. The order was remanded. **In re L.M., 345.**

CHILD CUSTODY AND SUPPORT

Findings of fact—sufficiency—The trial court's 19 November 2013 permanent child custody and visitation order was supported by adequate findings of fact. The Court of Appeals addressed and overruled defendant's challenges to the pertinent findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody within the restrictions placed upon plaintiff was in the best interests of the minor children. **Cox v. Cox, 22.**

CHILD CUSTODY AND SUPPORT—Continued

Future modifications-improper waiver of analysis—The trial court erred in a child custody case by issuing an order waiving analysis for future modifications. That portion of the order was contrary to law as it predetermined what amounted to a substantial change in circumstances. Therefore, this portion of the order was remanded to the trial court to strike the improper language. **Cox v. Cox, 22.**

Support modification—private school education—extraordinary expenses—The trial court erred in a child support modification case by failing to make adequate findings of fact in support of its determination that the cost of the children's private school education constituted an extraordinary expense. The trial court's order was reversed and remanded for entry of a new order containing sufficient findings of fact addressing the issue of defendant's ability to pay. **Ferguson v. Ferguson, 257.**

Support modification—reasonable needs of children—relative ability to pay—additional findings of fact required—The trial court erred in a child support modification case by failing to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support. The trial court's order was reversed and remanded for additional findings of fact to address the parties' request for modification of the existing child support arrangement and the validity of defendant's request for a deviation from the child support guidelines. **Ferguson v. Ferguson, 257.**

Uniform Child Custody Jurisdiction and Enforcement Act—significant connection jurisdiction—jurisdiction by necessity—The trial court did not have subject matter jurisdiction in a child custody modification case under the Uniform Child Custody Jurisdiction and Enforcement Act in N.C.G.S. § 50A-201(a). Neither the parties nor the children had resided in North Carolina for several years. Further, both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012, and thus, North Carolina could not exercise jurisdiction by necessity under subdivision (4). The orders entered on 13 June 2013, 28 June 2013, and 3 December 2013 were vacated. **Gerhauser v. Van Bourgondien, 275.**

CITIES AND TOWNS

Condemnation—demolition—motel—decision not arbitrary and capricious—The Town of Holden Beach Board of Commissioners' decision to condemn petitioners' ocean-side motel and order its demolition was not arbitrary and capricious. **Six at 109, LLC v. Town of Holden Beach, 469.**

Condemnation—demolition—motel—standard of review—The superior court did not err by affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side motel and ordering the demolition of the property based on an alleged arbitrary and capricious standard. The decision of the Board of Commissioners was supported by substantial evidence. **Six at 109, LLC v. Town of Holden Beach, 469.**

Subdivision performance bonds—assignment of bonds—standing—In an action to enforce subdivision performance bonds, the Town of Black Mountain had standing to sue defendant bond insurance companies for breach of contract. The assignment by the original obligee on the bonds, Buncombe County, to the Town of Black Mountain gave the Town standing to sue defendants. **Town of Black Mountain v. Lexon Ins. Co., 180.**

CITIES AND TOWNS—Continued

Subdivision performance bonds—governmental function—action not barred by statute of limitations—An action for breach of contract on subdivision performance bonds was not barred by the statute of limitations. Buncombe County's entry into the bonds to assure compliance with subdivision ordinance requirements was a governmental function. Therefore, because the section 1-52 statute of limitations does not include the State or its subdivisions, the County (and the Town of Black Mountain, by assignment of the bonds) was not subject to the statutory time limitation. **Town of Black Mountain v. Lexon Ins. Co., 180.**

CIVIL PROCEDURE

Parallel lawsuits in multiple states—N.C.G.S. § 1-75.12 motion to stay granted—not abuse of discretion—The trial court did not abuse its discretion by granting defendants' motion to stay under N.C.G.S. § 1-75.12 in an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey. Using the factors outlined in *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, the trial court made detailed findings of fact and conclusions of law that a substantial injustice would result if the stay was denied, that the stay was warranted, and that the alternative forum in New Jersey was convenient, reasonable, and fair. **Bryant & Assocs., LLC v. ARC Fin. Servs., LLC, 1.**

CIVIL RIGHTS

Direct claim under North Carolina Constitution—action permitted only when no adequate remedy under state law—tort claims provided adequate remedy—affirmative defense does not negate adequacy—In an action for plaintiff's injuries resulting from an encounter with a police officer, the trial court did not err by granting summary judgment for defendants on plaintiff's claim under the North Carolina Constitution. A cause of action under the state Constitution is permitted only when there is no adequate remedy under state law. Even though plaintiff would have to overcome the affirmative defense of public officer immunity for his common law tort claims, his claim under the state Constitution was barred because he could seek a remedy on the common law tort claims. **Debaun v. Kuszaj, 36.**

CONSPIRACY

Civil conspiracy—failure to state a claim—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for civil conspiracy. Plaintiffs' complaint failed to allege one of the elements of civil conspiracy—an agreement between two or more individuals. Moreover, plaintiffs' complaint made only conclusory allegations without offering any supporting factual allegations. **Bottom v. Bailey, 202.**

CONSTITUTIONAL LAW

Effective assistance of counsel—testimony by defense counsel legal assistant—conflict of interest hearing required—Given the likelihood that an effective assistance of counsel issue would arise on remand of a prosecution for possession of methamphetamine precursor chemicals, the Court of Appeals held that a conflict of interest hearing should be held if defense counsel's legal assistant testified, even if the State's only purpose in admitting the testimony was the verification of a document signed by defendant. The privileged communications issue should be addressed even if defendant obtained new counsel. **State v. Johnson, 500.**

CONSTITUTIONAL LAW—Continued

Ex post facto laws—sex offender registration statutes do not violate—The trial court's application of the sex offender registration statute to support its denial of petitioner's petition did not constitute an ex post facto violation. The imposition of lifetime sex offender registration programs does not constitute an ex post facto violation. **In re Hall, 322.**

First Amendment—no contact order—The trial court properly denied defendant's motions to dismiss and for a directed verdict in a case involving a civil no contact order where defendant contended that the order violated his First Amendment rights. While some of plaintiff's allegations were based upon statements made by defendant, the trial court found that defendant revved his engine and charged his car toward plaintiff in such a manner that she jumped into a ditch, and that defendant fraudulently contacted the sheriff's department regarding plaintiff. It was noted that plaintiff's complaint was filed before 1 October 2013, the effective date of an amendment to N.C.G.S. § 50-7. **Norrell v. Keely, 441.**

Freedom of speech—freedom of assembly—motion to dismiss—no heightened requirement—The trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss two constitutional claims arising from her employment termination. The trial court's order had the effect of imposing a heightened pleading requirement for freedom of speech or freedom of assembly claims under the North Carolina Constitution that is not recognized by North Carolina courts and is inconsistent with notice pleading. **Feltman v. City of Wilson, 246.**

Right to confrontation—not violated by non-hearsay—In a driving while impaired prosecution, the trial court did not err by admitting an officer's testimony that other officers had informed him that they had observed defendant weaving outside her lane of travel. This testimony did not violate the Confrontation Clause because it was admitted to prove that the officer was told that defendant was weaving, not to prove that defendant was in fact weaving. **State v. Shaw, 151.**

Right to control nature of defense—court's failure to conduct inquiry into nature of impasse—The trial court erred by failing to adequately address an impasse between defendant and his trial counsel concerning the extent to which certain questions should be posed to a prosecution witness during the trial. As a result of the fact that no inquiry was conducted into the nature of the impasse, there was no basis for finding that the State had established that the error was harmless beyond a reasonable doubt. Thus, defendant was entitled to a new trial in the case in which he was convicted of possessing a weapon of mass destruction. **State v. Floyd, 110.**

Right to counsel—defense counsel legal assistant—compelled to appear by State—There was prejudice in a methamphetamine precursor prosecution where the trial court compelled defense counsel's legal assistant to appear for the State to authenticate a written statement in which defendant took full responsibility for possession of the chemicals. But for the written confession, there was a reasonable possibility that the jury might have believed that one or both of the other people in the car were responsible for possession of the precursors. **State v. Johnson, 500.**

Right to counsel—notice of right—The argument of respondent in a termination of parental rights case that she was never told she had a right to be represented by counsel was rejected. The trial court explained that respondent was represented by court-appointed counsel because she filed an affidavit of indigency and requested a lawyer and that if she chose to represent herself she would waive her right to a

CONSTITUTIONAL LAW—Continued

lawyer. Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings and was represented by counsel at various points throughout the proceedings, and respondent read and signed the waiver form. **In re J.K.P., 334.**

Right to counsel—waiver—The trial court did not err in a termination of parental rights case by allowing respondent to waive her right to counsel and proceed pro se. The transcript showed that respondent asked to represent herself and read and signed the waiver of counsel form. **In re J.K.P., 334.**

Right to speedy trial—pre-indictment delay—failure to show prejudice—The trial court did not err by denying defendant's motion to dismiss the charges of possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and having attained habitual felon status on the basis of an excessive period of pre-indictment delay. Defendant failed to show that he sustained actual and substantial prejudice as a result of the two year delay between the date upon which he allegedly possessed the shotgun and the date that he was formally charged with committing that offense. S**tate v. Floyd, 110.**

CONTRACTS

Breach—judicial foreclosure—dismissal of counterclaims—unfair and deceptive trade practices—North Carolina Debt Collection Act—The trial court did not err in a breach of contract and judicial foreclosure case by granting plaintiff's motion to dismiss defendants' counterclaims under N.C.G.S. § 1A-1, Rule 12(b)(6). Defendants failed to state a claim under the Unfair and Deceptive Trade Practices Act or the North Carolina Debt Collection Act. **Wells Fargo Bank, N.A. v. Corneal, 192.**

CONVERSION

Summary judgment—defendant towed vehicle from co-owner without consent—The trial court did not err by granting summary judgment on plaintiff's claim for conversion where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. There was no genuine issue of material fact regarding whether defendant was entitled to "repossess" the vehicle because the forecasted evidence tended to show that defendant forcibly took possession without plaintiff's consent. These actions did not fall near the "shadowy line" limiting how far a tenant in common may go in exercising control without creating a claim for conversion. **Steele v. Bowden, 566.**

CORPORATIONS

Quitclaim deed—dissolved corporation to de facto corporation—effective conveyance—In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, a 2011 quitclaim deed from the developer to the corporate plaintiff was valid. Even though the quitclaim deed was filed forty-nine minutes after plaintiff's articles of incorporation, plaintiff was a de facto corporation because a bona fide effort was made to incorporate and the persons affected acquiesced to the action. In addition, even though the developer was under revenue suspension and otherwise administratively dissolved, the conveyance was permissible as an act of winding up the corporation's

CORPORATIONS—Continued

affairs. Therefore, the 2011 quitclaim deed, along with the unchallenged 2013 quit claim deed, transferred whatever interest the developer had in the oceanfront strip to plaintiff. **LE Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n, Inc., 405.**

CRIMINAL LAW

Failure to give jury instruction—self-defense—In a murder prosecution, the trial court did not err by refusing to instruct the jury on self-defense. Defendant was not entitled to the instruction because he testified that he did not intend to shoot anyone but rather intended to fire a warning shot. **State v. Hinnant, 493.**

Jury instruction—malicious maiming—disabled eye—The trial court did not err by instructing the jury that it could convict defendant under North Carolina's malicious maiming statute if it found that he had "disabled" the victim's eye. The total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" under N.C.G.S. § 14-30. Even assuming that the trial court erred by instructing the jury on an improper theory of disabling, any such error was harmless beyond a reasonable doubt. **State v. Coakley, 480.**

Jury instruction—malicious maiming—put out or disabled eye—The trial court did not err by allegedly instructing the jury on a theory of malicious maiming that was not included in the indictment. Although the indictment charging defendant with malicious maiming only stated that defendant "put out" the victim's eye while the jury instructions stated that defendant had "disabled or put out" his eye, this distinction was illusory. The term "disabled," as applied to the facts, could only be interpreted to mean total loss of sight. **State v. Coakley, 480.**

DAMAGES AND REMEDIES

Compensatory—supported by evidence—stipulation—The record provided ample support for the compensatory damages awarded to plaintiffs in an action for breach of fiduciary duty and defamation arising from an estate. Although defendant argued that the jury's award of compensatory damages to each plaintiff was contrary to stipulations involving interest, interest began at the date of reasonable distribution and the stipulations allowed the jury to determine when a distribution from the estate could reasonably have been made. Moreover, although defendant argued that the jury's decision to award equal damages to each plaintiff also violated a stipulation concerning shares in the estate, the evidentiary record supported the jury's overall damage award and it is not for appellate court to second-guess the means by which the jury calculated the award of damages. **Lacey v. Kirk, 376.**

Punitive damages—no criminal liability—award not excessive—Although defendant argued that a punitive damage award was excessive because she was not subjected to criminal liability for her conduct, nothing in our case law requires the availability of a criminal sanction to uphold a punitive damages award and the fact that defendant was merely subject to a civil rather than a criminal sanction does not in any way serve to mitigate the reprehensibility of her conduct. **Lacey v. Kirk, 376.**

Punitive damages—not excessive—A jury award of punitive damages in a breach of fiduciary duty claim arising from an estate was not grossly excessive. Although defendant argued that her actions were not particularly egregious given that she did not do anything more than merely delaying distribution, her conduct considered in its entirety was exceedingly reprehensible. **Lacey v. Kirk, 376.**

DAMAGES AND REMEDIES

Punitive damages—ratio to compensatory—not excessive—A 38 to 1 ratio of punitive to compensatory damages in a breach of fiduciary duty case was not excessive given the ratios held not to be excessive in other cases. **Lacey v. Kirk, 376.**

DECLARATORY JUDGMENTS

Liability insurance—summary judgment—voluntary worker—The trial court did not err in a declaratory judgment action requesting that the court declare the rights and obligations of the parties pursuant to a Commercial General Liability Insurance Policy by granting defendant Jackson Burns' motion for summary judgment, denying plaintiff's motion for summary judgment, and concluding that Jackson Burns was not a "volunteer worker" as a matter of law. Because eleven-year-old Jackson was compelled by parental authority to sweep the grain bin, and did so not out of his own free will but out of obligation and obedience, he was not considered to have "donated" his work. **N.C. Farm Bureau Mut. Ins. Co. v. Burns, 72.**

Offensive summary judgment—restrictive covenants—construction of parking lot—The trial court did not err in a declaratory judgment action by granting plaintiff developers' offensive summary judgment motion seeking a declaration that their proposed use of the pertinent land did not violate a restrictive covenant. Although the covenant provided that a developer may not build a store that constituted a vitamin store, beauty aid store, or pharmacy, the intent of the grantor was not to outlaw the construction of those things which were integral or essential to the operation of a retail business. Thus, the construction of a parking lot and access easement on the restricted property was not a prohibited use. **Charlotte Pavilion Rd. Retail Inv., LLC v. N.C. CVS Pharmacy, LLC, 10.**

DEFAMATION

Damages—accusation of murder—emotional trauma—The trial court did not err by denying defendant's motion for a new trial concerning the amount of compensatory damages the jury awarded for defamation. Defendant made oral communications to several people in which she accused plaintiff Lacey of having committed murder; any failure on plaintiff Lacey's part to establish pecuniary loss as a result of defendant's statements was simply irrelevant. Moreover, the testimony that plaintiff Lacey provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from defendant's false accusations. **Lacey v. Kirk, 376.**

DIVORCE

Alimony—condoned marital misconduct—no abuse of discretion—The trial court did not abuse its discretion by awarding plaintiff wife only two years of alimony. In its order, the trial court addressed all of the factors prescribed by N.C.G.S. § 50-16.3A(b). Specifically, the trial court properly considered plaintiff's extramarital affair and the "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony." **Ellis v. Ellis, 239.**

Alimony—condoned marital misconduct—The trial court did not err by considering plaintiff wife's extramarital affair when it awarded her two years of alimony. N.C.G.S. § 50-16.3A(b) allows the trial court to consider acts of condoned marital misconduct in determining awards of alimony. **Ellis v. Ellis, 239.**

DIVORCE—Continued

Equitable distribution—assets co-owned by husband—motion in limine—In an equitable distribution action involving an LLC and a commercial building, the trial court did not abuse its discretion by granting the husband's motion in limine to prohibit the introduction of evidence regarding assets the husband co-owned with his father. The trial court found that there was not sufficient evidence to value these assets. **Montague v. Montague, 61.**

Equitable distribution—commercial building—post-separation appreciation—separate property—parties bound by tax returns—In an equitable distribution action involving an LLC and a commercial building, the trial court's findings supported its treatment of a portion of an LLC's post-separation appreciation as the husband's separate property. Although there is a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property, in this case the wife and the husband were bound by the manner in which the distributions to the husband were treated on the LLC tax returns. **Montague v. Montague, 61.**

Equitable distribution—estate plans—donor's intention—In an equitable distribution action involving an LLC and a commercial building, it was within the trial court's discretion to consider the husband's parents' estate plans in making its equitable distribution determination. A trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations. **Montague v. Montague, 61.**

Equitable distribution—LLC—distribution to husband—In an equitable distribution action involving an LLC and a commercial building, the court's distribution of the LLC to the husband was supported by the trial court's application of the distribution factors and its findings, which were supported by the evidence. Although the wife challenged the trial court's finding that she did not contribute to the LLC, noting that she signed a loan guaranty along with the husband for the loan which financed the purchase of the building from the husband's parents, the trial court's reference to "contributions" was read as "equity" contributions toward the LLC. **Montague v. Montague, 61.**

Equitable distribution—LLC—lawn mower—loan payments—distribution from corporation—sufficiency of evidence—In an equitable distribution action involving an LLC and a commercial building, the trial court did not err by treating loan payments on a mower as distributions to the husband from the LLC. There was no evidence of the amount of debt still owed on the mower at the date of distribution or of how much the mower had depreciated in value; without those valuations in the record, the trial court was not required to distribute the mower and did not abuse its discretion in not including it within the equitable distribution scheme. **Montague v. Montague, 61.**

Equitable distribution—LLC—post-separation distributions from LLC to husband—In an equitable distribution action involving an LLC and a commercial building, the trial court erred by characterizing two post-separation distributions made to the husband by the LLC as management fees earned for managing the building after the parties separated and then treating them as the husband's separate property. The husband was bound by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. **Montague v. Montague, 61.**

DIVORCE—Continued

Equitable distribution—weight given to factors—explanation of balance—In an equitable distribution action involving an LLC and a commercial building, the trial court was not required to show how it balanced the distribution factors. The weight given to each factor is in the trial court's discretion and there is no need to show exactly how the trial court arrived at its decision regarding unequal division. **Montague v. Montague, 61.**

DOMESTIC VIOLENCE

Protective order—renewal—facts reused—The trial court did not err by concluding that good cause existed to renew a domestic violence prevention order (DVPO) where the order renewing the DVPO rested, in large part, on acts by defendant that served as the basis for the original DVPO. There is nothing in N.C.G.S. § 50B-3 or North Carolina case law prohibiting the renewal of a DVPO based on acts that happened in the past that served as the basis for issuance of the original DVPO. **Forehand v. Forehand, 270.**

Protective order—subjective fear—exchange of drug test results—The trial court did not err by renewing plaintiff's domestic violence protective order. Although defendant disputed that he was a danger to plaintiff, plaintiff's testimony was adequate to support a finding that she was in subjective fear of defendant and, as to the finding that there was a "poor exchange" of the drug test results, there was also competent evidence to support the finding. **Forehand v. Forehand, 270.**

EMPLOYER AND EMPLOYEE

Non-compete agreement—preliminary injunction—likelihood of success on merits—The trial court erred when ruling on a motion for a preliminary injunction by concluding that plaintiff failed to present a likelihood of success on the merits of its claim for breach of a non-compete agreement governed by Pennsylvania law. The non-compete was validly assigned to plaintiff through a bankruptcy reorganization, the agreement was reasonable to protect TSG's legitimate business interests, and the equities weighed in favor of enforcement under the facts. **TSG Finishing, LLC v. Bollinger, 586.**

Retaliatory discharge—letter to supervisor—grievance rather than report of discrimination—Plaintiff's claim that he was fired in retaliation for reporting discrimination based on race or national origin was without merit and was properly dismissed by the trial court. It was clear that plaintiff-physician's letter to the medical director of the facility constituted an employee grievance rather than his reporting of racial discrimination and that he did not believe that he was ever discriminated against because of his race or national origin in his employment at this facility. **Manickavasagar v. N.C. Dep't of Pub. Safety, 418.**

Retaliatory discharge—reasons for discharge pretextual—no reviewable arguments—summary judgment—Plaintiff's claim for retaliatory discharge was properly dismissed by the trial court where plaintiff did not provide reviewable arguments that defendants' articulated reasons for firing him were pretextual. **Manickavasagar v. N.C. Dep't of Pub. Safety, 418.**

ESTOPPEL

Collateral estoppel—previous order not a final judgment or entered in a separate action—The trial court did not violate the principle of collateral estoppel

ESTOPPEL—Continued

by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. Because the order denying the motion for judgment on the pleadings neither constituted a final judgment nor was entered in a separate action, there was no error. **Steele v. Bowden, 566.**

Judicial estoppel—party did not adopt an inconsistent position—In an action involving a business dispute with parallel lawsuits in North Carolina and New Jersey, defendants were not judicially estopped from arguing in their motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. When defendants previously certified in their New Jersey complaint that the New Jersey action was not the subject of any other action or contemplated action, they did not know that plaintiff had filed an action in North Carolina. Defendants therefore never adopted a position that was clearly inconsistent with their previous position. **Bryant & Assocs., LLC v. ARC Fin. Servs., LLC, 1.**

EVIDENCE

Detective vouching for witness's credibility—plain error—The trial court committed plain error in a prosecution for larceny and obtaining property by false premises by permitting a detective to testify that she moved forward with her investigation into the allegations that a witness had made against defendant, despite a great deal of family drama, because she believed that the witness was telling her the truth. The challenged testimony constituted an impermissible vouching for the witness's credibility; given the importance that the jury probably gave to the detective's assessment of the relative credibility of the positions taken by the witness and defendant, and the fact that the outcome in this case depended largely on the witness's credibility, the admission of the detective's testimony constituted plain error. **State v. Taylor, 159.**

Expert testimony—lack of physical evidence consistent with claims of sexual abuse—In a prosecution for sexual offenses committed by defendant against his two daughters, the trial court did not commit plain error by allowing the nurse who performed the forensic physical exam of one of the girls to state her opinion that the lack of physical evidence of sexual abuse was consistent with the girl's assertion that she had been sexually abused. While the nurse's opinion regarding the victim's credibility would have been impermissible, her opinion that her findings were consistent with, not contradictory to, the victim's account was permissible. **State v. Pierce, 537.**

Improper witness testimony—curative instruction not required—In a murder prosecution, the trial court did not commit plain error by failing to give a curative instruction not requested by defendant, where a witness gave his own opinion as to what "made reasonable sense." The trial court sustained trial counsel's objections to the testimony and granted his motion to strike. Even assuming the trial court erred, any error did not have a probable impact on the jury's verdict. **State v. Hinnant, 493.**

Prior crimes or bad acts—sexual abuse—sufficiently similar—time lapse explained by incarceration—In a prosecution for sexual offenses committed by defendant against his daughters, the trial court did not err by admitting testimony from several witnesses regarding previous instances of sexual abuse by defendant. The prior instances of sexual abuse, which occurred between ten and twenty years before the trial, were sufficiently similar to the present offenses, and lapses in time

EVIDENCE—Continued

between instances could be explained by defendant's incarceration and lack of access to a victim. The strong evidence of a common plan outweighed any danger of unfair prejudice. **State v. Pierce, 537.**

Relevance—sheriff's office policy—sexual offender registration—There was no prejudicial error in a prosecution for violating the sexual offender registration statutes from the admission of the Mecklenburg County Sheriff's Office policy that Urban Ministry was not a valid address for compliance with the sex offender registration. The sheriff's office policy was relevant in that it tended to show that no one could live at Urban Ministry and that defendant's actual address was not the one he had registered. Even assuming that this policy lacked relevance, defendant did not show that the error was prejudicial. **State v. Crockett, 96.**

FALSE PRETENSES

Indictment—sufficiency of allegation—false representation and causation— A false pretenses indictment sufficiently alleged the existence of a causal connection between any false representation by defendant and the attempt to obtain real property. The facts alleged in the indictment were sufficient to imply causation, since they were obviously calculated to produce the result sought to be achieved. **State v. Pendergraft, 516.**

Indictment—sufficiency of allegation—real estate—false representation of right to occupy—Defendant's contention in a false pretenses case that the indictment failed to allege a specific false representation lacked merit. The indictment sufficiently alleged that defendant obtained real property by falsely representing that he was lawfully entitled to occupy it, thus alleging more than mere entry into a building. **State v. Pendergraft, 516.**

Instruction—adverse possession—intent—ignorance of law—In a prosecution for obtaining real property by false pretenses, the trial court did not err by instructing the jury that ignorance or mistake of law would not serve to obviate defendant's guilt or by not instructing the jury that the State was required to prove that defendant did not intend to adversely possess property. The law of adverse possession does not have any bearing on the issue of defendant's guilt of obtaining property by false pretenses. **State v. Pendergraft, 516.**

Instructions—burden of proof—The trial court instructed the jury on obtaining real property by false pretenses in a manner consistent with North Carolina Supreme Court precedent and the North Carolina Pattern Jury Instructions, and placed upon the State the burden of proving that defendant acted with the necessary intent to deceive upon the State. **State v. Pendergraft, 516.**

Sufficiency of evidence—real property—adverse possession—The trial court did not err by denying defendant's motion to dismiss a false pretenses charge involving real property for insufficient evidence. Defendant contended that the undisputed evidence showed that he honestly but mistakenly believed that he could obtain title to the property by adverse possession; however, the mere fact that defendant attempted to adversely possess the property does not insulate him from criminal liability if the evidence otherwise shows his guilt of obtaining property by false pretenses. Defendant made multiple representations intended to further his plan to occupy and obtain title to the property, and the knowing falsity of these representations shows that Defendant made them with an intent to deceive. **State v. Pendergraft, 516.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by convicted felon—motion to dismiss—attempted assault not recognized in North Carolina—The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon charge for insufficiency of the evidence. The prior felony conviction alleged in support of this charge was attempted assault with a deadly weapon, and that attempted assault is not a recognized offense in North Carolina. Defendant's conviction for possession of a firearm by a convicted felon was vacated. **State v. Floyd, 110.**

HOMICIDE

Jury instruction—intent to kill—voluntary manslaughter—In a murder prosecution, the trial court did not err by refusing to instruct the jury on voluntary manslaughter based on adequate provocation. One of the elements of voluntary manslaughter based on adequate provocation is the intent to kill, but defendant testified that he did not intend to kill anyone. **State v. Hinnant, 493.**

Jury instruction—involuntary manslaughter—In a murder prosecution, the trial court did not err by refusing to instruct the jury on involuntary manslaughter. Even though defendant testified that he did not intend to shoot anyone, his firing of the gun was intentional and occurred under circumstances naturally dangerous to human life. **State v. Hinnant, 493.**

IMMUNITY

Governmental immunity—action dismissed—failure to allege waiver of immunity through purchase of insurance—The trial court did not err by dismissing an action for claims against a fire department and its employee. Plaintiff failed to allege that the department waived governmental immunity by purchasing insurance. **Pruett v. Bingham, 78.**

Governmental immunity—defense adequately pleaded—The trial court did not err by dismissing an action for claims against a fire department and its employee. Defendants adequately pleaded the affirmative defense of governmental immunity by stating in their answer and motion to dismiss that, as a fire and rescue department and its employee, they were entitled to governmental or sovereign immunity. **Pruett v. Bingham, 78.**

Governmental immunity—emergency medical services—claim barred—The trial court did not err by dismissing an action for claims against a fire department and its employee resulting from an automobile accident. The claims were barred by governmental immunity because the fire department was providing emergency medical services pursuant to its contract with the county. **Pruett v. Bingham, 78.**

Governmental immunity—oral motion to amend complaint—properly denied—The trial court did not err by denying plaintiffs' oral motion to amend their third-party complaint in an action against a fire department and its employee. The fire department raised the defense of governmental immunity in its answer, giving plaintiffs notice of the defense. Moreover, plaintiff could have obtained the fire department's contract with the county from the public record. **Pruett v. Bingham, 78.**

INDECENT LIBERTIES

Multiple sexual acts in same encounter—multiple counts—The trial court did not err by denying defendant's motion to dismiss one count of indecent liberties with

INDECENT LIBERTIES—Continued

a child. The State presented evidence that defendant had sex with his girlfriend in the presence of his daughter, performed oral sex on his daughter, and watched as his girlfriend performed oral sex on his daughter. Even though these actions occurred during a single encounter, they constituted more than one sexual act and therefore supported defendant's conviction for more than one count of indecent liberties with a child. **State v. Pierce, 537.**

INDICTMENT AND INFORMATION

Facial invalidity—raised first on appeal—statutory language—Although defendant never challenged the sufficiency of a false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal and will be reviewed de novo. An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court, but an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute. **State v. Pendergraft, 516.**

Sexual offenders—registration—change of address—not properly notifying sheriff—The trial court did not err by denying defendant's motion to dismiss two charges of failing to register as a sex offender where defendant argued that the State did not present sufficient evidence that defendant changed his address and did not provide proper written notice to the sheriff. N.C.G.S. §§ 14-208.9 and 14-208.11 are properly read together when charging a defendant with a violation of the sex offender registration statute. **State v. Crockett, 96.**

INJUNCTIONS

Preliminary—irreparable loss—likelihood demonstrated—In an action for violation of a non-compete agreement and misappropriation of trade secrets, plaintiff demonstrated that it was likely to suffer irreparable loss unless a preliminary injunction was issued where plaintiff was at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry. **TSG Finishing, LLC v. Bollinger, 586.**

JURISDICTION

Child support modification—amended withholding order—appeal already perfected—The trial court lacked jurisdiction in a child support modification case to enter an amended withholding order in light of the fact that defendant had noted, and subsequently perfected, an appeal from the 29 October 2013 order. **Ferguson v. Ferguson, 257.**

Clerical error—correction after notice of appeal—The trial court had jurisdiction to amend a waiver of counsel form after appeal where the court first checked the not knowing and voluntary box on the waiver form, then amended the form several days later to show that respondent's waiver was knowing and voluntary. The trial court's findings on the form, and its additional contemporaneous statements at that hearing, show that the trial court made an inadvertent clerical mistake by checking the wrong box. Under N.C.G.S. § 1A-1, Rule 60(a), the trial court had jurisdiction to correct that mistake at any time before the record on appeal was docketed in the Court of Appeals. **In re J.K.P., 334.**

JURISDICTION—Continued

Standing—termination of parental rights—petition to adopt—Petitioners' standing to file a petition for termination of parental rights was established by their petition to adopt the child in question. **In re Baby Boy, 316.**

Subject matter jurisdiction—condemnation—statutory authority— Respondent Town had subject matter jurisdiction to condemn petitioner's oceanside motel. The order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing. **Six at 109, LLC v. Town of Holden Beach, 469.**

Subject matter jurisdiction—failure to join necessary party—The trial court did not err by denying a Board of Adjustment's motion to dismiss a petition for lack of subject matter jurisdiction based on failure to name the City of Asheville (City) as respondent in the petition. Failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of a proceeding. Further, the City's participation in the proceedings cured the defect in the petition. **MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjust. for City of Asheville, 432.**

Termination of parental rights—adoption appeal pending—The trial court was not deprived of jurisdiction to terminate parental rights during the pendency of an adoption appeal by N.C.G.S. § 7B-1003. The plain language of the statute limits the trial court's jurisdiction while an appeal of an order entered under the juvenile code is pending, but the statute does not refer to appeals of orders outside the juvenile code. **In re Baby Boy, 316.**

LANDLORD AND TENANT

Ejectment—federal subsidized housing—unconscionable—In an action for summary ejectment from a federally subsidized apartment after marijuana and other drug-related materials belonging to defendant's babysitter were found in her apartment, plaintiff did not establish that summarily ejecting defendant from the apartment would not produce an unconscionable result. After analyzing the totality of the surrounding facts and circumstances, the Court of Appeals concluded that evicting defendant based solely upon the actions of her babysitter would be excessive and shockingly unfair or unjust, where defendant had no knowledge of her babysitter's actions, did nothing to encourage or even tolerate them, and eviction would put defendant and her small children on the street. **E. Carolina Reg'l Hous. Auth. v. Lofton, 42.**

Ejectment—unconscionability requirement—not preempted by federal statute—North Carolina's unconscionability requirement in its summary ejectment statute is not preempted by federal law, and the trial court here did not err by concluding that plaintiff had failed to establish the existence of a right to have defendant summarily ejected from her apartment. Although plaintiff argued that *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, recognized the existence of a strict liability rule that cannot be reconciled with a prohibition against unconscionable evictions, *Rucker* specifically stated that 42 U.S.C. § 1437d(l)(6) did not require eviction but left that decision to the local public housing authority. **E. Carolina Reg'l Hous. Auth. v. Lofton, 42.**

MEDICAL MALPRACTICE

Motion to dismiss—sufficiency of evidence—res ipsa loquitur—The trial court did not err in a medical malpractice case by granting defendants' motion to dismiss

MEDICAL MALPRACTICE—Continued

based on plaintiff's failure to properly allege that she was entitled to relief on res ipsa loquitur grounds. Plaintiff explicitly alleged that she was injured in a specific manner by a specific act of negligence, a fact that bars her from any attempt to rely on the doctrine of res ipsa loquitur. Further, expert testimony would be necessary to establish the cause of the injury that plaintiff claimed to have suffered. **Wright v. WakeMed, 603.**

MOTOR VEHICLES

Habitual impaired driving—results of blood test volunteered—right to be readvised of implied consent rights not triggered—The trial court did not err in a habitual impaired driving case by admitting the results of defendant's blood test into evidence. Defendant, without any prompting, volunteered to submit to a blood test. Thus, defendant's statutory right to be readvised of his implied consent rights was not triggered. **State v. Sisk, 553.**

PLEADINGS

Failure to state a claim—weight of evidence—inappropriate argument—The trial court erred by granting defendants' motion Rule 12(b)(6) to dismiss an action arising from things plaintiff said and her employment termination on the theory that she did not adequately plead causation. The detailed fact-based arguments defendants made in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation. **Feltman v. City of Wilson, 246.**

Summary judgment hearing—defendant not permitted to give oral testimony—defendant offered no other evidentiary materials—The trial court did not abuse its discretion by declining to allow plaintiff to give sworn oral testimony at a summary judgment hearing or by declining to consider her unsworn oral statements. Because defendant did not present any affidavits, depositions, or other evidentiary materials at the hearing, her oral testimony would have impermissibly constituted more than "supplementary" evidence to serve as a "small link" between other evidence. **Steele v. Bowden, 566.**

Summary judgment—granted after motion for judgment on pleadings denied—not improper overruling of another judge—The trial court did not improperly overrule another judge by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. A denial of a motion for judgment on the pleadings does not preclude summary judgment, which considers matters outside the pleadings. While both parties referenced facts outside the pleadings at the hearing for the motion on the pleadings, the trial court did not review any evidentiary materials when considering the motion. For this reason, the motion on the pleadings was not converted to a motion for summary judgment. **Steele v. Bowden, 566.**

PROBATION AND PAROLE

Erroneous revocation of probation and activation of suspended sentence—gap in statutory provision—The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 07 CRS 60072-74. Defendant, who committed the offenses prior to 1 December 2009 but had her

PROBATION AND PAROLE—Continued

revocation hearing after 1 December 2009, was not covered by either statutory provision N.C.G.S. § 15A-1344(d) or § 15A-1344(g) authorizing the tolling of probation periods for pending criminal charges. **State v. Sitosky, 558.**

Erroneous revocation of probation and activation of suspended sentence—based on violations neither admitted nor proven—The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 10 CRS 53201-03 based, in part, on probation violations that were neither admitted by defendant nor proven by the State at the probation hearing. The case was remanded for further proceedings. **State v. Sitosky, 558.**

Juvenile delinquency—federally recognized disability—The trial court did not err in a juvenile delinquency case by finding that respondent juvenile willfully violated the terms and conditions of his probation allegedly without accounting for the fact that he had a federally recognized disability. Even if this aspect of juvenile's challenge to the trial court's orders were properly preserved for purposes of appellate review, it had no merit. **In re Z.T.W., 365.**

Juvenile delinquency—hearsay evidence—The trial court did not err in a juvenile delinquency case by finding that respondent juvenile had violated the terms and conditions of his probation allegedly based solely on hearsay evidence. Juvenile's argument applied to adjudication rather than dispositional hearings. **In re Z.T.W., 365.**

Juvenile delinquency—secure custody pending placement in out-of-home setting—The trial court did not err in a juvenile delinquency case by ordering that respondent juvenile be held in secure custody pending placement in an out-of-home setting. As a result of the fact that juvenile had been adjudicated delinquent by the trial court and had also been found to be in violation of the terms and conditions of his probation, the trial court had the authority under N.C.G.S. § 7B-1903(c). **In re Z.T.W., 365.**

PUBLIC OFFICERS AND EMPLOYEES

Basketball coach—forced retirement accepted—loyalty to team—administrative remedies not exhausted—The trial court correctly dismissed plaintiff's employment termination action under N.C.G.S. § 1A-1, Rule 12 (b)(6). Plaintiff, the former basketball coach at a state university, retired in the face of the university's indicated intent to pursue termination but alleged in his complaint that he had accepted forced retirement and not pursued administrative relief out of loyalty to his basketball team. Plaintiff was not required to exhaust his administrative remedies if the only remedies available would be inadequate, but he provided no authority that loyalty to the team satisfied his burden of showing an inadequate remedy. Therefore, the trial court lacked subject matter jurisdiction and properly dismissed plaintiff's complaint. **Tucker v. Fayetteville State Univ., 188.**

County director of elections—salary—statutory requirements—There was sufficient evidence to support the trial court's conclusion that the Guilford County Board of Elections failed to comply with N.C.G.S. § 163-35(c) in setting the salary of its former Director of Elections (Plaintiff). The statute requires that the salary of a county director of elections "be commensurate with the salary paid to directors in counties similarly situated and similar in population and number of registered voters." The evidence showed that, among the seven largest counties in North Carolina, Guilford County ranked third in voter population, third in voter registration, and first

PUBLIC OFFICERS AND EMPLOYEES—Continued

in election complexity; Plaintiff ranked highest in years of service; and Plaintiff's salary ranked last from 2006 to 2012. **Gilbert v. Guilford Cnty., 54.**

PUBLIC RECORDS

Action to compel production of emails—assistant director not custodian of records—The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts (AOC) in his official capacity for the production of emails pursuant to North Carolina's Public Records Act. Because the public official in charge of an office having public records is the custodian of those records, the assistant director of AOC was not the proper party to sue to compel production of the emails. **Cline v. Hoke, 16.**

Action to compel production of emails—defendant named in individual capacity—action properly dismissed—The trial court did not err by dismissing an action filed against the Assistant Director of the Administrative Office of the Courts in his individual capacity for the production of emails pursuant to North Carolina's Public Records Act. To compel a custodian of public records to permit inspection of those records, a party must sue the custodian in his or her official capacity. **Cline v. Hoke, 16.**

Settlement documents—action initiated by public agency—The trial court erred by dismissing a public records action under N.C.G.S. § 1A-1, Rule 12(b)(6) where the action was brought against Carolinas Health System (CHS), a local unit of government, seeking documents from the settlement of an action involving investments initiated by CHS. Based on the language of N.C.G.S. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that N.C.G.S. § 132-1.3 be construed consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, that statute does not except from the Public Records Act settlement documents in actions instituted by public agencies falling within the Public Records Act. **Jackson v. Charlotte Mecklenburg Hosp. Auth., 351.**

SEARCH AND SEIZURE

Traffic stop—information received from other officers provided reasonable suspicion—In a driving while impaired prosecution, the trial court did not err by denying defendant's motion to suppress. The officer who conducted the traffic stop had been radioed by other officers and informed that they had observed defendant weaving outside her lane of travel. This information gave the officer reasonable, articulable suspicion that defendant was driving while impaired, justifying the traffic stop. **State v. Shaw, 151.**

SENTENCING

Assault inflicting serious bodily injury—assault with deadly weapon inflicting serious injury—remanded for resentencing—The trial court erred by entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. The assault inflicting serious bodily injury judgment was arrested and the case was remanded to the trial court for resentencing. **State v. Coakley, 480.**

SENTENCING—Continued

Habitual felon status—runs consecutively with other sentences—At defendant's resentencing hearing, the trial court did not err by ordering that defendant's term of imprisonment for his conviction as a habitual felon begin at the expiration of his two consecutive sentences for prior convictions. N.C.G.S. § 14-7.6 requires that sentences imposed for habitual felon status "shall run consecutively with and shall commence at the expiration of any sentence being served" by the habitual felon. **State v. Jarman, 128.**

Habitual felon status—underlying offense—attempted assault not recognized in North Carolina—The trial court by allowing the use of defendant's attempted assault conviction to support the determination that he had attained habitual felon status. Attempted assault is not a recognized criminal offense in North Carolina. Defendant's conviction for having attained the status of an habitual felon was vacated. **State v. Floyd, 110.**

Nonstatutory aggravating factor—insufficient notice—The trial court erred by allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Simply providing notice in compliance with N.C.G.S. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non- statutory aggravating factor that defendant committed the sexual offense against the victim knowing that he was HIV positive and could transmit the AIDS virus. **State v. Ortiz, 508.**

Resentencing—de novo hearing—no error—The trial court properly conducted at de novo hearing for defendant's resentencing. The trial court's comment that "those judges had the benefits of things I do not have in front of me" was a response to defense counsel's request that he consider evidence of mitigation presented at a previous sentencing hearing. Further, the trial court sentenced defendant at the bottom of the presumptive range and therefore was not required to formally find or act on defendant's proposed mitigating factors. **State v. Jarman, 128.**

Robbery with dangerous weapon—assault with deadly weapon—separate acts sufficient for separate convictions—The trial court did not err by entering judgment and imposing sentences for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. There was sufficient evidence for the jury to find that the acts necessary to convict defendant of robbery with a dangerous weapon concluded before defendant committed the acts which constituted the offense of assault with a deadly weapon. Thus, separate convictions and sentences for the two offenses were appropriate. **State v. Ortiz, 508.**

Second-degree murder—aggravating factors—especially heinous atrocious or cruel—The trial court's finding that a second-degree murder was especially heinous, atrocious, or cruel was not supported by the evidence. Additional injuries found on the victim's hands and face before she was shot did not alone rise to the necessary level of extreme physical and psychological suffering; defendant was in the home that he lawfully shared with the victim and his mere presence in his own home did not make his actions especially atrocious, heinous, or cruel; and the fact that the victim did not die instantaneously did not support the factor because the medical examiner testified that the victim likely lost consciousness shortly after being shot and there was no indication she suffered. **State v. Myers, 133.**

Second-degree murder—aggravating factors—not supported by evidence—disposition—Where neither of the aggravating factors supporting a sentence for second-degree murder had a sufficient factual basis in the record, the Court of Appeals determined that the proper disposition for defendant's appeal was to set

SENTENCING—Continued

aside his plea agreement and remand for disposition on the original charge of first-degree murder. **State v. Myers, 133.**

Second-degree murder—aggravating factors—position of trust or confidence—spouse—The trial court's finding that defendant took advantage of a position of trust or confidence in order to kill his wife was not supported by the evidence. In essence, the State argued that the marital nature of the relationship made his killing a per se taking advantage of a position of trust or confidence. However, in order for this aggravating factor to be supported by the evidence, a defendant spouse must utilize that position of trust or confidence to effectuate the offense. **State v. Myers, 133.**

SEXUAL OFFENDERS

Registration—change of address—willful failure to notify sheriff—The record contained sufficient evidence that a registered sex offender changed his address and failed to notify the sheriff's office and sufficient evidence that defendant willfully failed to report his changes of address. **State v. Crockett, 96.**

Registration—change of address—willfulness—email notice to sheriff—Urban Ministry—N.C.G.S. § 14-208.11(a) is a strict liability offense if analyzed under the 2005 version of the statutes; however, in 2006, the General Assembly amended the statute to add the requirement that the State must show that defendant willfully failed to comply with the registration requirements. Although defendant argued that the State did not prove that he willfully failed to notify the Mecklenburg County Sheriff's Office of his change of address, an email in lieu of defendant completing and signing paperwork with his address was not sufficient to constitute registration as statutorily prescribed. Even if the email had been sufficient to constitute registration, Urban Ministry (where defendant claimed residence) was not a valid address for compliance with the sex offender registration statute because Defendant could not live there. S**tate v. Crockett, 96.**

Registration—failure to notify new sheriff's office of change of address—sufficiency of indictment—Although the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender improperly alleged that defendant failed to notify the "last registering sheriff" of his address change, the indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office, the "new county sheriff." **State v. Pierce, 141.**

Registration—failure to notify sheriff's office of change of address—motion to dismiss—temporary home address—The trial court did not err by denying defendant's motion to dismiss the charge of failing to notify the sheriff's office of a change of address as a registered sex offender based on the State's alleged failure to provide substantial evidence that defendant changed his address. The State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address, in Wilkes County. **State v. Pierce, 141.**

Registration—jury unanimity—The requirement of jury unanimity was satisfied in a prosecution for violating the sexual offender registration statutes where any of several alternatives satisfied the third element of the jury instruction, that defendant changed his address and failed to notify the sheriff within the requisite time period. **State v. Crockett, 96.**

SEXUAL OFFENDERS—Continued

Registration—new address—amendment of indictment—expansion of dates of offense—The trial court did not err by allowing the State to amend the indictment for failing to notify the sheriff's office of a change of address as a registered sex offender to expand the dates of the offense from 7 November 2012 to June to November 2012. The amendment did not substantially alter the charge because the specific date that defendant moved was not an essential element of the crime. Further, defendant's argument that timing was of the essence in charges involving failure to report a change of address as a sex offender was without merit. Finally, defendant failed to show that he detrimentally relied on the original date of the offense and that he was substantially prejudiced by the amendment. **State v. Pierce, 141.**

Registration—subsequent release from jail—change of address—A registered sex offender's January 2011 release from jail was a change of address falling within the purview of N.C.G.S. § 14-208.9 rather than § 14-208.7 because defendant had been a registered sex offender since April 1999. **State v. Crockett, 96.**

Sex offender registration—denial of request to terminate—The trial court did not err by relying on the federal sex offender registration statute to deny petitioner's request to terminate his sex offender registration. Since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A was retroactively applicable to petitioner. **In re Hall, 322.**

SEXUAL OFFENSES

With a child—motion to dismiss—insufficient evidence as to elements, locations, and time—conviction vacated—The trial court erred by denying defendant's motion to dismiss one count of sexual offense with a child. Defendant was charged with numerous sexual offenses of varying elements, locations, and time periods. Although the victim testified that defendant sexually assaulted her more than ten times and that he performed a sexual act on her in Caldwell County, there was no evidence as to each element of the offense occurring at the time and place alleged in the indictment. The Court of Appeals vacated the conviction, which had been consolidated for judgment with other convictions, and remanded for resentencing. **State v. Pierce, 537.**

STALKING

Civil no contact order—emotional distress—In an action for a civil no contact order, the trial court properly found that defendant caused plaintiff substantial emotional distress where the complaint was completed on an AOC form with the words "tormented," "terrorized," and "terrified" underlined; plaintiff wrote detailed allegations in the blanks on the form; While both plaintiff's and her husband's testimony could have been more descriptive of emotional distress, the trial court had the opportunity to see the parties; to hear the witnesses; and the trial court's ultimate determination that plaintiff was caused substantial emotional distress was supported by the findings. **Norrell v. Keely, 441.**

Emotional distress—substantial—A no contact order was properly entered where defendant contended that the trial court improperly found "considerable emotional distress" rather than "substantial emotional distress." The law in this type of case is not treated as a "magic words" game, and a finding of "considerable

STALKING—Continued

emotional distress" is no different than a finding of "substantial emotional distress." **Norrell v. Keely, 441.**

Harassment—intent—The trial court did not err in determining defendant intended to harass plaintiff in a case involving a no contact where the trial court had found that defendant's "purpose" was to harass plaintiff. A finding regarding defendant's "purpose" was the equivalent of a finding regarding his "intent." **Norrell v. Keely, 441.**

Harassment—knowing conduct directed at specific person—The trial court properly concluded that defendant's conduct of charging at plaintiff with a vehicle and making false claims about her to a sheriff's department were forms of harassment. N.C.G.S. § 14-277.3A(b)(2) only requires knowing conduct directed at a specific person. **Norrell v. Keely, 441.**

TRADE SECRETS

Misappropriation—likelihood of success on the merits—The trial court erred by concluding that plaintiff had not demonstrated a likelihood of success on the merits of plaintiff's claim for trade secret misappropriation. Although general processes are too vague to receive protection, plaintiff sought to protect specific knowledge of each discrete step in the process and presented sufficient evidence on its specific trade secrets to warrant protection. Additionally, plaintiff presented prima facie evidence of misappropriation. **TSG Finishing, LLC v. Bollinger, 586.**

TRESPASS

Personal property—summary judgment—defendant towed vehicle from co-owner without consent—sold vehicle to satisfy lien—The trial court did not err by granting summary judgment on plaintiff's claim for trespass to personal property where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. Defendant forcibly took the vehicle from plaintiff without his consent and allowed it to be sold to satisfy a lien, thereby preventing plaintiff from recovering the vehicle. Even assuming defendant would have been entitled to take the vehicle based upon a prior agreement with plaintiff, summary judgment nonetheless was proper because defendant failed to forecast any evidence of such an agreement at the hearing. **Steele v. Bowden, 566.**

TRIALS

Comment by court—not an assertion about defendant's position—not a statement that defendant was being deceptive—In context, a comment by the trial court was nothing more than a reiteration of the trial court's prior statement that defendant should not testify about statements made by other people and was not an assertion that defendant's position had no merit or that defendant was being deceptive. **Lacey v. Kirk, 376.**

Comments by trial judge—impatience—both sides treated equally—The defendant in a breach of fiduciary duty and defamation case did not receive a new trial where she contended that the trial court made inappropriate comments to or about her trial counsel. Although the record clearly indicated that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties and did not make inappropriate jokes. **Lacey v. Kirk, 376.**

TRIALS—Continued

Comments to defendant—outside the presence of jury—not prejudicial— Defendant in an action for a breach of fiduciary duty and defamation was not entitled to relief from the trial court's judgment on the basis of comments made to defendant outside the presence of the jury. Defendant did not establish that these comments prejudiced her chances for a more favorable outcome at trial. **Lacey v. Kirk, 376.**

Judge's direction to defendant—not a comment on credibility—In context, the trial court's decision to urge defendant to "tell the truth" was nothing more than an effort to persuade defendant to refrain from giving confusing answers and did not constitute a comment concerning defendant's credibility. **Lacey v. Kirk, 376.**

Judge's instruction to answer the questions—restatement of defendant's answers—no error—The trial court did not err when attempting to address defendant's failure to answer directly the questions posed to her. The trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses. **Lacey v. Kirk, 376.**

UNFAIR TRADE PRACTICES

Civil conspiracy—claim predicated upon properly dismissed claim—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for unfair and deceptive practices. Plaintiffs' claim for unfair and deceptive practices was predicated upon their claim for civil conspiracy, which the Court of Appeals held was properly dismissed. Therefore, their claim for unfair and deceptive practices was also properly dismissed. **Bottom v. Bailey, 202.**

UNJUST ENRICHMENT

Failure to submit jury instructions—reimbursement for payments on loaned vehicle—In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, the trial court erred by failing to instruct the jury to consider defendant's counterclaim seeking reimbursement for payments she made on the loan for the vehicle. Even though defendant's answer did not specifically designate a counterclaim, her answer nonetheless properly pled a counterclaim for unjust enrichment by alleging that she as co-signer had paid the balance of the automobile loan and that plaintiff now owed her reimbursement for the amount paid. The Court of Appeals vacated the judgment as to this issue and remanded for a trial on the counterclaim. **Steele v. Bowden, 566.**

WATERS AND ADJOINING LANDS

Dredging of marina—description of boat slip—bottom not included—In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court's finding that the description of a boat slip in the Declaration of Unit Ownership was two dimensional only and did not include the bottom was supported by competent evidence and was therefore binding. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

Dredging of marina—public waters—public trust doctrine not applicable—common property of association—In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court did not err by concluding that the entire marina basin, including the boat slips, was

WATERS AND ADJOINING LAND—Continued

common property. The marina was navigable, and the waters in the marina were public trust waters subject to defendants' riparian rights, but the public trust doctrine was of little significance because the inquiry concerned control of the submerged land rather than an allegation of trespass. While there was evidence that members owned the submerged land beneath their boat slips as private parties, the trial court considered that evidence and found that the boat slips were in a common area. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

Marina dredging—approval of assessment—In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court did not err by concluding that a dredge assessment was properly approved where there was insufficient notice of an initial meeting, but the assessment was approved at a subsequent special members meeting. The fact that some members had already paid the assessment and dredging had already occurred was of no consequence. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

Marina dredging—assessment—individual maintenance of boat slips—In an action between condominium owners and a condominium association concerning the dredging of a marina, certain owners unsuccessfully argued against paying the assessment based on their maintenance of their boat slips. The description of a "slip" did not encompass the submerged land beneath the slips; moreover, there was both evidence and findings that the defendants benefitted from the dredging. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

Marina dredging—ownership of docks, pilings and bottom—conclusion supported by findings and evidence—In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court's conclusion that the docks, pilings, and bottom under the each boat slip were community property was supported by the findings and the evidence. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

WITNESSES

Subpoena—continuing obligation—compulsory attendance—initial session of court required—The trial court erred in ordering, under threat of contempt, that defense counsel's legal assistant, Martinez, appear as a witness for the State. Martinez was subpoenaed to appear on specific weeks in November and December 2013, and January 2014. However, the trial did not occur until a week after the first date listed in the subpoena. Although the State argued that Martinez was required to appear on the first date, and then from session to session until released by the court, there must first be a session of court at which a particular case is scheduled to be heard to trigger compulsory attendance. **State v. Johnson, 500.**

WORKERS' COMPENSATION

Conclusions of law—compensable injury—supported by findings of fact—In a workers' compensation case, the Industrial Commission did not err by concluding that plaintiff had suffered from a compensable work-related injury. The Commission's findings of fact supported its conclusions that plaintiff suffered from a bilateral peripheral vascular disorder that (1) was characteristic of someone working in his particular job balancing air compressor units, (2) was not an "ordinary disease of life," and (3) was caused by plaintiff's job. **Seamon v. Ingersoll Rand, 452.**

WORKERS' COMPENSATION—Continued

Conclusions of law—failure to make reasonable efforts to return to work—supported by findings of fact—In a workers' compensation case, the Industrial Commission's findings of fact supported its conclusion that plaintiff failed to establish that he suffered from a continuing disability after 16 November 2011. The Commission found that plaintiff did not make reasonable efforts to return to work after 16 November 2011 and did not have a pre-existing condition that would make it futile for him to do so. **Seamon v. Ingersoll Rand, 452.**

Credit for payments made before award—from plan entirely funded by employer—not abuse of discretion—In a workers' compensation case, the Industrial Commission did not abuse its discretion by awarding defendant employer a credit for certain disability payments it made to plaintiff before workers' compensation benefits were awarded. Plaintiff's election to pay approximately $10.00 per month for an additional twenty percent of coverage in addition to the forty percent coverage provided by defendant did not render the insurance plan "no longer fully employer funded." In addition, the payment of the employer-funded coverage by insurance carrier Cigna was not a payment from an outside source. Because the plan was employer-funded, the Commission had the discretion to award a credit to defendant. **Seamon v. Ingersoll Rand, 452.**

Erroneous denial—timely filing of claim—medical compensation—other compensation—The Industrial Commission erred by denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C.G.S. § 97-24(a). It was filed before defendants' last payment of "medical compensation" in Florida, plaintiff had been paid no "other compensation" since the Florida workers' compensation benefits did not qualify as "other compensation," and defendant's liability had not otherwise been established under the North Carolina's Workers' Compensation Act. **Clark v. Summit Contr'rs Grp., Inc., 232.**

Findings of fact—nature of job and cause of injuries—supported by competent evidence—In a workers' compensation case, the Industrial Commission's findings of fact challenged by defendant were supported by plaintiff's testimony regarding the manner in which he performed his job and by his doctor's testimony regarding the nature and cause of the injuries. **Seamon v. Ingersoll Rand, 452.**

Findings of fact challenged by plaintiff—manner of work—attempt to return to work—In a workers' compensation case, the Industrial Commission's findings of fact challenged by plaintiff were supported by competent evidence. Plaintiff misread or misinterpreted the findings regarding the manner in which he performed his job. In addition, there was no evidence in the record that plaintiff attempted to return to work, or that he had a pre-existing condition that would make it futile for him to do so. **Seamon v. Ingersoll Rand, 452.**

Ongoing temporary total disability—temporary employee—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff temporary employee was entitled to ongoing temporary total disability payments. Under the applicable standard of review, Dr. Burke's testimony was competent evidence supporting the Commission's finding that plaintiff was unable to continue work as a delivery driver because of his back injury. **Tedder v. A&K Enters., 169.**

Temporary total disability—calculation of average weekly wage—temporary employees—The Industrial Commission erred in a workers' compensation case by its calculation for the average weekly wage of temporary total disability

WORKERS' COMPENSATION—Continued

compensation for a temporary employee. In calculating average weekly wages for employees in temporary positions, the Commission must take into account the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period. **Tedder v. A&K Enters., 169.**

ZONING

Billboard sign—cannot rely on misrepresentations of city official—Although petitioner argued that the City Attorney failed to inform him that the previous billboard sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. It is undisputed that the sign was installed without a permit and was larger than allowed by ordinance. **MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjust. for City of Asheville, 432.**

Billboard sign—city ordinance—legal nonconforming signs could not be reestablished after discontinued use for more than a year—The trial court did not err by concluding that a billboard sign was not allowed based on a variance granted in 1992 for a sign located on the same property. The City's ordinance provided that legal nonconforming signs may not be reestablished after discontinued use for more than a year, and the pertinent structure was not in use for more than two years. The sign was installed without a permit and was larger than allowed by ordinance. **MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjust. for City of Asheville, 432.**