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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CLARENCE EARL BUTLER, PLAINTIFF
v.
VIKKI ELAINE BUTLER (NOW REID), DEFENDANT

No. COA14-521

Filed 20 January 2015

Unjust Enrichment—federal retirement pension benefits—qualified domestic relations order—incorporated divorce settlement

The trial court erred by awarding $20,492.64 and attorney fees to defendant ex-wife based on the court's finding that plaintiff ex-husband was unjustly enriched when he received the entirety of 24 months of federal retirement pension benefits that defendant was entitled to share in based on the qualified domestic relations order incorporated into the parties' divorce settlement. Defendant's failure to receive her court-ordered portion of the benefits resulted solely from her own failure to comply with federal law and the terms of the order.

Appeal by Plaintiff from order entered 27 January 2014 by Judge Robert P. Trivette in Pasquotank County District Court. Heard in the Court of Appeals 6 October 2014.

Frank P. Hiner, IV, for Plaintiff.

The Twiford Law Firm, P.C., by Edward A. O'Neal, for Defendant.

STEPHENS, Judge.

Plaintiff Clarence Earl Butler appeals from the trial court's order awarding $20,492.64 and attorneys' fees to his ex-wife Defendant Vikki Elaine Butler (now Reid) based on the court's finding that Plaintiff was unjustly enriched when he received the entirety of 24 months of federal retirement pension benefits that Defendant was entitled to share in based on the qualified domestic relations order ("QDRO") incorporated into the parties' divorce settlement. Because we agree with Plaintiff's argument that Defendant's failure to receive her court-ordered portion of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the order, we hold that the trial court erred in its findings of fact and conclusion of law that Plaintiff was unjustly enriched. Accordingly, we reverse.

Facts and Procedural Background

Plaintiff and Defendant were married to each other on 21 April 1972. They separated on or about 4 March 1992, and on 12 May 1994, Plaintiff filed a complaint in Pasquotank County District Court for absolute divorce, accompanied by a Separation and Property Settlement Agreement ("Separation Agreement") drafted by Defendant's attorney and executed by the parties on 20 April 1994. At the time of the parties' separation, Plaintiff was employed as a Federal Civilian Employee with the Norfolk Naval Shipyard. Paragraph 15F of the Separation Agreement, entitled "Retirement Benefits," provided in relevant part that:

> The marital interest in [Plaintiff's] retirement benefits with the Norfolk Naval Shipyard shall be divided proportionately between the parties based on [Plaintiff's] length of service and the coincident turn of the parties' marriage. The parties agree to enter into a [QDRO] immediately following or simultaneously with the entry of a divorce judgment, which [QDRO] shall provide for a proportionate division (as defined in the preceding sentence) of [Plaintiff's] Norfolk Naval Shipyard retirement benefits payable when [Plaintiff] begins receiving such retirement benefits. The [QDRO] shall then be submitted to both the Norfolk Naval Shipyard and to the court of competent jurisdiction for approval and entry.

On 19 September 1994, a judgment of absolute divorce was entered incorporating the Agreement and, simultaneously, upon consent of all parties, the court entered a QDRO, referred to in the Agreement as an "Order for Division of Federal Civil Service Retirement Plan," drafted by Defendant's attorney. Paragraph 1 of the QDRO provided

the formula for computing Defendant's share of Plaintiff's benefits and Paragraph 4 directed the United States Office of Personnel Management ("OPM") to pay Defendant's share directly to her. Paragraph 7 of the QDRO provided that Defendant "shall be entitled to receive the benefits specified herein only in accordance with law and the terms of the Civil Service Retirement Spouse's Equity Act of 1984" and further stated that Defendant "shall comply with all terms and conditions of the Act . . . ." Paragraph 13 of the QDRO provided that a copy of the order "shall be served upon [OPM], Civil Service Retirement System, as the Administrator of the Retirement Plan herein, and the Administrator shall determine within a reasonable period of time whether this order can be administered by the Retirement System."

Plaintiff continued his employment in the federal civil service at the Norfolk Naval Shipyard until his retirement in October 2009. Prior to his retirement, in August 2009, Plaintiff—who had served as an active duty enlisted member of the United States Air Force from 11 July 1972 until his honorable discharge on 10 July 1978—paid $10,381.50 to the Defense Finance and Accounting Service in order to add his six years of active duty Air Force service to the computation of his overall federal civilian retirement benefits. By the time Plaintiff retired, Defendant had remarried, and Plaintiff did not inform her of his retirement. In fact, Plaintiff had been erroneously informed at a pre-retirement seminar he attended that because of her remarriage, Defendant would not be entitled to receive any share of his benefits. Beginning in November 2009 and continuing through October 2011, Plaintiff received his full retirement benefits from OPM, without any deductions for Defendant's share.

Sometime in 2011, Defendant discovered that Plaintiff had retired two years earlier. When she contacted OPM to inquire why she had not received any portion of the benefits she was entitled to share in under the QDRO, Defendant learned that the QDRO had never been filed with OPM. Defendant subsequently filed a copy of the QDRO with OPM and began receiving her share of Plaintiff's benefits in November 2011.

On 11 June 2012, Defendant sent Plaintiff a letter requesting that he reimburse her $25,616.63 in retirement back pay plus $200 in attorneys' fees. When Plaintiff refused, Defendant filed a Motion in the Cause in Pasquotank County District Court seeking (1) damages for Plaintiff's failure to advise her of his receipt of 24 months of unreduced retirement benefits and his refusal to repay her share; (2) specific performance of the Separation Agreement and a modification of the QDRO to proportionally increase her share of Plaintiff's benefits in light of his additional

six years of credited employment from his military service; (3) liquidated damages; and (4) attorneys' fees.

Defendant's motion was heard on 9 October 2013. Defendant testified that, prior to this litigation, she had not had any contact with Plaintiff since their divorce. Most of Defendant's testimony focused on her allegation that Plaintiff violated the Separation Agreement by failing to inform her that he had purchased additional years of credited employment. When Plaintiff testified, he admitted to having received 24 months of unreduced retirement benefits, but asserted that he had done nothing to breach the Separation Agreement, noting that it did not require him to do anything regarding Defendant's share of his retirement benefits, as both federal law and the terms of the QDRO explicitly conditioned Defendant's receipt of her share on her filing a copy of the QDRO with OPM. Defendant acknowledged that it was her and her attorney's responsibility to submit the QDRO to OPM and that until her discovery to the contrary in 2011, she had believed that her attorney had done so shortly after the 1994 divorce proceeding concluded. Toward the end of the hearing, the trial court asked Defendant's counsel:

> THE COURT: . . . [H]ow is it that it's [Plaintiff's] problem for the two year period —how come [Plaintiff] is responsible for that back payment based upon all this other information that indicates that it's clearly your client's duty to make sure that OPM is notified[?] I mean [Defendant] may have a gripe with [her lawyer from the divorce proceeding], she may have a gripe with OPM.
>
> [Defendant's counsel]: She doesn't have a remedy against OPM.
>
> THE COURT: Well, just because she doesn't have a remedy that doesn't mean it makes [Plaintiff] the party.
>
> [Defendant's counsel]: I'm not saying that he's a bad guy, Your Honor.
>
> THE COURT: I'm not saying he's a bad guy either, but why is he supposed to pay for [Defendant's lawyer from the divorce proceeding] or OPM's mistake?
>
> [Defendant's counsel]: He has received her money. That's exactly what it is. He received her money. It's not that he's paying back something that all of a sudden popped up. If he had—if he hadn't gotten her money I wouldn't ask—I'm not asking him to do anything but give back to her

what the Separation Agreement says she is entitled to receive. The Separation Agreement divides it and he got it and she's entitled to have it paid back to her.

THE COURT: Okay.

[Defendant's counsel]: And that is just as simple as I know how to make it, Your Honor.

THE COURT: I just find it hard to believe—again, you know, I don't think that I'm at all unique as a District Court Judge. You gentlemen are unique, and I appreciate that, but I just can't believe that these facts haven't come before a district court and there is not a case right on point. This just seems like something that would have happened again and again and again. And so it just—there's no case law on this?

[Defendant's counsel]: I didn't find any case law on it, on point.

THE COURT: All right. That's fine.

[Defendant's counsel]: But I'll tell you what I did find. I did find that interpretation of separation agreement divided these retirement benefits. The fact is that he received her benefits and he will be unjustly enriched by her share of those benefits. I can tell you and I'm going to—[Plaintiff's counsel] when he gets tired of it, he can stop me, but it is not unusual for OPM to lose these papers. I had a case exactly—

[Plaintiff's counsel]: I'm going to stop him.

[Defendant's counsel]: Well, I gave him the nod ahead of time. I didn't want him tearing out of that chair.

THE COURT: That's why I don't understand why there's not a case on it. I mean, that's my point. I can't believe this is the first time this has ever happened.

[Plaintiff's counsel]: Judge, I know [Defendant's counsel] has looked, and I have looked, and I haven't found anything.

On 27 January 2014 the trial court entered an order denying Defendant's claims for specific performance and liquidated damages but granting relief, as well as attorneys' fees, on her claim for her share of the

retirement benefits Plaintiff received between 2009 and 2011. In its findings of fact, the trial court found that

> Plaintiff has been unjustly enriched by receiving 24 months of unreduced federal retirement pension when Defendant received nothing—Defendant, during these 24 months, should have received 17.66% of Plaintiff's federal retirement pension. Thus . . . , Plaintiff should pay Defendant $20,492.64.

Accordingly, in its conclusions of law, the court held that

> Plaintiff has been unjustly enriched by erroneously receiving and retaining Defendant's share of the CSRS benefits in the amount of $20,492.64.

The trial court also awarded $4,000 in attorneys' fees to Defendant, based on a provision in the Separation Agreement entitling the prevailing party to recover suit costs in the event litigation proved necessary for its enforcement. Plaintiff gave written notice of appeal on 14 February 2014. In his appeal, Plaintiff contends that the trial court: (1) erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched; (2) erred by admitting improperly authenticated evidence; and (3) abused its discretion by awarding attorneys' fees to Defendant when both parties "prevailed" on some claims, and by failing to make findings regarding the reasonableness of that award.

Standard of Review

Under North Carolina law, it is well established that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). We review the trial court's conclusions of law *de novo*. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Analysis

Plaintiff first contends that the trial court erred in its finding of fact and conclusion of law that he was unjustly enriched as a result of receiving two years of unreduced retirement benefits. Specifically, Plaintiff argues that unjust enrichment is not an appropriate remedy here, given that Defendant's failure to receive her court-ordered share of his federal

retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. We agree.

Unjust enrichment is "a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *rehearing denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). The doctrine has been described as

> the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another.

Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (emphasis omitted). However, this Court has recognized that, "the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. There must be some added ingredients to invoke the unjust enrichment doctrine." *Id.* Indeed, as we recently explained, there are five elements to a *prima facie* claim for unjust enrichment:

> First, one party must confer a benefit upon the other party. . . . Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. . . . Third, the benefit must not be gratuitous. . . . Fourth, the benefit must be measurable. . . . Last, the defendant must have consciously accepted the benefit.

JPMorgan Chase Bank, Nat'l Ass'n v. Browning, __ N.C. App. __, __, 750 S.E.2d 555, 559 (2013) (citations, internal quotation marks, and emphasis omitted). Thus, in order to prevail on a claim of unjust enrichment, a plaintiff must show that "property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001). However, "[t]he recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (citation and internal quotation marks omitted). Moreover, we have long recognized

that "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 451, 312 S.E.2d 421, 426 (1984) (citation and internal quotation marks omitted). Indeed, "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (citation and internal quotation marks omitted), *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003).

In the present case, we note as an initial matter that the parties' appellate briefs offer wildly divergent accounts of the proceedings below. For example, Defendant argues that because Plaintiff did not make his argument against unjust enrichment before the trial court, he has failed to preserve the issue for our review as required by our Rules of Appellate Procedure and is now attempting to "swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). However, a careful review of the record reveals that, apart from Defendant's passing reference to the term toward the end of the hearing, the first time the words "unjust enrichment" were utilized in this litigation was in the trial court's order awarding it as a remedy. Defendant's Motion in the Cause did not specifically seek unjust enrichment as a remedy, nor did the parties meaningfully address its applicability during the 9 October 2013 hearing. We therefore conclude that Plaintiff had no opportunity to make this argument at trial, and because "the appealing party cannot be charged with impermissibly *swapping* horses when it never mounted one in the first place," *Rolan v. N.C. Dept. of Agric. & Consumer Servs.*, __ N.C. App. __, __, 756 S.E.2d 788, 795 (2014), we reject Defendant's argument to the contrary as baseless.

Defendant also contends in her brief that this case was actually pled and tried on a theory of breach of contract. However, the record before us flatly contradicts that claim. On the one hand, the first cause of action in Defendant's Motion in the Cause deals with Plaintiff's receipt of 24 months of unreduced retirement benefits, but it fails to allege the *prima facie* elements of a claim for breach of contract. If anything, Defendant's request for specific performance on her second cause of action makes clear that she was seeking equitable relief, rather than a legal remedy. On the other hand, during the 9 October 2013 hearing, Defendant did not allege that her failure to receive her share of the

retirement benefits resulted from Plaintiff's breach of any legal duty he owed to her. But perhaps the most significant reason that Defendant could not have prevailed below on a theory of breach of contract is that this is not a contract case. Our Supreme Court has long recognized that separation agreements lose their contractual nature and become orders of the court upon incorporation into a divorce judgment. *See*, *e.g.*, *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) ("These ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case."). As the proper remedy for violation of such an order is by an action for contempt, *see id.*, there simply is no basis for a breach of contract claim here. We therefore disregard as meritless Defendant's argument that, notwithstanding the plain meaning of the language used in the trial court's order awarding her the remedy of unjust enrichment, she prevailed below on a theory of breach of contract.

For his part, Plaintiff argues that the trial court erred in ordering unjust enrichment as a remedy because Defendant's failure to receive her court-ordered share of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. In support of this argument, Plaintiff cites our recent decision in *Holmes v. Solon Automated Servs.*, __ N.C. App. __, 752 S.E.2d 179 (2013), which he contends establishes that unjust enrichment is an inappropriate remedy for a party who does not receive the benefit she hoped to under an agreement her counsel bargained for simply because of her own failure to meet the terms and conditions agreed upon.

In *Holmes*, we reviewed an opinion and award from the North Carolina Industrial Commission denying the plaintiff's estate's breach of contract claim to enforce the terms of a mediated settlement agreement. After suffering a compensable injury at work, the plaintiff reached a comprehensive settlement agreement with his employer, the terms of which included the funding of a Medicare Set-Aside Allocation ("MSA"). *Id.* at __, 752 S.E.2d at 180. The agreement provided that the MSA would be funded in part by $19,582.37 in seed money and in part by annual payments of $9,247.23 per year for eighteen years in annuity benefits for ongoing medical expenses, but its terms explicitly conditioned payment of these annuity benefits on the plaintiff's survival. *Id.* When the plaintiff died unexpectedly before the agreement was finalized, the employer refused to pay both the seed money and the annuity benefits to his estate. *Id.* at __, 752 S.E.2d at 181. After finding that the purpose of the MSA agreement, which was "to protect Medicare from bearing the

burden of future medical expenses arising from this workers' compensation case," had been frustrated by the plaintiff's failure to satisfy the implied condition of survival, *id.*, the Commission denied his estate's claim for payment of both the seed money and the annuity benefits. *Id.* at __, 752 S.E.2d at 182. The plaintiff's estate appealed to this Court, arguing that the defendants would be unjustly enriched if allowed to retain the MSA funds. We agreed with the plaintiff's estate's argument regarding the seed money and reversed the Commission's decision because, in contrast to the annuity benefits, the MSA agreement treated the seed money as a guaranteed benefit of a specific sum without any language conditioning payment on the plaintiff's survival. *Id.* at __, 752 S.E.2d at 185. However, based on the express terms of the MSA agreement, we rejected the estate's unjust enrichment claim regarding the annuity benefits. In affirming the Commission's decision denying payment of the annuity benefits, we reasoned that because the plaintiff "did not survive a single year, we conclude that [he] failed to meet an explicit condition precedent in the contract, survival." *Id.* at __, 752 S.E.2d at 184.

Here, Plaintiff contends that Defendant should be similarly barred from recovery under a theory of unjust enrichment because of her failure to satisfy an explicit condition precedent in the terms of the QDRO that was bargained for and drafted by her own attorney. Specifically, the QDRO expressly states that it is OPM, rather than Plaintiff, that is responsible for paying Defendant her share of Plaintiff's retirement benefits. The QDRO also provides that Defendant is only entitled to receive those benefits "in accordance with law" and that she must "comply with all terms and conditions of the [Civil Service Retirement Spouse's Equity] Act." The Act expressly authorizes payments of a federal employee's retirement benefits to a former spouse if a court so orders, but by its own terms it is only applicable "after the date of receipt [by OPM] of written notice of such decree, order, or agreement, and such additional information and documentation as [OPM] may prescribe." Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600 (amending the Civil Service Retirement Act to authorize compliance by the Civil Service Commission with the terms of court orders regarding divorce, annulment, and legal separation), *codified at* 5 U.S.C. 8345(j)(2) (2012). Furthermore, Part 838 of the Code of Federal Regulations, which provides guidance for OPM's handling of court orders affecting federal employee retirement benefits, provides that "[c]laimants are responsible for . . . [f]iling a certified copy of court orders and all other required supporting information with OPM." 5 C.F.R. 838.123 (2014). In addition, the Code mandates that before OPM can make direct payments to a retired federal employee's former spouse, the "former spouse (personally or through a representative) must apply

in writing to be eligible for a court-awarded portion of an employee annuity." 5 C.F.R. 838.221. While the rationale behind these requirements is more likely based on increasing administrative efficiency, rather than barring recovery of benefits by former spouses, the implication is clear: OPM will not pay benefits to a retired federal employee's former spouse until it has received her application and a copy of the court order awarding them. Here, the QDRO drafted by Defendant's own counsel is not quite so explicit insofar as it only states that a copy "shall be served upon OPM," but it does specifically state that Defendant must comply with the Act's terms and conditions. At trial, Defendant admitted during cross-examination that she understood it was her responsibility to file the Retirement Order with OPM, and that she believed that her attorney had done so. Nevertheless, OPM had no record of any filing prior to Defendant's 2011 inquiry.

Thus, based on both federal law and the terms that the parties agreed to, the burden was on Defendant to file the QDRO with OPM, and that burden was not met until 2011. While we recognize that the procedural posture of this case is not directly analogous to *Holmes*, insofar as it deals with enforcement of a court order rather than a claim for breach of contract, we nevertheless find its logic persuasive. We therefore conclude that, as in *Holmes*, Defendant's injury here was caused by her own failure to satisfy an express condition precedent—namely, filing a copy of the QDRO with OPM.

While we acknowledge that it may seem unfair to deny Defendant her share of Plaintiff's retirement benefits that she would have been legally entitled to had she filed a copy of the QDRO with OPM, it is well established that "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A.*, 160 N.C. App. at 15, 584 S.E.2d at 337. The trial court's attempt to fashion an equitable remedy here, without the benefit of controlling precedent, is understandable but erroneous because "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce*, 310 N.C. at 451, 312 S.E.2d at 426.

Moreover, we emphasize that while it is true as a general matter that a trial court has broad discretion to grant equitable relief and shape its remedies accordingly, unjust enrichment is a specific remedy that can only be applied when certain preconditions are present. The mere fact that one party benefited at the expense of another is not sufficient to invoke such remedy unless all five of the elements of the *prima facie*

case are met. *See JPMorgan Chase Bank, Nat'l Ass'n*, __ N.C. App. at __, 750 S.E.2d at 559. Here, Plaintiff clearly benefited by receiving 24 months of unreduced federal retirement benefits as a result of Defendant's failure to file a copy of the QDRO with OPM. The benefit Plaintiff received is measurable, which satisfies the fourth required element of unjust enrichment, *see id.*, and nothing in the record suggests that the benefit to Plaintiff resulted from Defendant's unjustifiable or officious interference in his affairs or desire that he keep her share of his benefits as a gift, thereby satisfying the second and third elements. *See id.* Indeed, as discussed above, the benefit to Plaintiff resulted solely from Defendant's failure to take action.

Plaintiff argues that this means Defendant cannot satisfy the first *prima facie* element's requirement that she conferred a benefit upon him, *see id.*, based on the definition of the term "confer" provided by the 1980 edition of the *Random House College Dictionary*, which Plaintiff contends implicitly requires knowing or conscious action. While we are generally reluctant to resort to decades-old dictionary definitions to resolve contemporary legal conflicts, Plaintiff's argument has some merit insofar as case law from this Court and our Supreme Court typically contemplates unjust enrichment as an appropriate remedy only in situations where the complaining party intentionally and deliberately undertook an action with an expectation of compensation or other benefit in return. *See*, *e.g.*, *Wright*, 305 N.C. at 351, 289 S.E.2d at 351 (analyzing unjust enrichment claims arising from mistaken but good faith improvements to another person's property); *JPMorgan Chase Bank, Nat'l Ass'n*, __ N.C. App. at __, 750 S.E.2d at 560 (analyzing unjust enrichment claims arising from unsolicited payments on deeds of trust). Here, by contrast, there is no suggestion that Defendant's failure to file a copy of the QDRO with OPM was done intentionally or with any expectation of benefit to Plaintiff or remuneration to herself. Thus, Defendant cannot satisfy the first required element of the *prima facie* case for unjust enrichment.

Furthermore, the record suggests that the fifth *prima facie* element is also lacking here because there is no evidence that Plaintiff consciously received the benefit. *See id.* at __, 750 S.E.2d at 559. During the trial, Plaintiff testified that prior to his retirement, he was informed that because Defendant had remarried, she would not be entitled to receive any share of his benefits. Although this advice proved incorrect, Plaintiff testified further that at no point during his first two years of receiving retirement benefits did OPM offer any indication that Defendant was still entitled to receive a share. Neither the QDRO nor the Settlement

Agreement obligated Plaintiff to notify Defendant of his retirement or take any further action regarding her share of his retirement benefits. Further, nothing in the record suggests that Plaintiff acted in bad faith, was aware that the QDRO had not been filed, or did anything to prevent Defendant from filing it.

Under these circumstances, Defendant perhaps could have asserted a claim against the attorney who represented her in her divorce proceedings and failed to file the QDRO with OPM. However, the law is clear that she has no claim for unjust enrichment on these facts. Thus, we hold that the trial court erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched and, accordingly, we vacate its award to Defendant. Because this issue is dispositive, we need not reach Plaintiff's additional arguments concerning the propriety of the trial court's admission of allegedly improperly authenticated evidence, nor his contention that the trial court abused its discretion by awarding attorneys' fees to Defendant. Accordingly, the trial court's order is

REVERSED.

Chief Judge McGEE and Judge DIETZ concur.

JEANNE A. CLARK, PLAINTIFF
v.
RICHARD J. BICHSEL, DEFENDANT

No. COA14-577

Filed 6 January 2015

1. Contracts—oral agreement to divide rent—findings of fact

The trial court did not err by finding that the parties made an oral agreement to divide the rent on an apartment they shared. Both parties testified that they had agreed to divide the rent.

2. Appeal and Error—preservation of issues—issue not raised at trial

The trial court did not err when it made no findings of fact about mitigation of damages in a breach of contract case. Failure to mitigate damages is an affirmative defense, and defendant's failure to raise it at trial waived it for appellate review.

3. Judgments—money judgments—enforced by execution

In a breach of contract case, the trial court erred by ordering defendant to pay a money judgment within 60 days. Under N.C.G.S. § 1-302, money judgments are enforced by execution, not contempt proceedings.

Appeal by defendant from order entered 23 December 2013 by Judge Lori G. Christian in Wake County District Court. Heard in the Court of Appeals 22 October 2014.

No brief filed for plaintiff-appellee.

Heidgerd Law Office, LLP, by Eric D. Edwards and Jason E. Spain, for defendant-appellant.

STEELMAN, Judge.

The trial court's findings of fact were supported by competent evidence, and in turn support the trial court's award of a monetary judgment in favor of plaintiff. Where defendant failed to raise the affirmative defense of mitigation at trial, that argument on appeal is dismissed. The trial court erred in ordering defendant to pay money damages within 60 days.

I. Factual and Procedural Background

Jeanne Clark (plaintiff) and Richard Bichsel (defendant) entered into a lease agreement with a third party for an apartment beginning 1 September 2012 and expiring 1 September 2013. The parties agreed that they would each pay half of the rent. Defendant paid his half of the rent for the months of September, October, November, and December of 2012. In December of 2012, defendant moved out of the apartment. Defendant notified the apartment leasing agency that he would be moving out, and that plaintiff would remain on the premises with her three children and one dog. Neither party attempted to renegotiate the lease. After defendant's departure, plaintiff paid the entire rent.

On 1 July 2013, plaintiff filed a complaint for money owed against defendant in the Small Claims Court for Wake County. On 1 August 2013, the magistrate entered judgment in favor of plaintiff, and ordered defendant to pay $5,000. Defendant appealed to the District Court of Wake County. The case went to arbitration pursuant to N.C. Gen. Stat. § 7A-37.1. On 7 October 2013, an arbitration award was filed in favor of

defendant, awarding nothing to plaintiff. On 1 November 2013, plaintiff appealed this decision to the District Court of Wake County.

The case was heard by the trial court, sitting without a jury. On 23 December 2013, the trial court entered its judgment in favor of plaintiff. Specifically, the trial court found that plaintiff and defendant had an oral contract to split the rent, that defendant breached that contract, and that plaintiff was damaged by the breach. The trial court ordered defendant to pay damages in the amount of $5,280. The trial court further ordered that "Defendant shall pay Plaintiff within 60 days of receipt of this order."

Defendant appeals.

II. Findings of Fact

[1] In his first argument, defendant contends that the trial court's findings of fact were not supported by the evidence at trial. We disagree.

A. Standard of Review

" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)).

B. Analysis

Defendant contends that the trial court's findings of fact numbers 2, 8, 10, 12, and 14 are unsupported by and contrary to the evidence presented at trial. The trial court specifically found that:

> 2. The parties had a verbal agreement that they would each pay half the rent on said apartment.
>
> . . .
>
> 8. Plaintiff relied on Defendant's verbal agreement that the parties would to pay half of the rent for the term of the lease. The lease expired on September 1, 2013.
>
> . . .
>
> 10. Plaintiff could not pay the entire rent without Defendant's commitment to pay half the rent.
>
> . . .

> 12. Plaintiff relied on Defendant's commitment to pay half the rent.
>
> . . .
>
> 14. Plaintiff relied on Defendant's commitment to pay half the rent.

At trial, plaintiff stated that:

> The defendant and I signed a lease to establish residency together and it was a 12-month lease. And our agreement was to split the rent and expenses, which we did for four months, until he decided to establish residency elsewhere.

Defendant later testified, when discussing how he and plaintiff had planned to divide the rent:

> We were gonna split the rent and half the utilities while we were living together.

Given that both plaintiff and defendant testified that they agreed to divide the rent, we hold that there was evidence in the record to support the trial court's finding that the parties made a verbal agreement to divide the rent.

Plaintiff further testified that, after defendant moved out:

> I said I wasn't going to move out because I was financially bankrupt at that point. I wasn't -- I didn't have any other option but to stay there. I wasn't --
>
> Q You thought --
>
> A I didn't have the money to establish a new residence.
>
> Q Did you at that point talk to the leasing company, the landlord about trying to get out of the lease?
>
> A No. He did mention that. I can't remember if he paid like three months rent that we could get out of it. But as I just stated, I did not have the cash to do that. And he didn't offer to do that.

Plaintiff's repeated statements that she lacked the funds to move, and that she was financially bankrupt, tend to support a finding that she lacked the funds to pay the remaining rent, and that she relied on defendant's assurance that he would pay half of the rent. We hold that the trial court's findings were supported by competent evidence.

Defendant further contends that the trial court's conclusions of law based upon these findings were in error, because the findings were improper. As we have held that these findings were supported by competent evidence, we hold that the conclusions of law based thereon were also proper.

This argument is without merit.

III. Failure to Mitigate Damages

[2] In his second argument, defendant contends that the trial court erred in failing to make findings concerning plaintiff's failure to mitigate damages. Because defendant failed to raise this affirmative defense at trial, this argument is dismissed.

A. Standard of Review

"[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008); *see also* N.C. R. App. P. 28(b)(6).

B. Analysis

Defendant contends that plaintiff should have attempted to renegotiate her lease after defendant's departure, that plaintiff's failure to do so constitutes a failure to mitigate damages, and that the trial court erred in failing to make findings with respect to mitigation.

Failure to mitigate damages is an affirmative defense. *See e.g. Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 762, 663 S.E.2d 874, 875 (2008). "The [breaching] defendants [bear] the burden of proof on [their] affirmative defense that [the nonbreaching party] failed to mitigate its damages." *Kotis Props., Inc. v. Casey's, Inc.*, 183 N.C. App. 617, 623, 645 S.E.2d 138, 142 (2007). In the instant case, defendant made no argument at trial concerning plaintiff's failure to mitigate. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (quoting *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990)); *see also* N.C. R. App. P. 10(a)(1).

We hold that defendant's failure to raise the issue of mitigation at trial waives that issue for appellate review. This argument is dismissed.

IV. Money Judgment

[3] In his third argument, defendant contends that the trial court erred in ordering defendant to pay a money judgment within 60 days. We agree.

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Plaintiff brought this action against defendant seeking a money judgment. Money judgments are generally controlled by N.C. Gen. Stat. § 1-302, which provides that:

> Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.

N.C. Gen. Stat. § 1-302 (2013). We have previously held that, as a general rule, once a judgment fixes the amount due, execution, not contempt, is the appropriate proceeding. *Brown v. Brown*, 171 N.C. App. 358, 361, 615 S.E.2d 39, 41 (2005). In the instant case, the trial court ordered payment within 60 days, which was not authorized by N.C. Gen. Stat. § 1-302, and was in error.

We vacate the portion of the trial court's judgment requiring defendant to pay the judgment within 60 days. Upon remand, plaintiff may attempt to enforce the judgment in accordance with the provisions of Article 28 of Chapter 1 of the General Statutes.[1]

AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART.

Judges CALABRIA and McCULLOUGH concur.

1. We further note that pursuant to N.C. Gen. Stat. § 1-305(b), the Clerk of Superior Court is not authorized to issue execution until the provisions of that statute have been complied with.

ROBIN CRITE, PLAINTIFF
v.
TIMOTHY SHAWN BUSSEY, DEFENDANT

No. COA14-743

Filed 20 January 2015

Appeal and Error—interlocutory orders—sufficiency of service of process

Defendant's appeal from the trial court's interlocutory order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction was dismissed. Although defendant's motion was couched in terms of lack of jurisdiction under Rule 12(b)(2), it actually raised a question of sufficiency of service or process. Motions challenging only the sufficiency of service and process and not challenging the existence of sufficient minimum contacts with the State are not immediately appealable under N.C.G.S. § 1-277(b).

Appeal by defendant from order entered 28 April 2014 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 19 November 2014.

Sharpless & Stavola, P.A., by Eugene E. Lester III, for defendant-appellant.

No brief filed for plaintiff-appellee.

DIETZ, Judge.

Defendant Timothy Shawn Bussey appeals from the trial court's order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction. Although this appeal is interlocutory, Bussey contends that this Court has jurisdiction to hear it under N.C. Gen. Stat. § 1-277(b) (2013). Section 1-277(b) permits an immediate appeal from trial court rulings concerning "the jurisdiction of the court over the person."

For the reasons set forth in *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982), we reject Bussey's jurisdictional argument because the trial court's order concerns sufficiency of service and process, not whether Bussey had sufficient contacts with the State. Accordingly, section

1-277(b) does not apply and we must dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

On 19 June 2013, Robin Crite filed a complaint alleging that she was injured when Timothy Shawn Bussey, "a resident of Forsyth County, North Carolina," failed to use a turn signal and made an unsafe movement in his vehicle, resulting in a collision with Crite's car. At the time of the accident, Bussey was driving a vehicle owned by his employer, First Christian Church of Kernersville, North Carolina. An official Division of Motor Vehicles Crash Report, produced the day of the accident, listed the name and address of the owner-employer Church in addition to Bussey's personal contact information.

When Crite attempted personal service on Bussey at the home address listed on the report, the summons was returned undelivered with a notation that Bussey "[n]o longer lives at [the] address provided." Crite directed an alias and pluries summons to the same address, and when that was returned undelivered as well, she filed an Affidavit of Service of Process by Publication.

Crite published notice of the lawsuit in the Jamestown News, a Guilford County publication, for three consecutive weeks in September 2013. She made no further attempts at service on Bussey, by personal delivery, mail, or otherwise. Bussey filed an affidavit with the trial court stating that he never received service of process by personal delivery or mail, and he never received a copy of notice of service by publication at his residence or workplace.

On 9 December 2013, Bussey moved to dismiss the action for insufficient process, insufficient service of process, and lack of personal jurisdiction. In his answer filed on 16 December 2013, Bussey denied the allegations in the complaint and again asserted the defense of lack of personal jurisdiction, incorporating by reference his earlier motion to dismiss. The trial court denied Bussey's motion to dismiss, and he timely appealed.

Analysis

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Campbell v. Campbell*, ___ N.C. App. ___, ___, 764 S.E.2d 630, 632 (2014). Bussey contends that this appeal falls into an exception to this general rule spelled out in N.C. Gen. Stat. § 1-277(b), which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse

ruling as to the jurisdiction of the court over the person or property of the defendant."

But our Supreme Court has limited the scope of § 1-277(b). In *Love v. Moore*, the Supreme Court held that "G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint." 305 N.C. at 580, 291 S.E.2d at 145. Thus, the Court held that motions challenging only the sufficiency of service and process, and not challenging the existence of sufficient "minimum contacts" with the State, are not immediately appealable under § 1-277(b). *Id.* at 581, 291 S.E.2d at 146.

Applying *Love*, this Court has held that where a "defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b)." *Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984).

That is precisely the case here. Bussey moved to dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5) of the Rules of Civil Procedure, claiming that Crite was not justified in resorting to service by publication and that, even if she were, her method of publication was insufficient to provide him notice of the suit. Importantly, Bussey does not make any claim concerning the sufficiency of his contacts with North Carolina. Thus, his appeal pertains solely to the "process or service used to bring the party before the court" and is not immediately appealable under N.C. Gen. Stat. § 1-277(b). *Love*, 305 N.C. at 580, 291 S.E.2d at 145. Accordingly, this Court lacks appellate jurisdiction to hear this appeal.

DISMISSED.

Judges BRYANT and DILLON concur.

HESTER v. HUBERT VESTER FORD, INC.

[239 N.C. App. 22 (2015)]

JOANN HESTER, Individually and as Personal Representative of the Estate of Leland Hester, Plaintiff-Appellant
v.
HUBERT VESTER FORD, INC., and LARRY McPHAIL, Defendants-Appellants

No. COA14-233

Filed 6 January 2015

1. Unfair Trade Practices—car sale—two financing contracts—summary judgment

The trial court erred by granting summary judgment as to defendant Vester Ford on a claim for unfair and deceptive trade practices arising from the sale of a car and two financing contracts relating to that sale. There were issues of fact concerning the existence of the original contract, whether defendant committed an unfair or deceptive trade practice in threatening to repossess the car if plaintiff did not sign the second contract, whether plaintiff reasonably relied on the assertions of defendant's employee that the terms of the second contract were the same as the first, and whether plaintiff would have signed the second contract under duress if she had read it. Quasi-estoppel did not apply and plaintiff foretold some actual damages.

2. Fraud—summary judgment—automobile finance contracts

The trial court erred by granting summary judgment as to defendant Vester Ford on a claim for fraud arising from the sale of a car and two financing contracts. Plaintiff presented evidence that Vester Ford intentionally and falsely represented to plaintiff that Vester Ford could repossess the Jeep in order to induce her to sign the second contract.

3. Extortion—civil claim—not recognized in North Carolina

A civil cause of action for extortion does not exist in North Carolina, and the Court of Appeals declined to recognize such a tort, in an action arising from a car sale and two financing contracts, the second entered into under the threat of repossession.

4. Appeal and Error—fraud—constructive—not pled in complaint—not considered on appeal

Claims of unfair and deceptive trade practice and constructive fraud based on defendant allegedly "enhancing" plaintiff's financial data when obtaining automobile financing were not pled in the complaint and were not considered on appeal.

5. Unfair Trade Practices—enhanced financial information—mere authorization of contract—not sufficient for liability

Summary judgment was properly granted for an employee of an automobile dealer in an action arising from the sale and financing of an automobile. Plaintiff has not alleged that this defendant, Mr. McPhail, was aware of or in any way involved with the "enhancements" to plaintiff's financial data in the respective credit application that led to the terms of the contract. As such, Mr. McPhail's merely authorizing the contract alone was not sufficient to maintain an unfair and deceptive trade practices or fraud claim against him.

Appeal by Plaintiff from order and judgment filed 11 September 2013, *nunc pro tunc* 26 August 2013, by Judge Douglas B. Sasser in Superior Court, Bladen County. Heard in the Court of Appeals 26 August 2014.

Christopher W. Livingston for Plaintiff-Appellant.

Womble & Campbell, P.A., by H. Goldston Womble, Jr.; and C. Michael Thompson, for Defendants-Appellees.

McGEE, Chief Judge.

Plaintiff filed claims against Hubert Vester Ford, Inc. ("Vester Ford") and Larry McPhail ("Mr. McPhail") ("Defendants"), for unfair and deceptive trade practices, fraud, and common law extortion arising out of a vehicle purchase. Plaintiff alleged Defendants contracted to sell Plaintiff a Jeep vehicle under certain terms but then compelled Plaintiff to sign a second, less-favorable contract under the threat of repossession. We find that most, but not all, of Plaintiff's claims were properly resolved through summary judgment.

I. Standard of Review

This Court reviews a trial court's order allowing summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). This review is limited to determining whether "there is no genuine issue as to any material fact" and whether the moving parties were entitled to judgment in their favor as a matter of law. *See Blades v. City of Raleig*h, 280 N.C. 531, 544, 187 S.E.2d 35, 43 (1972). It generally is sufficient for a nonmoving party to survive summary judgment where the party can "produce a forecast of evidence demonstrating that [the party] will be able to make out at least a *prima*

facie case at trial." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation and internal quotations omitted). However,

> in passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in [the party's] favor which may be reasonably drawn from such material.

Whitley v. Cubberly, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974). "The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978).

II. Background

Because this is an appeal by Plaintiff from a grant of summary judgment against her, we take the facts in the light most favorable for Plaintiff. Plaintiff's son, Ryan Hester ("Ryan"), became interested in purchasing a 2007 Jeep Wrangler ("the Jeep") from Vester Ford sometime near Labor Day in 2009. Ryan had a preliminary phone conversation with Melvin Scott ("Mr. Scott"), a salesperson for Vester Ford. During that phone call, Ryan obtained some type of "pre-approval," but Mr. Scott also notified Ryan that he would need a co-signer in order to purchase the Jeep. Plaintiff, Ryan's mother, agreed to be that co-signer.

Plaintiff and Ryan traveled to Vester Ford the following evening and test-drove the Jeep. While at Vester Ford, they interacted with Mr. Scott and Mr. McPhail, and both stayed late to accommodate Plaintiff's and Ryan's schedules. Plaintiff and Ryan presented Defendants with bank and pay documents that showed their respective incomes, which were modest. However, Defendants allegedly agreed to sell the Jeep to Plaintiff and Ryan for a base price of about $22,000.00, with a trade-in credit of $1,000.00 for Plaintiff's Mercury Grand Marquis ("the Grand Marquis"), and monthly payments in the $300.00 to $350.00 range for between sixty (60) and seventy-two (72) months. Plaintiff and Ryan testified during their depositions that: (1) all parties purportedly signed a purchase contract containing these terms (the "original" contract); (2) the Grand Marquis' license plate was transferred to the Jeep at signing; and (3) Plaintiff and Ryan left with the Jeep that evening.

Plaintiff has been unable to produce a copy of the "original" contract, and Defendants deny its existence. Defendants contend they

sold the Jeep to Plaintiff on 30 September 2009. However, Plaintiff presented an affidavit from a neighborhood Labor Day party attendee, averring that he saw Ryan in possession of the Jeep several weeks before 30 September 2009. Vester Ford also submitted a credit application on Plaintiff's behalf to Marine Federal Credit Union to finance the purchase of the Jeep ("Marine Credit application"); the Marine Credit application was dated 24 September 2009, six days before Defendants state they sold Plaintiff the Jeep. Notably, this credit application greatly exaggerated Plaintiff's finances. Finally, the Jeep was transferred to Plaintiff's insurance on 28 September 2009, two days before Defendants state they sold Plaintiff the Jeep.[1]

Plaintiff alleged that Mr. Scott contacted her in early October 2009 and stated that: (1) the financing for Plaintiff's recent Jeep purchase had fallen through; (2) Plaintiff needed to sign a new purchase contract for the Jeep, with new financing; and (3) if Plaintiff did not sign the new contract, the Jeep would be repossessed. Soon thereafter, Mr. Scott arrived at Plaintiff's residence and presented Plaintiff and her husband with the new contract, which was backdated to 30 September 2009 (the "30 September" contract). Mr. Scott allegedly informed Plaintiff and her husband that the terms in the 30 September contract were the same as those in the "original" contract. Plaintiff alleged that Mr. Scott then physically covered the top half of the 30 September contract when he presented it to Plaintiff and her husband, obscuring their view of the terms therein. Neither Plaintiff nor her husband asked to read the terms of the 30 September contract before signing it.[2]

The 30 September contract required that Plaintiff make monthly payments of $614.83, with an interest rate of 14.69 percent, for sixty (60) months — almost doubling the monthly payments that Plaintiff contends were required under the "original" contract. The terms in the 30 September contract were based on a line of credit that Vester Ford obtained on Plaintiff's behalf from Ford Motor Credit Company after financing for the "original" contract reportedly fell through. The credit application submitted to Ford Motor Credit Company by Vester Ford inflated Plaintiff's financial data even more than the Marine Credit application.

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1. Some of Vester Ford's documentation indicates that Vester Ford did not actually take title to the Jeep until 30 September 2009.

2. Plaintiff's co-plaintiff husband has since passed away, and Plaintiff is the personal representative of her husband's estate in this matter. Plaintiff's husband's involvement in this case primarily arises out of his signing the 30 September contract.

Ryan remained in possession of the Jeep approximately nine months after Plaintiff signed the 30 September contract, although he only made a couple of monthly payments thereon. The Jeep was repossessed in July 2010, was sold, and a deficiency judgment was entered against Plaintiff for the remainder of the amount owed under the 30 September contract. However, that deficiency judgment was set aside by a consent order, and Plaintiff currently owes nothing on the Jeep.

Plaintiff filed a complaint against Defendants for unfair and deceptive trade practices ("UDTP"), fraud, and common law extortion. Plaintiff and Defendants then moved for summary judgment against each other. By order filed 11 September 2013, the trial court granted Defendants' motion for summary judgment but denied Plaintiff's motion. Plaintiff appeals.

III. Plaintiff's Motion for Summary Judgment Denied

As a preliminary matter, Plaintiff appeals both the trial court's grant of summary judgment against her and the trial court's denial of her motion for summary judgment against Defendants. However, "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). The trial court's grant of Defendants' motion for summary judgment was a final judgment on the merits. *See Id.* Therefore, on appeal, we will not review Plaintiff's denied motion for summary judgment.

IV. Defendants' Motion for Summary Judgment Granted

A. Claims Arising Under the 30 September Contract

1. Unfair and Deceptive Trade Practices

[1] Plaintiff presents this Court with a multitude of arguments on appeal, and many of them emanate from a core UDTP claim related to the formation of the 30 September contract. "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (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." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). The second requirement, that the act or practice be "in or affecting commerce," is not at issue in the present case. Thus, in order to survive summary judgment, Plaintiff must establish a material question of fact as to whether Defendants committed unfair or deceptive acts that proximately injured Plaintiff.

Plaintiff contends that she and Defendants entered into the "original" contract for the Jeep sometime before Labor Day in 2009. Plaintiff and Ryan testified during their depositions that they signed this "original" contract with Defendants. Plaintiff also presented the following circumstantial evidence in support of the existence of the "original" contract: (1) an affidavit from a neighborhood Labor Day party attendee, averring that he saw Ryan in possession of the Jeep early in September 2009; (2) a credit application that Vester Ford submitted on Plaintiff's behalf on 24 September 2009 to finance the purchase of the Jeep, six days before Defendants state they sold Plaintiff the Jeep; and (3) an automobile insurance policy statement showing that the Jeep was transferred to Plaintiff's auto insurance on 28 September 2009, two days before Defendants state they sold Plaintiff the Jeep. Plaintiff correctly points out that transferring auto insurance to a consumer's policy is only supposed to occur once financing is finalized and the consumer has taken title to the vehicle. *See* N.C. Gen. Stat § 20-75.1 (2013).

In light of this evidence, the fact that Defendants adamantly deny the existence of the "original" contract creates a material issue of fact in the case before this Court. *See Durham Life Broadcasting, Inc. v. Internat'l Carpet Outlet*, 63 N.C. App. 787, 788, 306 S.E.2d 459 (1983) ("There is clearly a dispute in the case *sub judice* where the defendant denies the existence of a contract."). However, Defendants argue that summary judgment for Defendants was proper nonetheless. They highlight the fact that Plaintiff has not produced a copy of the "original" contract and that Plaintiff's sworn statements as to the terms of this contract are less than precise. However, this is not necessarily dispositive of the circumstantial evidence that Plaintiff presented to the trial court as to the possible *existence* of the "original" contract.

Taking the evidence in a light most favorable to Plaintiff, the nonmoving party in Defendants' motion for summary judgment, and granting Plaintiff all reasonable inferences therefrom, we must assume that the "original" contract existed. Therefore, we assume that Plaintiff had a property interest in the Jeep before she was presented with the 30 September contract. As such, Mr. Scott's threat to repossess the Jeep if Plaintiff did not sign the 30 September contract presents a material question as to whether Vester Ford, through its agent, Mr. Scott, committed an unfair or deceptive act in or affecting commerce. If so, the resulting harm would be that Plaintiff was subjected to a subsequent purchase contract, the 30 September contract, on disadvantageous terms. Finally, contrary to Defendants' contention that Plaintiff has suffered no actual damages because her liability to Ford Motor Credit Company on the

loan for the Jeep was extinguished, Plaintiff has forecast *some* actual damages resulting from Vester Ford's alleged misconduct – for instance, losing the value of her Grand Marquis after the Jeep was repossessed.[3] Therefore, Plaintiff has sufficiently established the necessary elements to support an UDTP claim.

As Defendants correctly point out, notwithstanding the possible existence of the "original" contract, Plaintiff's failure to read the 30 September contract, and without even requesting an opportunity to do so, could preclude her from recovery under the new contract. "One who signs a written contract without reading it, when [she] can do so understandingly[,] is bound thereby unless the failure to read is justified by some special circumstance." *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962) (citations omitted). At its core, the question is whether Plaintiff acted with "reasonable prudence" by relying on Mr. Scott's assurances that the terms of the 30 September contract were the same as those in the "original" contract, except for the source of financing. *See id.* "What a reasonably prudent person will or will not do under various circumstances . . . is nearly always a question of fact, not of law. Only when the facts are such that reasonable minds can reach but one conclusion does the question become one of law." *Hulcher Brothers & Co. v. N.C. Dep't of Transportation*, 76 N.C. App. 342, 343, 332 S.E.2d 744, 745 (1985). Moreover,

> [i]t is only in exceptional cases that the issue of reasonable reliance may be decided by the summary judgment procedure. . . . [An aggrieved party who failed to read a contract] will not be charged with knowledge of the contents of [the contract she] signed *if it were obtained by trick or artifice.*

Northwestern Bank v. Roseman, 81 N.C. App. 228, 234, 344 S.E.2d 120, 125 (1986), *aff'd*, 319 N.C. 394, 354 S.E.2d 238 (1987) (emphasis added) (citations omitted).

Although Plaintiff's failure to read the 30 September contract likely is harmful to her claim, Plaintiff contends that her signature on the

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3. Because Plaintiff appeals from the trial court's grant of summary judgment against her, our review of Plaintiff's damages need not probe beyond finding the existence of actual damages. *See Creech*, 347 N.C. at 526, 495 S.E.2d at 911 ("[It is sufficient for a nonmoving party to survive summary judgment where the party can] produce a forecast of evidence demonstrating that [the party] will be able to make out at least a *prima facie* case at trial.").

30 September contract was made under duress and obtained through fraud. Given that we must presume Plaintiff was operating under the notion that the "original" contract established a set, binding, and existent agreement between her and Vester Ford, there remains the question of whether Plaintiff reasonably relied on Mr. Scott's assertions that the terms of the 30 September contract were identical to those in the "original" contract, except for the source of financing. Alternatively, when faced with Mr. Scott's threat to repossess the Jeep, there is a question as to whether Plaintiff would have signed the 30 September contract under duress, even if she had read it and objected to the new terms. These are questions of fact for a jury to determine.

Defendants further assert that Plaintiff is estopped from recovery because she accepted the benefits of the 30 September contract by using the Jeep for a number of months after signing the 30 September contract. To support this contention, Defendants note that "the acceptance of benefits [under a contract] precludes a subsequent inconsistent position [by an aggrieved party], even where acceptance is involuntary, arises by necessity, or where . . . a party voluntarily accepts a benefit to avoid the risk of harm". *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999) (citing *Carolina Medicorp, Inc. v. Board of Trustees*, 118 N.C. App. 485, 493–93, 456 S.E.2d 116, 120 (1995)) (quotes omitted).

This authority, however, is distinguishable from the present case. *Carolina Medicorp*, on which Defendants' authority relies, involved a contractual dispute between some North Carolina hospitals and the North Carolina state employee health insurance plan. *Carolina Medicorp*, 118 N.C. App. at 487–88, 456 S.E.2d at 117–18. The plaintiff hospitals had contracted to accept lower reimbursement rates in exchange for being designated "preferred providers" by the state health plan; state employees, in turn, would pay less out-of-pocket for services received at "preferred providers," making the hospitals financially attractive to patients. *Id.* The hospitals subsequently challenged the lower reimbursement rates under their contracts, contending that the hospitals entered into the contracts involuntarily. *Id.* However, the hospitals were estopped from litigating the issue because they had already accepted the benefits of being "preferred providers" under the plan. *Id.* at 492–94, 456 S.E.2d at 120–21 ("[V]oluntariness is not an element under the doctrine of quasi estoppel. Furthermore, even if it were an element of quasi estoppel, petitioners were not compelled to sign the contracts. They chose to avoid the risk of losing patients to other preferred provider hospitals by signing the contracts.").

In the present case, Plaintiff is not challenging the *enforcement* of the 30 September contract with Vester Ford; indeed, a default judgment was entered against Plaintiff after she stopped making monthly payments to Ford Motor Credit Company, and that default judgment was later set aside. There is nothing left to enforce under the 30 September contract. Instead, Plaintiff contends that Defendants engaged in unfair and deceptive trade practices during the *formation* of the 30 September contract, which presents a different legal question.

"[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions" under a contract. *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001). North Carolina's UDTP laws, however, are designed to provide consumers with a remedy for injuries done to them by dishonest and unscrupulous business practices. *See* N.C. Gen. Stat. § 75-16 (2013). Even where an aggrieved party is estopped from taking a subsequent inconsistent position under a contract due to quasi-estoppel, the party on the other side of the agreement is not categorically absolved of its unlawful acts during the formation of that same contract. Therefore, quasi-estoppel does not apply in the present case.

Plaintiff has established a *prima facie* UDTP claim against Vester Ford regarding the formation of the 30 September contract. The fact that Plaintiff has not produced the "original" contract and did not read the 30 September contract is not necessarily dispositive. Moreover, because Plaintiff's UDTP claim does not challenge the enforcement of the 30 September contract, quasi-estoppel does not apply. As such, the trial court erred by granting summary judgment as to Vester Ford on this claim.

2. Fraud

[2] Plaintiff's complaint also raised an alternative, but related, fraud claim against Defendants based on the same facts that gave rise to Plaintiff's UDTP claim above. The elements of fraud are well-established: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (citation and quotes omitted). Plaintiff presented evidence that Vester Ford intentionally and falsely represented to Plaintiff that Vester Ford could repossess the Jeep in order to induce her to sign the 30 September contract. Therefore, for reasons similar to those discussed in the previous section, Plaintiff's alternative claim for fraud as to Vester Ford should survive summary judgment.

3. Common Law Extortion

[3] Plaintiff's complaint raised a third alternative tort claim for common law extortion based on the same facts that gave rise to her UDTP and fraud claims. However, no civil cause of action for extortion currently exists under North Carolina law. *See Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 585, 664 S.E.2d 8, 12 (2008). Nonetheless, Plaintiff proposes that "[e]ven if extortion is not yet a recognized tort [under North Carolina law], it must become one."

To date, this Court has not been presented with a direct, supported, or convincing argument that extortion should be a cognizable tort under North Carolina law. *See, e.g., Brawley v. Elizabeth Townes Homeowners Ass'n, Inc.*, __ N.C. App. __, __ S.E.2d __, COA14–135, *slip op.* at 9–10 (Aug. 19, 2014) (unpublished) (affirming the dismissal of, *inter alia*, a *pro se* extortion claim on collateral estoppel grounds); *Lawson v. White*, 197 N.C. App. 758, 680 S.E.2d 904, COA07-296-2, *slip op.* at 5 (July 7, 2009) (unpublished) ("Plaintiff fails to cite any cases on point and fails to set forth what the elements of [extortion] might be."); *Free Spirit Aviation*, 191 N.C. App. at 585, 585 n.3, 664 S.E.2d at 12, 12 n.3 (2008) ("[Plaintiffs' complaint . . . expressly states a claim for extortion. . . . [However,] the issue of whether a civil claim for extortion exists in North Carolina was not argued [on appeal, so] we make no ruling either way on this issue."). Although "this Court will not shirk its duty to fully consider new causes of actions when they are properly presented," *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 233, 336 S.E.2d 716, 718 (1985), *aff'd*, 316 N.C. 550, 342 S.E.2d 523 (1986), *overruled on other grounds by Johnson v. Ruark Obstetrics*, 327 N.C. 283, 300–01, 395 S.E.2d 85, 95 (1990), so too must we proceed with the utmost caution and deliberateness in the face of such a request.

Plaintiff, in support of her argument that extortion should be a cognizable tort under North Carolina law, presents this Court with non-controlling authority from New Jersey, *People Exp. Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985), which discusses the adaptability of the common law in the face of significant, long-term shifts in societal norms. Plaintiff also cites the Open Courts Clause of the North Carolina Constitution, which states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. 1 § 18. In light of this authority, Plaintiff contends that her remedy for Defendants' inducing her to sign the 30 September contract, "falls between the two stools of fraud (if deception is absent) and conversion

(if consent is present)[.]" Between these two "stools," Plaintiff argues, necessarily sits her claim for extortion. We disagree.

First, we note that Plaintiff *has* raised a claim for fraud, alleging deception by Defendants, which allegedly was aimed at inducing Plaintiff to sign the 30 September contract. Second, the space between the two "stools" of fraud and conversion has been fully, and adequately, occupied by Plaintiff's UDTP claim. Plaintiff argues in her brief that she would need to prove two things for an extortion claim against Defendants: (1) that Defendants unlawfully threatened Plaintiff with repossession of the Jeep (2) in order to obtain value from Plaintiff by binding her to the allegedly disadvantageous terms of the 30 September contract. These essentially are the same facts that Plaintiff needs to prove in her UDTP claim and to obtain appropriate relief from the alleged harm done to her by Defendants. As such, Plaintiff is not being denied a "remedy by due course of law" presently, and we decline to use this case to recognize a cognizable tort of common law extortion under North Carolina law.

B. Claims Arising Under the "Enhanced" Credit Applications

1. Unfair and Deceptive Trade Practices

[4] On appeal, Plaintiff attempts to argue that Defendants committed unfair and deceptive trade practices by submitting credit applications on her behalf for the purchase of the Jeep that greatly "enhanced" Plaintiff's financial data. However, Plaintiff did not plead this claim in her complaint. Therefore, we will not consider it. *See* N.C.R. App. P. 10(a)(1) ("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.").

2. Fraud

Plaintiff also alleged fraud against Defendants based on Defendants' purportedly "enhancing" Plaintiff's financial information when submitting credit applications on her behalf. Again, the elements of fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (citation and quotes omitted). Plaintiff does not contend that Defendants made false representations to Plaintiff regarding her financial information. Instead, Plaintiff's fraud claim here rests on the contention that Ford Motor Credit Company was deceived by Defendants' "enhancing"

Plaintiff's financial data when submitting credit applications on her behalf and that Plaintiff was subsequently injured thereby. Plaintiff asserts that "[e]lements (2), (3), and (4) [of fraud] do not require that the deceived person be the same person as the injured party." However, Plaintiff provides this Court with no authority to support this argument, and we do not agree.

Notably, Plaintiff did not file a claim of constructive fraud against Defendants. A claim for constructive fraud would require only that Plaintiff show that she and Defendants were in a "relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which [Defendants are] alleged to have taken advantage of [their] position of trust to the hurt of [Plaintiff]." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). "[C]harging actual fraud is 'more exacting' than charging constructive fraud." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981).

We need not, and do not, decide whether Defendants, by allegedly "enhancing" Plaintiff's financial data while obtaining credit on her behalf, may have committed constructive fraud against Plaintiff; Plaintiff did not plead such a claim in her complaint. *See* N.C.R. App. P. 10(a)(1). Thus, restricting our analysis to the "exacting" elements of "actual" fraud, Plaintiff has not sufficiently pleaded facts that Defendants made deceptive statements to Plaintiff regarding her financial data and in the course of obtaining a line of credit on her behalf. Therefore, Plaintiff has not established a *prima facie* fraud claim against Defendants here, and the trial court did not err by granting summary judgment on this claim.

C. Summary Judgment as to Mr. McPhail

Finally, Plaintiff assigns error to the trial court's granting summary judgment as to her claims against Mr. McPhail.

1. Mr. McPhail's Liability Regarding the 30 September Contract

[5] On appeal, Plaintiff argues that Mr. McPhail should be held personally liable in the present case because Mr. McPhail knew of Plaintiff's modest finances, but he authorized the 30 September contract nonetheless, and this resulted in harm to Plaintiff. "As an essential element of a cause of action under G.S. 75-16 [for UDTP], [P]laintiff must prove . . . that [P]laintiff has suffered actual injury as a proximate result" of Defendants' actions. *Bailey v. LeBeau*, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986), *aff'd as modified*, 318 N.C. 411, 348 S.E.2d 524 (1986). The same is true for a claim of fraud. *See Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 599–601, 534 S.E.2d 233, 236–37 (2000).

Although Mr. McPhail may have been aware of the modest finances of Plaintiff and Ryan, the financing terms in the 30 September contract that Mr. McPhail approved were those given to Vester Ford by the Ford Motor Credit Company. Plaintiff has not alleged that Mr. McPhail was aware of, or in any way involved with, the "enhancements" to Plaintiff's financial data in the respective credit application that lead to the terms of the 30 September contract. As such, Mr. McPhail's merely authorizing the 30 September contract alone is not sufficient to maintain an UDTP or fraud claim against him.

2. Mr. McPhail's Liability Regarding the "Original" Contract

On appeal, Plaintiff also asserts certain additional facts as to her interactions with Mr. McPhail. Specifically, she argues that Mr. McPhail should be held personally liable in the present case because he was the Vester Ford employee who negotiated and agreed to the "original" contract; yet he still authorized the 30 September contract. Notably, in Plaintiff's complaint, she asserted that

> 14. Mr. Scott or Mr. McPhail on behalf of Vester told Mrs. Hester and Ryan that their credit was approved, and agreed unconditionally to sell the Jeep to Ryan and Mrs. Hester for a principal amount of about $23,000, paid in installments of about $320 per month (but not more than $350/month) for 60 months, in return for a trade-in allowance of $1,000 on Mrs. Hester's 1993 Mercury Grand Marquis.

Although Plaintiff's complaint named "Mr. Scott or Mr. McPhail" as the one who negotiated and agreed to the "original" contract, the depositions of Plaintiff and Ryan do not implicate Mr. McPhail as such. Plaintiff and Ryan even testified that they almost exclusively dealt with Mr. Scott during the purchase of the Jeep and that Mr. McPhail performed only ministerial functions in relation thereto. In fact, the only evidence presented to the trial court that Mr. McPhail was the Vester Ford employee who negotiated and agreed to the "original" contract came in the form of nearly identical affidavits, filed by Plaintiff and Ryan, only four days before the summary judgment hearing on 26 August 2013. On this point, it is clear:

> The affidavits [presented by Plaintiff and Ryan] materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment. . . . [I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his [or her] own prior testimony, this

> would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

See Marion Partners, LLC v. Weatherspoon & Voltz, LLP, 215 N.C. App. 357, 362-63, 716 S.E.2d 29, 33 (2011) (citation and quotes omitted). Therefore, the trial court properly was not persuaded by this "evidence" in granting summary judgment as to Mr. McPhail. Plaintiff has presented no other argument that Mr. McPhail should be held personally liable in this case for his involvement in the purported execution of the "original" contract.

V. Conclusion

The trial court properly granted summary judgment to Mr. McPhail on all of Plaintiff's claims against him. The trial court also properly granted summary judgment to Vester Ford with respect to Plaintiff's common law extortion claim, as well as her UDTP and fraud claims arising out of Vester Ford allegedly "enhancing" Plaintiff's financial information on credit applications. However, the trial court erred by granting summary judgment to Vester Ford on Plaintiff's UDTP and fraud claims arising out of the formation of the 30 September contract.

Reversed in part, and remanded; affirmed in part.

Judges BRYANT and STROUD concur.

IN THE MATTER OF A.E.C.

No. COA14-854

Filed 20 January 2015

1. Appeal and Error—preservation of issues—termination of parental rights—no notice of appeal from permanency planning review—appeal from termination order

A father properly preserved his right to challenge permanency planning review orders where he did not give timely notice of appeal from those orders, but appealed from the termination order and cited the review orders as issues he wished to address.

2. Termination of Parental Rights—findings—implicit cessation of reunification

The trial court erred in ceasing reunification efforts with respect to father in a termination of parental rights case. The trial court implicitly ceased reunification by changing the permanent plan to adoption and ordering the filing of a petition to terminate parental rights. The trial court made no findings as to whether the Department of Social Services (DSS) made reasonable efforts to reunite the father, whether reunification would be futile, and why placement with the father was not in the child's best interest, and the termination order, taken together with the earlier orders, did not contain sufficient findings of fact to cure the defects in the earlier orders.

Appeal by father from orders entered 10 April 2012, 24 August 2012, 23 August 2012, and 11 April 2014 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Christopher L. Carr for petitioner-appellee Cumberland County Department of Social Services.

Beth A. Hall for respondent-appellee guardian ad litem.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellant father.

STEELMAN, Judge.

Where the trial court's permanency planning orders did not contain the findings required by N.C. Gen. Stat. §§ 7B-507 and 7B-906.1, the trial court erred in ceasing reunification efforts with father. Where the trial court erred in ceasing reunification efforts, it erred in terminating father's parental rights.

I. Factual and Procedural Background

J.M. (father) began dating E.C. (mother) in 2008. Mother and her children were living with a mutual friend at the time; mother was married, but separated from her husband. After mother had a falling out with her friend, she and her children moved in with father. Mother lived in father's home for only a few weeks.

Mother then moved to Fayetteville, but maintained the relationship with father, who visited her on several occasions. Mother informed father that she was pregnant with his child; father did not believe it, and checked regularly for a "baby bump." On one of father's visits, mother's husband was present, and confronted father. Father told mother to handle the situation with her husband, and left. Father lost contact with mother, and moved to Virginia.

On 16 January 2009, mother gave birth to A.E.C. Her husband was named on the birth certificate as the child's father.

When A.E.C. was less than five months old, she was found home alone; mother did not return to the house for more than forty-five minutes. On 11 June 2009, Cumberland County Department of Social Services (DSS) filed a petition alleging that A.E.C. and her siblings[1] were neglected and dependent. This petition alleged that mother's husband and a "John Doe" were the putative fathers of A.E.C. At the time, father's identity was unknown. The children were temporarily placed in nonsecure custody with Mr. and Mrs. S., believed at the time to be A.E.C.'s paternal great grandparents. On 27 October 2009, adjudication and disposition hearings were held, at which A.E.C. was adjudicated neglected and dependent based on the petition. On 20 November 2009, the trial court entered its order on adjudication and disposition. Mother's husband was named as A.E.C.'s putative father.

On 5 January 2010, the trial court held its first review hearing. It found that the whereabouts of mother and her husband were unknown, and relieved DSS of reunification and visitation efforts. On 2 February

1. Mother's children other than A.E.C. are not the subject of the instant case.

2010, a permanency planning hearing was held, where the trial court again found that the whereabouts of mother and her husband were unknown. As Mr. S. had suffered a stroke, the court recommended that alternate placement be sought for the children. No permanent plan was established at this time, and DSS was ordered to present a permanent plan at the next hearing.

On 27 April 2010, the trial court held its next permanency planning hearing, at which mother was present. She reported that she was living in Arkansas. The trial court established the permanent plan as relative placement.

On 29 September 2010, the trial court held another permanency planning hearing. A.E.C.'s guardian *ad litem* (GAL) reported that a paternity test had been ordered for mother's husband in another court. A.E.C. had provided a DNA sample. The permanent plan remained relative placement, with a concurrent plan of adoption.

On 5 January 2011, the trial court held another permanency planning hearing. A.E.C.'s GAL reported that, according to the results of the paternity test, mother's husband was not A.E.C.'s father. DSS reported that A.E.C. and her siblings had been moved from the home of Mr. and Mrs. S. into foster care on 10 November 2010. No findings were made that mother's husband was not A.E.C.'s father, and no inquiries were made into her paternity. The trial court changed the permanent plan to adoption.

On 26 April 2011, the trial court held another permanency planning hearing. DSS reported that A.E.C. had been moved to a new foster home on 7 January 2011, and that the foster parents were interested in adoption. The trial court found and concluded that adoption and termination of parental rights should be pursued. This determination was upheld at a subsequent hearing on 1 September 2011.

Sometime in September of 2011, mother was able to acquire father's contact information. At the end of September or beginning of October in 2011, mother contacted father and informed him that he was the father of A.E.C., who was in foster care. Mother gave father the phone number for DSS. Father spoke with A.E.C.'s social worker about paternity testing, and she told father he would need to attend a hearing scheduled for 2 February 2012. Father also contacted the judge's chambers and was given the same information.

On 2 February 2012, father appeared in court for the permanency planning hearing. DSS requested that its petition be amended to include

father as A.E.C.'s father. Father requested paternity testing and custody of A.E.C. The court amended the petition and appointed counsel for father. It ordered paternity testing and continued the permanency planning review.

On 26 March 2012, at a permanency planning hearing, the trial court directed that DNA testing be expedited. The court maintained a permanent plan of adoption and ordered DSS to proceed with a termination of parental rights. The trial court further ordered that, should the DNA test confirm that father was A.E.C.'s father, the matter would return to court to address possible visitation rights.

On 26 April 2012, father received notice that he was A.E.C.'s father. On 29 June 2012, an order of paternity was entered in child support enforcement court.

On 2 and 3 July 2012, at another permanency planning hearing, father requested visitation, which was denied. The trial court ordered DSS to perform a complete home study and background check on father. The permanent plan remained adoption and termination of parental rights.

On 18 July 2012, father had back surgery. His hearing scheduled for 26 July 2012 was continued to 30 August 2012 due to his recovery. A permanency planning hearing was held on 1 August 2012, at which father's attorney requested a continuance for his recovery. This request was denied. Father's attorney informed the court that father was living with his ex-wife during his recovery, but the trial court found that this information had "not been verified." The trial court found that father's whereabouts were unknown, and that he was not cooperating with DSS because he had not provided an address for his home study. The plan remained adoption, with a concurrent plan of custody with relatives, and termination of parental rights.

On 3 October 2012, Harnett County Department of Social Services completed a study of father's home, and recommended placement of A.E.C. with father.

On 23 October 2012, child support court entered a permanent order for child support. Father was ordered to pay $50.00 per month effective 1 September 2012, to be deducted from his worker's compensation.

On 13 December 2012, DSS filed a petition to terminate parental rights against mother, her husband, and father, in regard to A.E.C. and her siblings. The grounds alleged against father were neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a

reasonable portion of the cost of care, failure to establish paternity, and willful abandonment.

On 19 December 2012, the trial court held a permanency planning hearing, at which father was present, but mother was not. The hearing was continued to allow mother to be present. The trial court denied father's motion to have a Christmas visit with A.E.C.

On 7 March 2013, at another permanency planning hearing, DSS reported the results of Harnett County's positive home study. The trial court made no findings regarding the home study, instead finding that father did not cooperate with the home study process. The court found that visitation with father would not be in A.E.C.'s best interest. The trial court reaffirmed these findings at a later hearing on 21 November 2013.

On 24 February 2014, the trial court began the termination of parental rights proceeding. DSS voluntarily dismissed the petition in regard to A.E.C.'s siblings. The trial court determined that grounds existed to terminate father's parental rights in regard to A.E.C. on the basis of neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a reasonable portion of the cost of care, and willful abandonment. The dispositional phase began on 25 February 2014 and concluded on 26 February 2014. The trial court found that it was in the best interests of A.E.C. to terminate father's parental rights.

Father appeals from the permanency planning review orders entered on 10 April 2012, 24 August 2012, and 23 August 2012, and also the order terminating his parental rights entered on 11 April 2014.

II. *Certiorari*

[1] "At any hearing at which the court orders that reunification efforts shall cease, the affected parent, guardian, or custodian may give notice to preserve the right to appeal that order in accordance with [N.C. Gen. Stat. §] 7B–1001." N.C. Gen. Stat. § 7B–507(c) (2013). According to N.C. Gen. Stat. § 7B–1001 (a)(5)(a):

> The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.

> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2013). In an unpublished opinion, this Court held that, where the review of an order ceasing reunification efforts was not preserved, but the order was raised as an issue in the timely appeal from a termination order, N.C. Gen. Stat. § 7B-1001 permitted the adjudication to be reviewed directly on appeal. *In re J.R.*, ___ N.C. App. ___, 759 S.E.2d 712 (2014) (unpublished). Although that case is not binding precedent, we find its reasoning persuasive.

The record in the instant case shows that father did not preserve the right to appeal the permanency planning review orders by giving timely notice of appeal. However, he did appeal the termination order in a timely fashion. In his appeal from the termination order, father cited the review orders as issues he wished to address on appeal. These orders ceased reunification efforts. We hold therefore that father has properly preserved his right to challenge the review orders, and dismiss his petition for the issuance of a writ of *certiorari* as moot.

We examine his challenge to these orders directly on appeal.

III. Ceasing Reunification

[2] In his first argument, father contends that the trial court, in its permanency planning orders, erred in implicitly ceasing reunification by maintaining a permanent plan of adoption for A.E.C. We agree.

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

B. Analysis

Father first contends that, although the trial court did not issue explicit findings in its permanency planning orders ceasing reunification, it implicitly ceased reunification by changing the permanent plan

to adoption and ordering the filing of a petition to terminate parental rights. Father is correct; we have previously held that "where a trial court failed to make any findings regarding reasonable efforts at reunification, the trial court's directive to DSS to file a petition to terminate [a parent's] parental rights implicitly also directed DSS to cease reasonable efforts at reunification." *In re A.P.W.*, ___ N.C. App. ___, ___, 741 S.E.2d 388, 390-91, *disc. review denied*, ___ N.C. ___, 747 S.E.2d 251 (2013) (citations and quotations omitted). We hold that the trial court's order to file a petition to terminate parental rights implicitly ceased reunification with father.

Although the order need not explicitly cease reunification efforts, it "must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, ___ N.C. ___, ___, 752 S.E.2d 453, 455 (2013) (quotations omitted). Father contends that the trial court failed to address these statutory concerns in its findings.

1. Reasonable Efforts

Father notes first that an order placing or keeping a child in DSS custody must contain findings regarding the provision of reasonable efforts by DSS "to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines . . . that such efforts are not required or shall cease[.]" N.C. Gen. Stat. § 7B-507(a)(3) (2013). Father became a party to the case in February of 2012, at which time the trial court had already decided to pursue a plan of adoption and termination of parental rights. Despite the revelation of A.E.C.'s biological father, the trial court determined that the existing plan was consistent with A.E.C.'s best interest, and would not change. The trial court made no findings as to whether DSS made reasonable efforts to reunite father with A.E.C.

2. Futility

The trial court may order that reasonable efforts at reuniting the child with parents shall cease if it finds:

> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
>
> (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

> (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
>
> (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; has committed sexual abuse against the child or another child of the parent; or has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-507(b). While subsections (2)-(4) do not apply to the facts before us, we acknowledge that the trial court had an obligation to determine that efforts to reunite A.E.C. with father would be futile before it could direct reunification efforts to cease. We have previously held that the trial court cannot merely recite findings of fact; it must "link . . . these findings to the two prongs set forth in N.C. Gen. Stat. § 7B–507(b)(1)." *In re I.R.C.*, 214 N.C. App. 358, 362, 714 S.E.2d 495, 498 (2011). "This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home where the trial court was required to make *ultimate* findings specially based on a process[] of logical reasoning." *Id.* at 363-64, 714 S.E.2d at 499 (citations and quotations omitted).

In the first order to which father was a party, entered 21 March 2012, the only finding concerning father was that he had not yet taken a DNA test. In the second order, entered 10 April 2012, the only findings concerning father were that he had requested paternity testing, which the court directed to be expedited. In the third order, entered 24 August 2012, the trial court found that father first became aware of A.E.C. in October of 2011 when he was contacted by mother; that he was A.E.C.'s biological father; that he had not provided any support for A.E.C.; and that he should have investigated the birth, as he had reason to believe that mother could be pregnant. The trial court also ordered a home study. In the fourth order, entered 23 August 2012, the court found that father had requested to become a part of A.E.C.'s life; that he and A.E.C. shared no bond; that he was unaware of A.E.C. until October 2011; that DSS was ordered to perform a home study; that father had failed to provide an address for the home study; that he was not present

in court and his whereabouts were unknown; that he had not contacted DSS or the court since the last hearing date; that counsel indicated that he was with his ex-wife while recovering from back surgery; and that he was not cooperating with DSS. None of these findings address the ultimate finding of fact required of the trial court, which is whether reunification with father would have been futile.

3. Best Interests

At the conclusion of any hearing in which a child is not returned home, a trial court is required to consider and make findings regarding:

> (1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e) (2013).[2] Father cites to *In re I.K.*, in which we held that the trial court's findings failed to explain why the child could not be returned home. *In re I.K.*, ___ N.C. App. ___, ___, 742 S.E.2d 588, 595-96 (2013). We remanded that case for further findings of fact and conclusions of law. Father also cites to *In re Eckard*, in

2. Father, in his brief, cites to N.C. Gen. Stat. § 7B-907(b), which has since been repealed. N.C. Gen. Stat. § 7B-906.1(e) contains substantially the same provisions.

which the trial court found that the father made a "late appearance" and dismissed him as a candidate for custody because the child was "too bonded to her current placement[.]" *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002). We held that the trial court erred, in that the statute required it to consider custody with a relative, and reversed and remanded for reunification proceedings.

We find the instant case to be controlled by *Eckard*. As the father in *Eckard*, father in the instant case made a late appearance. Despite his appearance and subsequent confirmation as A.E.C.'s biological father, the trial court saw no need to change its permanent plan. It failed to determine whether DSS had made reasonable efforts to reunite A.E.C. with father, whether reunification would be futile, or why placement with father was not in A.E.C.'s best interest, in any manner other than the issuance of conclusory statements.

4. Termination Order

Our Supreme Court has held that we are to construe orders to cease reunification together with termination orders. *In re L.M.T.*, ___ N.C. at ___, 752 S.E.2d at 457. Specifically, the Court in *L.M.T.* held that "[b]ecause we consider both orders 'together,' incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." *Id.*

In its termination order, the trial court adopted its findings from its earlier permanent planning orders. Beyond these, the trial court made other findings, but none had any bearing on the issues outlined above. We hold that the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders. We further hold that the trial court erred in ceasing reunification efforts with respect to father.

IV. Conclusion

Because the trial court erred in ceasing reunification efforts with respect to father, it erred in entering its order terminating father's parental rights with respect to A.E.C. *See In re A.P.W.*, ___ N.C. App. at ___, 741 S.E.2d at 392. We vacate the order ceasing reunification with father and the order terminating father's parental rights, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges GEER and STEPHENS concur.

IN RE A.N.S., A MINOR CHILD

No. COA14-892

Filed 20 January 2015

Termination of Parental Rights—failure to conduct preliminary hearing—putative father

The trial court did not err in a termination of parental rights case by failing to conduct a preliminary hearing pursuant to N.C.G.S. § 7B-1105 in order to definitively determine the name or identity of the minor child's father. The petition alleged that respondent was the putative father. Further, the contingency that "John Doe" was the child's father was consistent with the other allegations that respondent was not named on the birth certificate and paternity had not been judicially established.

Appeal by respondent from judgment entered 28 May 2014 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 4 December 2014.

Ellis Family Law, P.L.L.C., by Gray Ellis, for petitioner-appellee.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant.

GEER, Judge.

Respondent father appeals from a judgment terminating his parental rights with respect to his daughter, "Angela."[1] Respondent's sole argument on appeal is that the trial court erred in failing to conduct a preliminary hearing pursuant to N.C. Gen Stat. § 7B-1105 (2013) in order to definitively determine the name or identity of Angela's father. However, we conclude that, under the circumstances of this case, the trial court was not required by N.C. Gen. Stat. § 7B-1105 to conduct such a hearing. We, therefore, affirm.

Facts

Angela was born to petitioner mother on 23 September 2011 in Onslow County. On 12 December 2012, petitioner filed a complaint

1. The pseudonym "Angela" is used throughout this opinion to protect the privacy of the minor and for ease of reading.

asking that respondent's paternity of Angela be "judicially established," that petitioner be granted "sole and exclusive legal and physical custody" of Angela, and that respondent be ordered to pay child support. Although respondent filed an answer to the complaint and received proper notice of the custody hearing, he did not appear. On 20 February 2013, the trial court ordered respondent to submit to paternity tests, but he never did so.

On 26 September 2013, petitioner filed a verified petition to terminate parental rights to Angela alleging that respondent was Angela's biological father or, "[i]n the alternative, the Respondent 'John Doe' is the father of [Angela]." On 28 May 2014, the trial court entered a "judgment" that found the following facts.

Although petitioner and respondent never married, at the time of the termination hearing petitioner was "married and her husband would like to adopt the minor child." Petitioner and respondent were 20 and 26 years old, respectively, when they had an intimate relationship. Petitioner's "choice of [respondent] as a boyfriend did not show the best judgment."

During the relationship, respondent lived in a halfway house, had a criminal history, and was in a Drug Court program that had conditions on fathering a child during the program. Respondent lied to the judge in Drug Court "about fathering a child, prior to the birth [of Angela] because he did not want to be extended in the program another year[,]" and, ultimately, respondent was imprisoned for two weeks for lying to the judge.

The day that Angela was born, respondent informed petitioner that he wanted to break off their relationship, although the intimate relationship did continue. Respondent nonetheless showed up at the hospital the following day with his mother, which resulted in friction between petitioner's and respondent's families. Petitioner did not name respondent as the father in filling out Angela's birth certificate at the hospital.

After Angela was born, respondent made no effort to establish his paternity or have his name added to Angela's birth certificate. He never paid any money to petitioner to support Angela and only "help[ed] to purchase a few clothing items" for Angela, despite the fact that he had the means to provide more. Although respondent had occasional contact with Angela, he relied exclusively on petitioner or his own mother to initiate any visitation. While petitioner and Angela were visiting respondent and his parents for Easter 2012, respondent's mother threw Angela's Easter gift at petitioner following an argument.

Respondent was able to see Angela on her first birthday in September 2012. However, in October 2012, respondent and petitioner broke off their relationship, which caused the relationship between their families to deteriorate. After the breakup, respondent and his mother, "the paternal grandmother," visited petitioner at her residence but petitioner told them to leave or else she would call the police.

Respondent and his family members also tried to contact petitioner after the breakup by phone, but "the phone was either not answered or if answered, would be hung up as soon as the party identified themselves." Petitioner filed criminal charges of harassing phone calls against respondent for which he was convicted. Although respondent bought Angela a Christmas gift in 2012, he never delivered it.

After petitioner filed her custody action on 12 December 2012, respondent "admitted the allegation of paternity 'upon paternity test' but made no counterclaim for custody or visitation." Although the trial court ordered respondent to submit to a paternity test, "the Respondent putative father failed to comply with the Order of the court to submit to a paternity test to establish paternity."

While respondent was not in jail the six months preceding the filing of the termination of parental rights petition, he "has either been incarcerated, resided in three different half-way houses or his mother's house over the past several years; he has not maintained any independent residence." He has also "been unable to maintain steady employment."

The trial court also found, with respect to the potential "John Doe" father, that "John Doe has never had any contact with the minor child since birth"; "John Doe has never provided any support for the minor child since birth"; and "John Doe has never taken steps to establish paternity of the minor child."

Based on these findings, the trial court further found that it was in the "best interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe[.]" These findings included that "[w]hile the paternal grandmother wants a relationship with the child, [respondent] has not shown any similar interest."

The trial court concluded that, "by clear, cogent and convincing evidence," respondent abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). It also concluded separately that, "by clear, cogent and convincing evidence," John Doe abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). Further, the trial court concluded that "it is in the best

interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe" and ordered the termination of their parental rights with respect to Angela. Respondent timely appealed to this Court.

Discussion

When reviewing a trial court's order terminating parental rights, this Court must determine

> whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. However, [t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re D.T.L., 219 N.C. App. 219, 220-21, 722 S.E.2d 516, 517 (2012) (internal citations and quotation marks omitted).

Respondent does not contend that any of the trial court's findings are inadequately supported by the evidence. Rather, respondent argues that the trial court erred in terminating his "parental rights" as a "putative father" because no preliminary hearing was conducted pursuant to N.C. Gen. Stat. § 7B-1105 to determine the actual identity of the biological father. He further contends that the trial court was not authorized to enter an order terminating his "parental rights" because the trial court did not specifically find that he was Angela's father, as it was required to do after conducting a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

N.C. Gen. Stat. § 7B-1105(a) sets out the procedure for the trial court to follow when "the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner . . . ." When this provision is triggered, a trial court is required to conduct a preliminary hearing, generally within 10 days of the filing of the petition to "ascertain the name or identity of [the unknown] parent." *Id.* Additionally, "[s]hould the court ascertain the name or identity of the parent, it shall enter a finding to that effect[.]" N.C. Gen. Stat. § 7B-1105(b).

We note initially that, given the language "not known to the petitioner," and because N.C. Gen. Stat. § 7B-1105 contemplates a preliminary hearing to be conducted prior to the expiration of the 30-day time period for a respondent to file an answer to the petition, *see* N.C. Gen. Stat. §§ 7B-1106(a) and 7B-1107 (2013), the legislature intended the preliminary hearing described in N.C. Gen. Stat. § 7B-1105 to apply only

when the petition demonstrates that the petitioner is unaware of "the name or identity" of a parent, regardless of the respondent's answer.

Here, the petition alleges that "the Respondent is the putative father," that "the Petitioner did not have an intimate relationship with anyone else during the relevant period that could be the father of [Angela]," and that "the Petitioner is informed and believes that the Respondent putative father is the biological father of the minor child." These allegations unquestionably indicate that petitioner knew that respondent was Angela's father.

Respondent, however, contends that "[t]he petition in this case plainly alleged that the petitioner did not know who Angela's father was" because it alleged "[*i*]*n the alternative*, the Respondent 'John Doe' is the father of [Angela]." (Emphasis added.) However, this allegation is contingent, and there are no factual allegations actually suggesting John Doe's paternity of Angela. Further, the contingency of the allegation that "John Doe" is Angela's father appears to be consistent with the other allegations that respondent "is not named on the birth certificate and paternity has not been judicially established." *See In re J.S.L.*, 218 N.C. App. 610, 610, 723 S.E.2d 542, 542 (2012) ("Because no father was named on the birth certificate, petitioner also sought to terminate the parental rights of any possible unknown father."). The allegations regarding "John Doe," we conclude, provide no reason to suppose that petitioner did not know the identity of Angela's father when she filed the petition. Thus, the trial court was not required to conduct a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

Respondent cites *In re M.M.*, 200 N.C. App. 248, 684 S.E.2d 463 (2009), in support of his position that the trial court did not comply with N.C. Gen. Stat. § 7B-1105 and, therefore, erred. However, in *In re M.M.*, the preliminary hearing under N.C. Gen. Stat. § 7B-1105 was triggered when the petitioner Department of Social Services alleged that although the juvenile had a "legal father," the juvenile's "biological father was unknown." 200 N.C. App. at 250, 684 S.E.2d at 465.

Respondent also contends that the trial court's findings "did not identify Angela's father." Rather, the petition "variously referred to [respondent] as the 'putative father,' the 'father,' and 'Mr. [respondent's last name]'." Respondent further points out that the order "included findings regarding John Doe's complete absence from Angela's life" and "it found that both [respondent] and John Doe neglected and abandoned [Angela]."

"Section 7B-1111 of our statutes, which establishes grounds for terminating parental rights, is used to determine a *putative father's*

commitment to his child." *In re Williams*, 149 N.C. App. 951, 958, 563 S.E.2d 202, 206 (2002) (emphasis added). While respondent's putative status was sufficient to terminate his putative parental rights, nonetheless, we find that the trial court made findings positively identifying respondent as Angela's father: the judgment found that respondent lied to Drug Court about fathering Angela, and it also referred to respondent's mother as Angela's "paternal grandmother."

Although the order references "John Doe" in its findings, these findings contingently refer to "John Doe" as Angela's father, which is consistent with findings of respondent's paternity. The "John Doe" findings, in turn, supported the termination of John Doe's parental rights and not respondent's. This is also consistent with respondent's paternity. *See In re R.R.*, 180 N.C. App. 628, 633, 638 S.E.2d 502, 505 (2006) (holding that inclusion of grounds for terminating parental rights of "unknown father" was consistent with terminating parental rights of father identified in order). Further, the uncontradicted evidence at the hearing affirmatively established respondent as Angela's father; there was no evidence suggesting that "John Doe" was Angela's father.

Affirmed.

Judges STEELMAN and STEPHENS concur.

IN RE B.L.H.

[239 N.C. App. 52 (2015)]

IN THE MATTER OF B.L.H., A MINOR CHILD

No. COA14-910

Filed 20 January 2015

1. Termination of Parental Rights—subject matter jurisdiction

The trial court did not err by exercising subject matter jurisdiction over a termination of parental rights proceeding. Although a Virginia court entered the initial custody order, under N.C.G.S. § 50A-203 the trial court had subject matter jurisdiction to terminate the father's parental rights because North Carolina was the child's home state and neither the child nor the parents resided in Virginia at the time the motion was filed.

2. Termination of Parental Rights—statutory right to counsel—ineffective assistance of counsel

Respondent received ineffective assistance of counsel in a termination of parental rights proceeding and was entitled to a new hearing. Trial counsel did not attempt to communicate with respondent before the hearing and did not present any evidence or make a cogent argument during the hearing.

Appeal by respondent from order entered 29 April 2014 by Judge Angela B. Puckett in Surry County District Court. Heard in the Court of Appeals 22 December 2014.

H. Lee Merritt, Jr. for petitioner-appellee.

Peter Wood for respondent-appellant.

DAVIS, Judge.

R.H.L. ("Respondent") appeals from the trial court's 29 April 2014 order terminating his parental rights to his daughter, B.L.H. ("Barbara").[1] On appeal, Respondent argues that (1) the trial court lacked subject matter jurisdiction to terminate his parental rights; and (2) he received ineffective assistance of counsel at the termination of parental rights proceeding. After careful review, we affirm in part, vacate in part, and remand for further proceedings.

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1. The pseudonym "Barbara" is used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

Factual Background

M.M.W.N. ("Petitioner") and Respondent are the natural parents of Barbara, who was born in 2001. The parties married in February 2003 and lived together with Barbara in Patrick County, Virginia until Respondent and Petitioner separated in December 2003. Following the parties' separation, Petitioner and Barbara moved to Surry County, North Carolina, and Respondent remained in Patrick County, Virginia. The parties subsequently divorced.

On 1 July 2004, a custody order was entered in Patrick County, Virginia granting the parties joint legal custody of Barbara and primary physical custody to Petitioner. The order contained provisions for visitation by Respondent, which he exercised on a regular basis until July 2006. In late July 2006, Respondent was charged with federal drug-related offenses. On 5 October 2006, the Virginia court entered an order modifying the terms of Respondent's visitation to permit supervised visitation only. Respondent was convicted of the drug offenses and sentenced to active imprisonment in May 2007. Respondent is currently serving his sentence at a federal prison in Texas, and his projected date of release is 10 July 2017.

Petitioner remarried in September 2006 and since that time has continuously lived with Barbara and her present husband in Surry County, North Carolina. Petitioner's husband filed a petition to adopt Barbara in October 2013. On 16 December 2013, Petitioner filed a motion in Surry County District Court to terminate Respondent's parental rights, alleging that Respondent had neglected and abandoned Barbara. The summons issued to Respondent in connection with that proceeding contained a notice that an attorney had been temporarily assigned as Respondent's counsel. The notice also contained contact information for the attorney and encouraged Respondent to contact him immediately. The return of service indicated that service was effectuated upon Respondent on 17 January 2014.

Respondent filed a *pro se* response on 7 February 2014, opposing the termination of his parental rights and the proposed adoption of Barbara by Petitioner's husband. In his response, he asserted that he had written letters to Barbara but that Petitioner had refused to give the letters to her. He also alleged that despite his incarceration, he had made child support payments from 2007 to May 2013, at which time his funds were depleted. The response was addressed to the "Surry County Court" in care of the temporarily-assigned attorney.

On 24 February 2014, the trial court officially appointed the same attorney to represent Respondent in the termination of parental rights proceeding. At a hearing held on 27 February 2014, the trial court concluded that it possessed subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and scheduled an adjudication hearing on the motion to terminate Respondent's parental rights for 26 March 2014. Respondent's attorney asked the trial court for sufficient time to communicate with Respondent and expressed concerns about his ability to contact Respondent in prison. However, the attorney ultimately agreed to the 26 March 2014 hearing date and stated that if he encountered a problem, he would discuss it with Petitioner's counsel.

At the beginning of the 26 March 2014 proceeding, Respondent's trial counsel requested that the following information be noted in the record: (1) Respondent was incarcerated in federal prison in Texas; (2) the attorney had not yet spoken to Respondent but had spoken to "Kristin," Respondent's adult daughter who was in "some type" of contact with Respondent; (3) the attorney had not spoken to anyone else about the case after his conversation with Kristin; and (4) even though he had not communicated with Respondent, the attorney believed that he had enough information to cross-examine Petitioner and that "if [Respondent] were present and if he had communicated [with the attorney,]" Respondent would have wanted the attorney to proceed in representing Respondent at the hearing.

After counsel's statements were read into the record, the following colloquy occurred between him and the trial court:

> THE COURT: All right. And what efforts have you made to contact [Respondent]?
>
> [COUNSEL]: Your Honor, there was a -- I did not write [Respondent], Your Honor. I sent a request to the prison to find out about the email down there because it is my understanding just through my research that inmates do have, for a fee, an email service that they can use. I heard no response from [Respondent], Judge. I did not write him. Honestly, I did not have a way to phone him and speak to him as well. As I indicated, I spoke to his daughter. She essentially raised some of the same issues as her father had raised in response.
>
> THE COURT: Has she — had she spoke to him about this trial?

> [COUNSEL]: I think she had spoken to him. That's my understanding, Your Honor.
>
> THE COURT: Okay, and has he made any effort to contact you or write you at your address?
>
> [COUNSEL]: No, Your Honor, he has not.
>
> THE COURT: And it looks like he was given your name and address through the summons. All right. Then, are you ready to proceed today, then, [Counsel]?
>
> [COUNSEL]: Yes.
>
> THE COURT: Okay. All right.

The trial court then proceeded to conduct the adjudication hearing. Petitioner was the only witness to testify at the hearing, and Respondent's counsel conducted the following cross-examination of her:

> Q. Ma'am, you indicated that [Barbara] — I mean, excuse me, your stepdaughter is [Kristin]; is that correct?
>
> A. It is. . . .
>
> Q. Okay. I understand. And you and [Kristin] stay in kind of regular contact?
>
> A. Yes.
>
> Q. Have you ever told [Kristin] that you did not want [Barbara] to see, observe, look at any letters that her father may have sent to [Kristin]?
>
> A. Whenever — he hadn't spoken to her — Do you mind if I explain?
>
> When he was first sent away and hadn't talked to her, it had been years, three years that he was away and one conversation the first time that she was allowed to stay the night at her sister's house three years later, he called his oldest daughter and wanted to speak with [Barbara] and [Barbara] got very upset. And at that point there was nothing else.
>
> Q. So getting back to my question. So is it your testimony that you did not want [Barbara] to have any type of correspondence or any letters that her father may've sent?

A. No, my — I never once stopped her from ever speaking to him.

Q. Has [Kristin] tried to ever give you any letters that —

A. Nope.

Q. — your — her father has sent to her to give to [Barbara]?

A. No.

[COUNSEL]: That's the only questions, Your Honor.

The trial court asked Respondent's attorney whether he had any evidence to offer. Counsel replied, "No evidence, Judge, on adjudication." The guardian *ad litem* also declined to present evidence. The trial court then invited arguments from the parties' attorneys. After arguments were made by Petitioner's counsel, Respondent's attorney stated the following:

[COUNSEL]: Thank you, Your Honor.

Your Honor, obviously counsel (inaudible) [Respondent] — and that (inaudible). I'm not an expert, Judge, on the workings of the Federal Prison System. I do know that — I don't know what actions [Respondent] could have taken to've [sic] availed himself to be present at this hearing. I don't know how easy it is for [Respondent] to be moved from Texas to North Carolina. That — Judge, whether the county or whether the Federal Prison System would allow a writ to be issued for him to be present in court, my guess is probably no. The only evidence I can offer up — and we've all heard cases. Mr. Merritt and I have had cases involving this issue, Your Honor. In the case law — I think we all agree the case law is pretty clear, that just because one is incarcerated it's kind of a double-edged sword, that does not automatically equate to grounds to terminate one[']s parental rights. But on the other edge of the sword, it doesn't mean that your rights or your duties as a parent doesn't [sic] end. In our (inaudible) estimate, the testimony I can offer, Judge, would be that . . . I mean [Petitioner] testified that a few years after he had been incarcerated that the daughter [Barbara] spent the night with her half sister [Kristin] in — I believe up in Virginia, and that at that point in time the respondent called his — [Kristin], the other daughter and wanted to speak to

> [Barbara] but [Barbara] was somehow upset by this. And I don't know what happened after then but — the only thing I can argue, Judge, is that perhaps the reaction that he got, Judge, and probably, again, estimation that — thinking that this is probably not going to happen again, Judge, letting him not to have any contact with the — with his daughter. Again, without him being here, I can't -- I don't have any way to contradict what the testimony would be with him, Judge. So we would simply argue that due to his circumstances, Judge, he has made all efforts that he can, (coughing/inaudible) preponderance of the evidence, the facts as alleged in the petition and the facts — the issue that they contend that should lead this Court to terminate his parental rights.

The trial court concluded that grounds existed to terminate Respondent's parental rights and proceeded to the disposition hearing. During the disposition phase of the proceeding, Petitioner was once again the only witness to testify. Respondent's counsel did not cross-examine her and did not present any evidence on Respondent's behalf. When offered the opportunity to be heard, Respondent's counsel stated, "Judge, for those reasons I've stated, I'd contend it's not in the best interest . . . (inaudible)." No other argument by Respondent's counsel appears in the record.

The trial court entered an order on 29 April 2014 terminating Respondent's parental rights based on its determination that (1) the two alleged grounds for termination — abandonment and neglect — were proven by clear, cogent, and convincing evidence; and (2) termination of Respondent's parental rights was in Barbara's best interests. Respondent filed a timely notice of appeal to this Court.

Analysis

I. Subject Matter Jurisdiction

[1] Respondent first contends that the trial court lacked subject matter jurisdiction to terminate his parental rights because (1) the Virginia court that entered the initial custody order did not relinquish jurisdiction; and (2) Respondent remained domiciled in Virginia.

"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). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter

jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

"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). For termination of parental rights proceedings, the statute establishing jurisdiction is N.C. Gen. Stat. § 7B-1101, which provides in pertinent part:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen. Stat. § 7B-1101 (2013).

The above-referenced statutes listed within N.C. Gen. Stat. § 7B-1101 are all provisions of the UCCJEA, which defines a "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to termination of parental rights proceedings. *In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 53, *disc. review denied*,

___ N.C. ___, 763 S.E.2d 517 (2014). As such, N.C. Gen. Stat. § 7B-1101 requires that the trial court "have jurisdiction to make a child-custody determination under the provisions of N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203 in order to terminate the parental rights of a nonresident parent." *Id.*

As Respondent does not reside in North Carolina and is therefore a nonresident parent, we must determine whether the trial court possessed subject matter jurisdiction under either N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203. Because N.C. Gen. Stat. § 50A-201 pertains only to *initial* custody determinations and the initial custody order in the present case was made by a Virginia court, § 50A-201 is inapplicable. *See In re J.D.*, ___ N.C. App. ___, ___, 759 S.E.2d 375, 378 (2014) (concluding that § 50A-201 could not confer jurisdiction upon North Carolina court because initial custody determination had been made by Indiana court). As such, N.C. Gen. Stat. § 50A-203 is the only possible basis for the trial court's exercise of jurisdiction over this matter.

N.C. Gen. Stat. § 50A-203 states that a court of this State may not modify a child-custody determination of another state

> unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:
>
> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (2013).

N.C. Gen. Stat. § 50A-201(a)(1) requires either that (1) North Carolina is the home state[2] of the child on the date of the commencement of the proceeding; or (2) North Carolina was the home state of the child within six months before the commencement of the proceeding and, although

2. The UCCJEA 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 proceeding." N.C. Gen. Stat. § 50A-102(7).

the child is presently absent from this State, a parent continues to reside here. N.C. Gen. Stat. § 50A-201(a)(1) (2013).

In this case, Barbara has been living in North Carolina with Petitioner since December 2003. Accordingly, North Carolina is Barbara's home state, and the first prong of N.C. Gen. Stat. § 50A-203 is therefore satisfied. However, because nothing in the record indicates that the Virginia court determined either that it no longer had exclusive, continuing jurisdiction or that a North Carolina court would be a more convenient forum, N.C. Gen. Stat. § 50A-203(2) must be satisfied in order for a North Carolina court to possess jurisdiction to modify the initial custody determination regarding Barbara.

Respondent contends that N.C. Gen. Stat. § 50A-203(2) is not satisfied because although Petitioner and Barbara no longer live in Virginia, Respondent remains domiciled there despite being physically incarcerated in Texas. We disagree.

N.C. Gen. Stat. § 50A-203 does not require that the parties no longer be *domiciled* in the state which initially exercised jurisdiction over the child in order for another state to modify the existing custody determination. Rather, the relevant statutory provisions permit modification of another state's custody determination if neither the child nor the parents "presently reside" in the state which entered the initial custody order. N.C. Gen. Stat. § 50A-203; *see* N.C. Gen. Stat. § 50A-202(a)(2) (2013) (explaining that if child and parents "do not presently reside" in state that made initial custody determination, that state no longer possesses exclusive, continuing jurisdiction). Indeed, the official comment to N.C. Gen. Stat. § 50A-202 clarifies that the phrase "do not presently reside" was intended to mean

> that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.
>
> The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.
>
> If the child, the parents, and all persons acting as parents have all left the State which made the custody

> determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

N.C. Gen. Stat. § 50A-202 cmt.

"Residence simply indicates a person's actual place of abode, whether permanent or temporary." *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). It is undisputed that neither Respondent, nor Petitioner, nor Barbara *actually resided* in Virginia at the time of the filing of the motion to terminate Respondent's parental rights. Consequently, Virginia no longer possessed exclusive, continuing subject matter jurisdiction, and a North Carolina court was legally authorized to assume jurisdiction. Respondent's argument on this issue is therefore overruled.

II. Ineffective Assistance of Counsel

[2] Respondent next contends that he received ineffective assistance of counsel because his trial counsel made no effort to communicate with him prior to the 26 March 2014 hearing.[3] We agree.

An indigent parent has a statutory right to counsel in a termination of parental rights proceeding. N.C. Gen. Stat. § 7B-1101.1(a) (2013).

> A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation.

In re Bishop, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) (internal citation omitted).

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3. Respondent also asserts that his trial counsel's failure to present evidence regarding his state of domicile constituted ineffective assistance of counsel. As explained in the preceding section, however, a party's physical residence, rather than his domicile, is the relevant issue when determining subject matter jurisdiction under the UCCJEA. As such, Respondent was not prejudiced by trial counsel's failure to offer evidence regarding Respondent's domicile. *See In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (explaining that parent must show that he was prejudiced in order to establish ineffective assistance of counsel in termination of parental rights proceeding), *appeal dismissed*, 363 N.C. 564, 686 S.E.2d 676 (2009).

The right to counsel provided by statute "includes the right to effective assistance of counsel." *Id.* at 665, 375 S.E.2d at 678. "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

Here, the record reveals that Respondent's counsel did not have any actual contact whatsoever with Respondent. Counsel did not write any letters or send any emails to Respondent. Nor did he engage in any conversation with Respondent by telephone. The record indicates that the only affirmative act undertaken by counsel even arguably constituting an attempt to communicate with Respondent was to contact the federal prison to learn about the prison's email system.

Our Supreme Court has explained that "a lawyer cannot properly represent a client with whom he has no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). Indeed, counsel's argument at the termination hearing revealed how this lack of contact hindered his ability to effectively represent Respondent. Counsel did not present any evidence on Respondent's behalf at either phase of the hearing, failed to present a cogent argument at the adjudication phase, and declined to make any substantive argument during the disposition phase of the hearing.

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010). A parent facing the termination of his parental rights is "entitled to procedures which provide him with fundamental fairness in this type of action." *Id.* at 561, 698 S.E.2d at 79. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L.Ed.2d 599, 606 (1982).

This is not a case in which a parent failed to cooperate with his attorney or declined to respond to inquiries from his attorney. To the contrary, Respondent acted promptly upon receiving the summons and motion to terminate his parental rights by filing a response, which he directed to his appointed counsel. Respondent also acted in a timely fashion by returning the affidavit of indigency form that had been mailed to him by the clerk of court. Nothing in the record suggests that Respondent personally received notice of the 26 March 2014 hearing or that Respondent wanted his appointed attorney to proceed on his behalf at the hearing in the absence of any prior consultation with him.

Accordingly, we conclude that Respondent's counsel did not make sufficient efforts to communicate with Respondent in order to provide him with effective representation and that this failure deprived Respondent of a fair hearing. As a result, Respondent is entitled to a new hearing on the termination of his parental rights.

Conclusion

For the reasons stated above, we conclude that the trial court possessed subject matter jurisdiction over this action. However, because Respondent was denied effective assistance of counsel, we vacate the order terminating his parental rights and remand for a new hearing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEELMAN concur.

IN THE MATTER OF J.D.R.

No. COA14-697

Filed 20 January 2015

1. Child Abuse, Dependency, and Neglect—neglected juvenile determination—supported by evidence

The trial court's determination that a child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), was supported by the evidence where the trial court found that mother had previous problems with drugs and that she had previously injured the child while abusing drugs, that the mother had continued to use drugs illegally, that the mother had hit and kicked the child, and that she had refused to cooperate with the Department of Social Services to assess the child's safety. Moreover, even though the child had been diagnosed with oppositional defiant disorder, the trial court found that the child treated the mother like a friend and that this relationship seemed to contribute to the child's defiant behavior.

2. Child Abuse, Dependency, and Neglect—dependent—alternative care arrangement—no finding

The trial court erred by adjudicating a child as dependent. A dependent juvenile is defined, in pertinent part, as one in need of assistance or placement because the juvenile's parent, guardian,

or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement. In the present case, the Department of Social Services failed to present any evidence on child care at the hearing and the trial court made no finding of fact that the mother lacked an alternative child care arrangement.

3. Child Abuse, Dependency, and Neglect—jurisdiction terminated—custody award to father—findings sufficient

The trial court complied with N.C.G.S. § 7B-911 when it awarded custody to a father and terminated its jurisdiction. Although the mother argued the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50, and therefore the trial court's order awarding custody to the father did not comply with N.C.G.S. § 7B-911(a), the court's findings were relevant to the child's interest and welfare and were sufficient under N.C.G.S. § 7B-911(a).

4. Child Abuse, Dependency, and Neglect—jurisdiction terminated—custody transferred to Chapter 50 case—findings—no need for further State intervention

The trial court erred by terminating its jurisdiction over a child pursuant to Chapter 7B by transferring the issue of the child's custody to a Chapter 50 case. The trial court's order did not contain the required ultimate finding that there was no need for continued State intervention on the child's behalf, and no findings from which it could be inferred that the issue had been considered.

5. Child Abuse, Dependency, and Neglect—dependency—mother's visitation—at father's discretion

The trial court improperly delegated its judicial authority in a dependent child proceeding by granting the father discretion in determining the terms of the mother's visitation. The trial court effectively turned the father into the mother's case worker and also gave the father the authority to determine whether the mother complied with the trial court's directives.

Appeal by Respondent-Mother from order entered 18 March 2014 by Judge Laura Powell in District Court, Rutherford County. Heard in the Court of Appeals 22 December 2014.

No brief for Petitioner-Appellee Rutherford County Department of Social Services.

Leslie Rawls for Respondent-Appellant Mother.

Callahan Law Office, PLLC, by J. Christopher Callahan, for Respondent-Appellee Father.

Smith Moore Leatherwood LLP, by Kip D. Nelson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Appellant Mother ("Mother") appeals from an adjudication and disposition order ("the disposition order") adjudicating J.D.R ("the Child") a neglected and dependent juvenile, awarding custody of the Child to Respondent-Appellee Father ("Father"), granting Mother visitation, and transferring the case to a Chapter 50 civil action. For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

At the time the following events occurred, the Child had a diagnosis of mild oppositional defiant disorder, although his "symptoms [were] confined to only one setting, [the] home." The Child was eight-years-old and primarily had lived with Mother for most of his life.

The Rutherford County Department of Social Services ("DSS") filed a petition on 30 October 2013, based upon reports concerning the Child's safety, alleging that the Child was a neglected and dependent juvenile. DSS alleged that when the Child went to school on 29 October 2013, he had scratches near his eye. The Child told school personnel that Mother had hit and kicked him. Mother took the Child to the hospital later that day and the Child told the doctor Mother had kicked him and had pulled him from under the bed. Mother would not allow a DSS social worker to interview the Child at the hospital and would not allow Father to assist her. DSS took non-secure custody of the Child and subsequently placed the Child with Father. By orders entered 6 and 11 November 2013, the trial court continued its non-secure custody order.

The trial court held an adjudication and disposition hearing in January and February of 2014. During the February hearing, the trial court suspected that Mother was intoxicated. At the conclusion of the hearing, the trial court ordered Mother to submit to a drug test, which was administered approximately twenty minutes later. Mother tested positive for opiates, amphetamines, and methamphetamines. By order entered 18 March 2014, the trial court adjudicated the Child

neglected and dependent. The trial court further ordered that the court's jurisdiction be terminated, initiated a Chapter 50 civil custody case, awarded custody of the Child to Father, and granted Mother visitation. Mother appeals.

Mother's first notice of appeal, filed 18 March 2014, does not have a certificate of service attached and states only that Mother was "appealing the adjudication in these matters." Mother's second notice of appeal, filed 19 March 2014, states that Mother was appealing from both the disposition order as well as the trial court's 26 November 2013 order continuing the non-secure custody order of the Child. This second notice was served only on counsel for the Guardian ad Litem. Mother's third, and final, notice of appeal, filed 28 March 2014, states only that Mother is appealing from the disposition order, and this notice was served on counsel for the Guardian ad Litem, as well as counsel for Father.

II. Scope of Review

As a preliminary matter, we note that Mother filed three separate notices of appeal in this action. Notwithstanding possible issues with Mother's first two notices of appeal, the arguments in Mother's brief focus exclusively on the disposition order. As such, our review of Mother's appeal will be limited accordingly. N.C.R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

III. Standard of Review

On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

IV. Adjudication of Neglect

[1] Mother first challenges the trial court's adjudication of the Child as neglected. A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is

> not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). We have consistently held that an adjudication of neglect requires "that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted).

In support of its neglect adjudication, the trial court made the following findings of fact:

> 3. On October 29, 2013, the minor child went to school with scratches and bruises on his face.
>
> 4. On the 29th[,] the minor child met with the school counselor and told her that his mother had hit and kicked him that morning.
>
> 5. The hitting and kicking occurred when the minor child would not get ready for school.
>
> 6. Later in the day, the minor child hid under the bed and while trying to get him out the child hit his back on the bed causing an abrasion.
>
> 7. The mother called the police that morning in order to aid her in getting him to school.
>
> 8. The mother came to pick the minor child up at school on the 29th after school had been released. The Minor Child was in the school office, waiting for his mother [to] arrive, but was not there for disciplinary reasons.
>
> 9. The minor child left with his mother but came back into the school and said his mother had locked him out of the car and would not let him in until he apologized.
>
> 10. The mother was not in the car at this time but was sitting outside the school and would not let the minor child in the car until he apologized.
>
> 11. The mother was very agitated and at that point called Kevin Blackwell with juvenile services.

12. After describing behaviors to Mr. Blackwell, which only the mother observed and which were not occurring at the school, Mr. Blackwell told her she may want to take the child to the hospital for an evaluation.

. . . .

15. During the month of September, the mother had taken the minor child to the Department of Juvenile Justice because of his defiant behavior.

. . . .

17. The Department [of Juvenile Justice] did tell the mother that if the child committed a crime and she felt it necessary then she should call the police. The Department never told her to call the police if the child would not go to school.

. . . .

20. [The mother] has provided financially for the child with the help of child support from the father. She has provided [for] all necessary medical care and all the child's educational needs. She testified that [t]he minor child treats her like a friend and at times she testified that [t]he minor child was her "buddy".

21. This relationship seems to contribute to [t]he minor child's defiance.

22. The mother had a drug problem in the past and had involvement with the Department of Social Services because she slapped the child in the face, leaving a handprint bruise on his face.

. . . .

25. The mother takes pain medication for different injuries she received [in] at least one and possibly two car wrecks. She no longer has a prescription but she still continues to use the medication. She testified that she last used the pain medication approximately one week prior to this hearing, but that she was unsure what the medication was.

26. The mother testified that she purchases or is given painkillers by different individuals.

27. The mother testified [at the hearing] and was very erratic. She would talk around the question and would talk of grandiose ideas and reasons for her and [t]he minor child's behavior.

28. On October 29th, 2013[,] the mother took the minor child to the hospital for an evaluation. During the evaluation the child disclosed that he had been hit and kicked by the mother.

29. The hospital called [DSS].

30. [DSS] had received a report earlier that day regarding the bruising, hitting[,] and kicking and also regarding the mother's erratic behavior at school.

31. The school was concerned about her emotional state when she came to pick the minor child up that day.

32. The school secretary, counselor, principal[,] and assistant principal all testified and the Court finds that the mother was so upset and irrational that she posed a threat to the minor child's safety in light of what had happened earlier that day.

33. The DSS worker arrived at the hospital and spoke with the mother. She let the worker know that her attorney was on the way.

34. The DSS worker was not allowed to meet with the minor child although her attorney [] said that he would make the child available the next day at [DSS].

. . . .

37. Reasonable efforts were made in that DSS attempted to [substantiate] the allegations by interviewing the minor child and observing the marks that were alleged to have been made by the minor's parent by other than accidental means. Due to [respondent's] failure to comply with the request and her own refusal to speak about the allegations and give any explanation, [the] safety [of the Child] could not [be] assessed.

Mother does not challenge the trial court's findings of fact and, therefore, they are binding on appeal. *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337. Instead, Mother contends the trial court's findings are insufficient to support its conclusion that the Child was neglected.

The trial court found that Mother had previous problems with drugs and that she had previously injured the Child while abusing drugs. It also found that Mother had continued to use drugs illegally, that Mother had hit and kicked the Child on or around 29 October 2013, and that she had refused to cooperate with DSS to assess the Child's safety. Moreover, even though the Child had been diagnosed with oppositional defiant disorder, the trial court found that the Child "treats [Mother] like a friend" and that "[t]his relationship seems to contribute" to the Child's defiant behavior. These findings support the trial court's conclusion that the Child was not receiving proper care and supervision under the care of Mother, and that he was living in an environment injurious to his welfare. Therefore, the trial court's determination that the Child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), is supported by the evidence.

V. Adjudication of Dependency

[2] Mother next challenges the trial court's adjudication of the Child as dependent. A dependent juvenile is defined, in pertinent part, as one "in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

In the present case, DSS failed to present any evidence on child care at the hearing and the trial court made no finding of fact that Mother lacked an alternative child care arrangement. Without the necessary findings in support of the trial court's conclusion that the Child was a dependent juvenile, this conclusion was in error. *See id.* (trial court's order reversed when it failed to make any findings regarding the availability of alternative child care arrangements). Because we reverse, based on the lack of findings pertaining to the second prong of dependency, we need not address Mother's challenge to the first prong.

VI. Civil Child Custody Order

[3] Mother further contends the trial court failed to comply with N.C. Gen. Stat. § 7B-911 when it awarded custody to Father and terminated its jurisdiction. N.C. Gen. Stat. § 7B-911 (2013) provides, in part:

> (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or

not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

. . . .

(c) When entering an order under this section, the court shall satisfy the following:

(1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7.

(2) Make the following findings:

a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Mother first argues the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50 and, therefore, the trial court's order awarding custody to Father did not comply with N.C. Gen. Stat. § 7B-911(a). We disagree. N.C. Gen. Stat. § 50-13.2(a) (2013) provides, in part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child[.]

"The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child." *Green v. Green*, 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

In this case, the trial court's order contains findings of fact relevant to the issue of the Child's interest and welfare. The trial court specifically made findings that establish Mother tested positive for opiates, amphetamines, and methamphetamines; that Mother showed up late for visits; that Mother's behavior was erratic during visits; that Father tested negative for drugs; that Father's residence was appropriate for the Child; and that Father had sufficient financial resources to support the Child. Further, the trial court made the necessary conclusion that it was in the best interest of the Child to award custody to Father. Therefore, we conclude the trial court made sufficient findings pursuant to N.C.G.S. § 7B-911(a).

[4] Mother also argues the trial court failed to make the necessary finding pursuant to N.C.G.S. § 7B-911(c)(2)(a) that there was no need for continued State intervention on behalf of the Child and, therefore, the trial court erred in terminating its jurisdiction. On this contention, we agree. The trial court's order does not contain the required ultimate finding that there was not a need for continued State intervention on the Child's behalf. Further, the disposition order contains no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403–04 (2007) (upholding order entered under N.C.G.S. § 7B-911(c)(2)(a) where the trial court failed to explicitly find

that further state intervention was not needed, but included findings that: (1) the respondent parents were able to coordinate visitations between themselves; (2) the parents both had "suitable homes for visitation and/or custody of [the] . . . children[;]" (3) the mother was "capable of properly supervising and disciplining the . . . children and keeping them safe while in her care and custody[;]" and (4) DSS "wishes to be relieved of further involvement in this case."). In the present case, because the trial court did not make the required findings in compliance with N.C.G.S. § 7B-911(c)(2)(a), the trial court erred in terminating its jurisdiction over the Child pursuant to Chapter 7B by transferring the issue of the Child's custody to a Chapter 50 case. Accordingly, we reverse the trial court's order and remand this case to the trial court for further proceedings, at which the trial court must make findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 7B-911(c)(2)(a) (2013).

VII. Visitation Plan

[5] Mother contends the trial court improperly delegated its judicial authority by granting Father discretion in determining the terms of Mother's visitation. We agree. Our General Assembly recently codified a separate section entitled "Visitation" in N.C. Gen. Stat. § 7B-905.1 (2013), which provides in part:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.* The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

(emphasis added).

In the present case, the trial court's disposition order removed custody from Mother and placed custody with a relative, Father. The disposition order further provides that:

4. The Respondent Mother will have a full psychological evaluation by a PhD level psychologist and comply with [] treatment.

5. The Respondent Mother will have another substance abuse assessment and will comply with the results of the assessment. She will give the results of all of the assessments and treatment to the Respondent Father.

6. The Respondent Mother shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month. Said visits shall be supervised by her mother, her aunt[,] or anyone else that the Respondent Father deems appropriate. He may supervise the visit but he is not required to supervise.

7. The Respondent Mother will not be impaired during the visits and will not act inappropriately. She will not corporally punish the Minor Child during the visits.

8. If and when the Respondent Mother successfully completes drug treatment, provides to the Respondent Father multiple negative drug tests and completes the above conditions, she may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]

. . . .

10. The Respondent Father may determine whether [Mother] is allowed to eat lunch with the minor child so long as she does not cause a disturbance at the school.

11. The Respondent Mother shall have supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours. The Respondent Father may allow more time in his discretion.

12. Once the Respondent Mother complies with the above conditions[,] the parties will divide all major school holidays according to the school schedule.

13. Once she complies with all conditions above the Respondent Mother shall have two non-consecutive weeks of vacation during the summer.

. . . .

15. The Respondent Mother may have reasonable telephone contact if the child so desires and in the Respondent Father's discretion between the hours of seven o'clock and eight o'clock each night.

The disposition order does specify a certain "minimum frequency and length" for some of Mother's visits and indicates whether those visits must be supervised as required by N.C.G.S. § 7B-905.1. Specifically, the disposition order provides that Mother "shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month" as well as "supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours." However, the disposition order delegates to Father substantial discretion over other kinds of visitation, such as Mother having lunch with the Child at school. It also provides a number of future, conditional expansions of Mother's visitation rights that effectively are contingent on Father deciding that Mother has complied with the trial court's directives. For instance, the disposition order states that Mother "may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]" after she "successfully completes drug treatment, [and] provides to the Respondent Father multiple negative drug tests." The disposition order further states that Mother "will divide all major school holidays" with Father and will have "two non-consecutive weeks of vacation during the summer" after she complies with other directives from the trial court, which include Mother providing Father with her future substance abuse assessments. This Court has been very clear that

> [the] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.

In re Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). In the present case, we find that the trial court impermissibly delegated its judicial function to Father. The trial court effectively turned Father into Mother's case worker and also gave Father the authority to determine whether Mother complied with the trial court's directives. The present case is distinguishable from cases such as *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005) and *Stancil*, 10 N.C. App. at 545, 179 S.E.2d 844, in which this Court vacated visitation orders that gave the respective juveniles' custodians *complete* discretion over the juveniles' parents' visitation rights, in that the trial court did place some bounds on Father's discretion. However, in the present case, the trial court's delegation to Father still goes too far. Therefore, we remand in order that the trial court can make findings and conclusions relating to visitation rights that comport with this opinion.

VIII. Conclusion

Our review of Mother's appeal has been limited to the arguments in her brief regarding the disposition order. We find that the trial court's adjudication of the Child as neglected was supported by the evidence, although the trial court made insufficient findings to support its adjudication of the Child as dependent. Moreover, the trial court made sufficient findings to award custody of the Child to Father, pursuant to N.C.G.S. § 7B-911(a). However, the trial court did not make sufficient findings in order to terminate its jurisdiction over this action, pursuant to N.C.G.S. § 7B-911(c)(2)(a). Finally, the trial court impermissibly delegated its judicial function to Father in determining Mother's visitation plan.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and DAVIS concur.

IN RE M.G.

[239 N.C. App. 77 (2015)]

IN THE MATTER OF M.G. & H.G.

No. COA14-934

Filed 20 January 2015

Constitutional Law—right to counsel—erroneous attorney withdrawal prior to client notification

The district court erred when it granted an attorney's request to withdraw from representing respondent mother in a termination of parental rights (TPR) case without first confirming that respondent had been notified of the attorney's intention to do so. The superficial inquiry failed to confirm all three prerequisites that our Supreme Court held in *Smith v. Bryant*, 264 N.C. 208 (1965), must be satisfied before an attorney is allowed to withdraw from representing a client after making an appearance on their behalf. The TPR order was vacated and the case was remanded.

Appeal by Respondent-mother from order entered 3 July 2014 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Elizabeth Kennedy-Gurnee for Petitioner Cumberland County Department of Social Services.

Richard Croutharmel for Respondent-mother.

Beth A. Hall for guardian ad litem.

STEPHENS, Judge.

Respondent-mother ("Respondent") appeals from an order terminating her parental rights to her minor children, "Melvin" and "Hannah."[1] Respondent argues that the district court abused its discretion by: (1) denying her trial counsel's motion to continue the termination of parental rights ("TPR") hearing because Respondent was not present and had not received notice of the hearing date, and (2) by allowing Respondent's trial counsel to withdraw from her representation at the start of the TPR hearing without first confirming that Respondent had been notified of

1. For the purpose of protecting their privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juveniles by pseudonyms in this opinion.

counsel's intent to do so. After careful review of the record, we vacate the TPR order and remand the case to the Cumberland County District Court for further proceedings necessitated by its erroneous decision to allow Respondent's counsel to withdraw.

Facts and Procedural History

On 17 August 2011, Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging abuse, neglect, and dependency ("AND") of Respondent's five-year-old son Melvin and eight-year-old daughter Hannah, and also obtained an order for nonsecure custody of them. The petition alleged that on 3 August 2011, Melvin's father beat him severely enough that he sustained "black and blue" bruises from his waistline to his buttocks and thigh, as well as a handprint on his face from multiple slaps, while Hannah sustained bruising on her hip from being beaten or spanked with a belt by her father's girlfriend.[2] Respondent reported her children's injuries to the Fayetteville Police Department, but at that time had no permanent address and a history of unstable housing, unstable employment, drug use, and anger management problems. DSS also presented evidence of domestic violence by the children's father against Respondent, and further alleged that Respondent "put pills in the juice of the children for them to drink." On 22 August 2011, attorney Mona Burke was appointed as Respondent's trial counsel for the AND proceedings and the court continued its order of nonsecure custody for the children with DSS but granted Respondent supervised visitation rights.

On 27 April 2012, the parties engaged in a permanency mediation and agreed for Melvin and Hannah to be adjudicated neglected and for dismissal of the abuse and dependency claims. On 25 July 2012, the district court entered a Dispositional Order wherein Respondent was ordered to complete a psychological evaluation, a parenting assessment, and age appropriate parenting classes, as well as obtain and maintain safe, stable, and suitable housing and employment sufficient to sustain herself and her children.

A permanency planning hearing was held over the course of three days in late October 2012. The hearing was originally scheduled for 23 October 2012, on which date Respondent was initially present in the courthouse but disappeared without explanation prior to the matter

2. Criminal charges were subsequently filed against the juveniles' father, whose parental rights were terminated in the same proceeding from which Respondent now appeals. However, as he did not appeal from the TPR order entered against him, this opinion focuses solely on the issues raised by Respondent.

being called. The hearing was continued to 25 October 2012, but when Respondent again failed to appear and Ms. Burke could not explain her absence, the court temporarily suspended Respondent's visitation rights with her children. Respondent finally appeared on 31 October 2012, attributing her prior absences to transportation issues; she also informed the court that she had obtained housing and was working cleaning houses, although she did not provide any written verification. The district court reinstated Respondent's visitation rights, contingent on negative drug screens, set the permanent plan for reunification, and ordered Respondent to successfully complete a psychological evaluation, a parenting assessment, age appropriate and cooperative parenting classes, and anger management classes; submit to random drug testing and not use, possess, or consume alcohol or controlled substances; and actively engage in individual therapy and substance abuse counseling and treatment.

Respondent failed to appear at the next permanency planning hearing on 10 January 2013, and Ms. Burke was unaware as to the reasons for her absence. The court found Respondent had not made any progress toward complying with its orders but left the permanent plan as reunification. Respondent did attend the next permanency planning hearing on 29 April 2013, but the court found that she had failed to obtain permanent housing and had not yet completed a psychological evaluation or parenting assessment, and therefore changed the permanent plan to custody with other court-approved caretakers concurrent with reunification. The court also stated that, "[t]he parties have been put on notice on this date, that should [Respondent] continue to fail to make progress, the Court will relieve of further reunification efforts at the next setting in this matter."

Respondent failed to appear at the next permanency planning hearing on 29 July 2013. The court found that there had been no substantial change in circumstances since the previous hearing, that Respondent had not made any progress in alleviating the conditions which led to removal of the juveniles from her home, and that her attendance at visitations was becoming inconsistent. As a result, the court changed the permanent plan to custody with other court-approved caretakers concurrent with adoption and ordered DSS to pursue adoption and termination of parental rights.

On 15 January 2014, DSS filed a TPR petition against Respondent. On 16 January 2014, Ms. Burke, who had represented Respondent throughout the AND proceedings, was assigned as Respondent's counsel for the TPR proceeding and served with the TPR petition via first-class

mail. That same day, in accordance with N.C. Gen. Stat. § 7B-1106, DSS attempted to serve a summons on Respondent at her last known address on Indian Creek Drive in Fayetteville. However, on 23 January 2014, the Cumberland County Sheriff's Office reported that Respondent no longer lived at that address. DSS then came to believe that Respondent lived at an address on Sweetwater Road in Dunn and attempted to serve her there.[3] On 6 February 2014, the Cumberland County Sheriff's Office returned that summons to DSS as well, noting "[t]he defendant[s] do not live at listed address." Nevertheless, on 10 March 2014, DSS again attempted to serve Respondent at the Sweetwater Road address by certified mail package, but the package was returned as "unclaimed" and "unable to forward" on 8 April 2014. On 21 March 2014, DSS finally succeeded in serving Respondent with the help of a process server who went to the Sweetwater Road address and learned that Respondent had another child who was staying there in the care of family members but that Respondent herself was in Fayetteville. The process server reached Respondent by telephone and arranged to meet her at a nearby convenience store, where Respondent was served with the TPR petition and summons.

A pre-trial hearing was held on 2 April 2014. Respondent failed to appear but the district court found that all parties had been properly served and scheduled the TPR hearing for 29 April 2014. On 9 April 2014, DSS sent notice of the date, time, and location of the TPR hearing to Respondent at the Sweetwater Road address in Dunn. Respondent contends she never received this notice.

Neither Respondent nor Melvin's and Hannah's father was present in court when the TPR hearing began on 29 April 2014. Ms. Burke requested a continuance on Respondent's behalf, explaining that

> [m]y client has a corresponding case that was on, I believe, yesterday, and she was not here at the call which was very early in the morning, but apparently she did come to court after that. I would simply ask that this case be set. I think that case was set 30 days out. That this case be set 30 days out on the same date.

The district court denied that request but held the matter open to see if the parents would appear.

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3. The record does not indicate why DSS reached this conclusion. Both DSS and the juveniles' guardian *ad litem* submitted supplements to the record pursuant to N.C. R. App. P. 9(b)(5), which are discussed *infra*.

The district court reconvened the matter the next day, 30 April 2014, and again neither Respondent nor Melvin's and Hannah's father was present. Ms. Burke again asked for a continuance, explaining:

> Your Honor, she did have [a] case on Monday. We went ahead—I think it was very close to 8:30 and she did show up after that, and she was given a next court date on that day. So, she did [unintelligible], so I would ask that everything be continued to that court date.

DSS objected to this request for a continuance and stated that it wanted to conduct a permanency planning hearing before starting the TPR hearing. The district court denied Ms. Burke's motion for continuance, prompting her to inquire:

> MS. BURKE: Your Honor, then I don't know if I should withdraw or not because [Respondent] sort of maintains contact with me she's coming through the other case. So, Your Honor, [unintelligible] at this point.
>
> THE COURT: She knew to be here. Notice was given. We held the other case open from yesterday. So, I will allow you to withdraw.
>
> MS. BURKE: At least as to this——
>
> THE COURT: As to this hearing, yes.
>
> MS. BURKE: Would that be in regards to the TPR as well, Your Honor? Because I am in the same position. If the Court's not going to be inclined to continue that, this afternoon.
>
> THE COURT: I'm not going to be inclined to continue it. I'll hold it until we call it, however. Because I don't know how the rest of the docket is going to go.

The district court then conducted a permanency planning hearing. When the TPR hearing started later that afternoon, Ms. Burke suggested that Respondent might have confused the date of the TPR hearing with her other case that had been continued and made another motion to continue the TPR hearing, which the court denied. Ms. Burke then made a motion to withdraw. The trial court inquired if Ms. Burke had been in contact with Respondent since Monday, 28 April 2014. Ms. Burke replied that she had not, and explained that she did not have a phone number for Respondent and that her only known contact information was the Sweetwater Road address where DSS had previously failed in

its attempts to serve Respondent. The court then granted Ms. Burke's motion to withdraw and subsequently entered a written order confirming her withdrawal based on the denial of Ms. Burke's motion to continue and the fact that "the Respondent was served but has failed to appear."

During the TPR hearing that followed, DSS offered into evidence the district court's prior orders and Melvin's and Hannah's parents' criminal records, then called for testimony from social worker Anne Saleeby. Ms. Saleeby testified that she had been involved in the case for two years and provided background on Respondent's repeated failure to comply with the court's orders or make any progress toward reunification, noting that Respondent had ceased visiting her children after the court ceased reunification efforts on 29 July 2013. Ms. Saleeby was the sole witness to testify at the TPR hearing. The district court then found by clear, cogent, and convincing evidence that grounds existed to terminate Respondent's parental rights on the bases of neglect, willful failure to make any reasonable or substantial progress toward alleviating the conditions which led to the children's removal from her home, and failure to pay financial support. On disposition, the court found that the likelihood of adoption was high and that the children were in a pre-adoptive home, that they no longer had any bond with their parents, that they had bonded with their foster mother, and that it was in their best interests to terminate Respondent's parental rights. On 3 July 2014, the district court entered an order terminating Respondent's parental rights.

Respondent filed a *pro se* notice of appeal on 23 May 2014. However, that notice did not include Ms. Burke's signature as required by our Rules of Appellate Procedure. On 13 June 2014, Respondent and Ms. Burke filed an amended notice of appeal containing both of their signatures.

Analysis

On appeal, Respondent argues that the trial court abused its discretion by: (1) denying her trial counsel's motion to continue the TPR hearing due to Respondent's absence and alleged lack of notice as to the date, time, and location of the hearing; and (2) allowing her trial counsel to withdraw from her representation without first notifying Respondent of her intent to do so. Because we find the issue of Respondent's counsel's withdrawal to be determinative of the outcome in this case, we address only Respondent's second argument.

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (citation and internal quotation marks omitted),

disc. review denied, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also* N.C. Gen. Stat. § 7B-1101.1 (2013). It is well established that after making an appearance in a particular case, an attorney may not cease representing a client without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). An abuse of discretion occurs only when the trial court's ruling is "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, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). As a result,

> before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a [TPR] proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.

In re D.E.G., __ N.C. App. __, __, 747 S.E.2d 280, 284 (2013) (citation omitted).

We acknowledge that one of our General Assembly's goals in enacting a procedure for the termination of parental rights was "to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age . . . ." N.C. Gen. Stat. § 7B-1100.2 (2013). We are always loath to delay that goal. Nevertheless, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982)). Consequently, this Court has consistently vacated or remanded TPR orders when questions of "fundamental fairness" have arisen due to failures to follow basic procedural safeguards. *See id.* (vacating TPR order where issues of lack of proper notice were raised and the respondent-parent's counsel was allowed to withdraw leaving her with no representation at a termination hearing that lasted only 20 minutes); *see also*, *e.g.*, *D.E.G.*, __ N.C. App. at __, 747 S.E.2d at 286 (vacating and remanding in part a TPR order where the

respondent-parent was not present for the TPR hearing and the district court allowed his counsel to withdraw from his representation without having appeared in court, notified the respondent of his intention to withdraw, or shown good cause for the allowance of his request); *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010) (remanding TPR order for determination by the district court regarding efforts by the respondent-parent's counsel to contact, consult, and adequately represent him at the TPR hearing where the respondent was not present and the court after minimal inquiry allowed his counsel, who the record indicated spent a total of 1.1 hours on the case, to not participate at the hearing); *In re K.R.B.*, __ N.C. App. __, 723 S.E.2d 173 (2012) (unpublished), *available at* 2012 WL 1117863 (vacating and remanding TPR order where the respondent-parent was not present at the hearing and the district court allowed his counsel to withdraw without inquiring into his efforts to contact the respondent prior to the hearing or notify him of his intention to withdraw).[4]

In the present case, the record is devoid of any evidence whatsoever that Respondent received any notice from her trial counsel that counsel would seek to withdraw from her representation at the start of the TPR hearing. When the court inquired whether she had any contact with Respondent, Ms. Burke replied that she did not know why Respondent was absent, that she had a history of difficulty communicating with Respondent and did not have her telephone number, and that she believed Respondent might have been confused about her court dates. Ms. Burke did state that Respondent had shown up late to court earlier in the week for another matter in which Ms. Burke was representing Respondent, but she offered no elaboration as to what discussion, if any, they had about Respondent's TPR hearing and the potential consequences that might follow if she failed to appear. The trial court then allowed Ms. Burke to withdraw without any further inquiry.

The failures to comply with basic procedural safeguards in the present case raise the same questions of fundamental fairness as those this Court addressed in prior cases such as *K.N.*, *D.E.G.*, and *S.N.W.* In fact, these concerns are exacerbated here by the difficulties DSS encountered in serving Respondent with the summons and notice of hearing. We note that although the record before us does not provide a clear explanation

4. Although Rule 30(e)(3) of our Rules of Appellate Procedure holds that this Court's unpublished decisions do not constitute controlling legal authority, given the factual and procedural similarities between *K.R.B.* and the present case, we find it persuasive and consistent with the precedent established in *K.N.*

for these issues, we can infer that Respondent was unusually difficult to reach given her lack of stable permanent housing and that DSS made a good-faith effort to serve the notice and summons for the TPR proceeding against her. In an attempt to clarify these issues, both DSS and the juveniles' guardian *ad litem* sought to supplement the record pursuant to N.C.R. App. P. 9(b)(5).[5] However, because both these supplements contain documents from another case that were not before the trial court in this case and raise issues that were never considered by the trial court, the documents in these supplements are not properly before us in this appeal. Thus, we cannot consider them, and we strongly admonish counsel for DSS and the guardian *ad litem* not to file materials with this Court that were not before the trial court. Nevertheless, we can and do conclude that the district court erred when it granted Ms. Burke's request to withdraw after conducting a superficial inquiry that failed to confirm all three of the prerequisites that our Supreme Court held in *Smith* must be satisfied before an attorney is allowed to withdraw from representing a client after making an appearance on her behalf.

DSS attempts to persuade us to reach a different result by arguing that the district court did not err by allowing Ms. Burke to withdraw because it was required to do so by N.C. Gen. Stat. § 7B-1101.1(a) given Respondent's failure to appear at the TPR hearing. DSS's argument is premised on the basic legal principle, recognized by our Supreme Court's decision in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), that TPR proceedings are independent from any underlying abuse, neglect,

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5. In its Rule 9(b)(5) supplement, DSS purports to show that: during the proceedings involving Melvin and Hannah, Respondent gave birth to another child; that DSS obtained an order for nonsecure custody of that child based on allegations of neglect and dependency; that the child was placed in the custody of his paternal grandmother who resided at the Sweetwater Road address in Dunn; and that during a face-to-face visit at that residence on 21 February 2014, a social worker came to believe that Respondent was residing there. DSS asserts that this is why so many fruitless attempts were made to serve Respondent at the Sweetwater Road address, with the implication being that the failure of those attempts resulted from Respondent acting in bad faith to avoid being served. However, the Rule 9(b)(5) supplement filed by the juveniles' guardian *ad litem* cites the same information as a basis for vacating and remanding the TPR order for defective notice of the TPR hearing because it tends to show that DSS was notified during the 21 February 2014 home visit that Respondent was planning to move to a new address on Dunn Road in Fayetteville at the beginning of March. Indeed, the order for nonsecure custody of Respondent's new child featured in both supplements lists the Dunn Road address in Fayetteville as Respondent's address, yet in April, DSS erroneously mailed the notice of the date, time, and location of the TPR hearing, required by N.C. Gen. Stat. § 7B-1106(b)(5), to the Sweetwater Road address, which may well explain Respondent's confusion over her court dates that Ms. Burke alluded to just before withdrawing at the start of the TPR hearing, as well as Respondent's failure to appear for the TPR hearing in this case.

or dependency proceedings. Thus, DSS asserts that although Ms. Burke served as Respondent's appointed counsel in the AND proceedings, her role in the TPR proceedings was only provisional, and section 7B-1101.1(a), which governs the appointment of provisional counsel in TPR proceedings, requires the court to dismiss a respondent-parent's provisional counsel if the respondent-parent "[d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1) (2013). However, this Court previously considered the very same argument in our *D.E.G.* decision, where we rejected it because it rests on a selective reading of the statute that ignores the fact that "the appointment of provisional counsel is unnecessary in the event that 'the parent is already represented by counsel.' " __ N.C. App. at __, 747 S.E.2d at 285 (quoting N.C. Gen. Stat. § 7B-1101.1(a)). Here, as in *D.E.G.*, the summons served upon Respondent clearly indicated that her trial counsel, who had represented her throughout the underlying proceedings, would continue to represent her in the TPR proceeding. Thus, because she was already represented by Ms. Burke, Respondent had no need for provisional counsel, Ms. Burke did not assume a provisional role in the TPR proceeding, and the trial court was not "excused from the necessity for compliance with the usual procedures required prior to the entry of an order allowing a parent's counsel to withdraw in this case by virtue of the provisions of [section 7B-1101.1(a)(1)]." *Id.*

Therefore, because the district court erred in allowing Ms. Burke to withdraw from representing Respondent without first confirming that Respondent had been notified of Ms. Burke's intention to do so, we conclude that the TPR order must be vacated and this case remanded for further proceedings consistent with this opinion.

VACATED and REMANDED.

Judges STEELMAN and GEER concur.

KHWAJA v. KHAN

[239 N.C. App. 87 (2015)]

TARIQ M. KHWAJA, PLAINTIFF
v.
MOHAMMED S. KHAN AND WIFE, HASEEB AKHTAR, MOHAMMED PERVEZ IQBAL AND WIFE, IRSHAD BEGUM, DEFENDANTS

No. COA14-728

Filed 20 January 2015

Perpetuities—commercial lease—renewal options—first refusal to purchase

A provision in a commercial lease granting the tenant a right of first refusal to purchase the building (the preemptive right) was subject to and violated the common law rule against perpetuities and was therefore void. Though the lease provided for an initial term of 15 years, it also provided the tenant the option to extend the lease for an additional term of 5 to 10 years, making it possible that the duration of the lease and the tenant's preemptive right would be 25 years. There was a possibility that the tenant's preemptive right would not vest, if at all, within 21 years of any life in being at the time the lease was executed; it did not matter that the landlord ultimately agreed upon terms to sell the property within the 21-year period.

Judge BRYANT concurring in result only.

Appeal by Defendants from an order entered 25 April 2014 by Judge W. David Lee and orders entered 29 October 2013 by Judge Theodore S. Royster in Davidson County Superior Court. Heard in the Court of Appeals 19 November 2014.

Sharpless & Stavola, P.A., by Eugene E. Lester, III, for Defendant-appellants.

Morgan Herring Morgan Green & Rosenblutt, L.L.P., by John Haworth and James F. Morgan for Plaintiff-appellee.

DILLON, Judge.

Defendants seek review of orders granting summary judgment and costs, including attorneys' fees, in favor of Plaintiff and of the denial of their Rule 60(b) motion for relief from these orders. For the following reasons, we reverse and remand the orders granting summary judgment and costs, and we vacate the order denying the Rule 60(b) motion as moot.

I. Synopsis

Plaintiff, who is a tenant of a commercial building, brought this action against his landlord and others to enforce a provision in his lease granting him a preemptive right, otherwise known as a right of first refusal, to purchase the building, claiming that this preemptive right vested when the landlord agreed on terms to sell the building to a third party.

Based on this Court's holding in *New Bar Partnership v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012), we hold that the provision in the lease granting the tenant the preemptive right is subject to and violates the common law rule against perpetuities and is, therefore, void. Specifically, the period during which Plaintiff's preemptive right could have vested under the lease provision was not tied to any life in being and, otherwise, extended beyond 21 years. Accordingly, we conclude that Defendants – and not Plaintiff - are entitled to judgment on Plaintiff's claims as a matter of law.

II. Background

Plaintiff (hereinafter referred to as "the Tenant") commenced this action to enforce his preemptive right under the Lease and for other relief. Defendants answered, praying that the Tenant's claims be dismissed with prejudice. The parties filed cross motions for summary judgment, and the evidence presented at the hearing on those motions tended to show as follows:

In 2009, Defendants Mohammed S. Khan and his wife Haseeb Akhtar (the "Landlord") entered into a written agreement (the "Lease") to lease a commercial building in Davidson County to the Tenant, Plaintiff Tariq M. Khwaja. The Lease provided for an initial term of 15 years and granted the Tenant an option to renew for an additional term of "5 to 10 years." The Lease further provided that if at any time "during [the] period of [the Lease]" the Landlord agreed on terms with a third party to sell the property, the Landlord was required to first allow the Tenant the opportunity to purchase the property under said terms. The Lease was not initially recorded in the Davidson County Registry.

In late 2011, the Landlord approached the Tenant to see whether he had any interest in purchasing the property; however, the Tenant responded that he did not have the desire or the money to do so.

Shortly thereafter, the Landlord negotiated with Defendants Mohammed Pervez Akhtar and his wife Irshad Begum (the "Third-Party

Buyers") to sell them the property. On 13 April 2012, the Landlord sold the property to the Third-Party Buyers, delivering them a deed; however, this deed was erroneously recorded in Guilford County rather than in Davidson County.

On 24 April 2012, the Tenant recorded the Lease in Davidson County. As of this date, there was nothing recorded *in Davidson County* indicating that the Landlord had sold the property to the Third-Party Buyers.

In June of 2012, the Third-Party Buyers sold the property back to the Landlord, financing the entire sales price pursuant to a ten-year promissory note and securing it with a deed of trust (the "Deed of Trust") on the property. The deed and the Deed of Trust were recorded in Davidson County.

In July of 2012, the Tenant – having become aware that the property was again owned by the Landlord – sent a letter demanding that the Landlord sell him the property for $100,000.00.[1] However, the Landlord refused to sell him the property. The Tenant continued making rent payments under the Lease, but has made them under protest.

On 29 October 2013, the trial court entered orders granting summary judgment in favor of the Tenant, decreeing essentially that the Landlord sell the property to the Tenant for $100,000.00 free and clear of the Deed of Trust in favor of the Third Party Buyers; and that the costs of the action, including $10,000.00 for attorneys' fees, be taxed to the Landlord.

Through neglect, Defendants' attorney failed to notice an appeal from these 29 October 2013 orders in a timely manner. Defendants subsequently filed a Rule 60(b) motion at the trial court seeking relief from the 29 October 2013 orders; however, this motion was denied. Defendants timely appealed the order denying their Rule 60(b) motion, and a panel of this Court granted *certiorar*i to review the 29 October 2013 orders.

III. Analysis

This matter involves the interpretation and application of a lease provision granting a preemptive right, a right which our Supreme Court has defined as one which "requires that, before property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301

1. The revenue stamps from each transaction between the Landlord and the Third Party Buyers reflect a sale price of $100,000.00. We note that Defendants contend that the actual amount of consideration was greater than $100,000.00.

N.C. 58, 61, 269 S.E.2d 608, 610 (1980). The preemptive right in the present case is found in Paragraph 21 of the Lease, a paragraph which also grants the Tenant an option to extend the term of the Lease, which states as follows:

> 21. Option to Sell Property or renew lease: If Lessor decide to sell property during period of signed agreement, Lessee shall has first right to buy this property on competent estate market price offered by other buyers. Option provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to renew the lease for an additional term of ***5 to 10 years*** commencing at the expiration of the initial lease term.[2]

(Emphasis in original).

The parties' arguments in their briefs raise a number of interesting issues, among which are the following:

> Whether there is an issue of fact that the Tenant, at least temporarily, waived his preemptive right based on his alleged statement to the Landlord that he had no desire nor the means to purchase the property.
>
> The effect of the timing of the recordation of the Lease and of other documents in the Davidson County Registry has on the rights and liabilities of the parties.
>
> Assuming the Tenant's preemptive right has vested, whether there is an issue of fact regarding the terms under which the right could be exercised.

However, we do not reach any of these issues. Rather, based on our holding in *New Bar Partnership v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012), we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.

The common law rule against perpetuities has been defined by our Supreme Court as follows:

> No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some

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2. The evidence tended to show that English was not the first language of the parties.

> life or lives in being at the time of the creation of the interest. ***If there is a possibility*** such future interest may not vest within the time prescribed, the gift or grant is void.

Rich v. Carolina Construction, 355 N.C. 190, 193, 558 S.E.2d 77, 79 (2002) (emphasis added).

As a tenant's preemptive right is a contingent right which does not vest until his landlord agrees on terms to sell the property, this Court held in *New Bar* that such "a preemptive right or right of first refusal" as contained in a commercial lease is subject to the common law rule against perpetuities and *not* subject to the Uniform Statutory Rule Against Perpetuities, codified in N.C. Gen. Stat. § 41-15, *et seq. New Bar*, ___ N.C. App. at ___, 729 S.E.2d at 684. The lease at issue in *New Bar* was for an initial term of five years, but provided for optional renewal terms extending for 35 years. The duration of the preemptive right contained in that lease was tied to the lease's duration. Accordingly, this Court held that since the time during which the preemptive right could vest extended beyond 21 years and was not otherwise tied to any life in being, the lease provision granting the preemptive right violated the common law rule against perpetuities and was, therefore, "void." *Id.* at ___, 729 S.E.2d at 685.

In the present case, Defendants argue in their brief that the language in the Lease providing "the time within which the [preemptive right] may be exercised" renders the provision "unenforceable." Specifically, the Lease provides this "time" to be "during period of signed agreement[,]" and is otherwise not tied to any life in being.[3] Though the Lease provides for an initial term of 15 years, it also provides the Tenant the option to extend the Lease for an additional term of "5 to 10 years," making it "possible" that the duration of the Lease – and the Tenant's preemptive right - to be 25 years. Accordingly, the preemptive right provision violates the common law rule against perpetuities. That is, at the time the Lease was entered into in 2009, there was a "possibility" that the Tenant's preemptive right would not vest, if at all, within 21 years of any life in being at the time the Lease was executed. This "possibility" is illustrated in the following scenario:

In 2009, the Landlords and the Tenant execute the Lease.

In 2010, the Landlords have a child, and the Tenant becomes a father.

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3. The Lease provides that its provisions are "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties."

In 2011, the Landlords and the Tenant die. Their respective wills name their newborn children as successors in the Lease.

In 2024, the Tenant's child exercises the right to extend the Lease for an additional term of ten years, to 2034.

In 2032, the Landlord's child decides to sell the property, *at which time* the preemptive right would finally vest.

Under this scenario, the vesting of the Tenant's preemptive right in 2032 – 22 years after the death of the original parties to the Lease — occurs more than 21 years after the death of any life that was in being at the time the Lease was executed in 2009. Accordingly, the provision in the Lease granting the preemptive right is in violation of the common law rule against perpetuities. It does not matter here that the Landlord ultimately agreed upon terms to sell the property within the 21-year period. Rather, the provision was in violation of the rule against perpetuities from the outset since there was at that time the "possibility" that the right might not vest within the required time. *See Rich*, *supra*.

The common law rule against perpetuities is grounded in the sound public policy concern regarding unreasonable restraints upon alienation. *Starnes v. Hill*, 112 N.C. 1, 19, 16 S.E. 1011, 1016 (1893); *see also Sandlin v. Weaver*, 240 N.C. 703, 707, 83 S.E.2d 806, 809 (1954) (recognizing that an option to purchase which violates the rule is void as an unreasonable restraint upon alienation). As such, the provision in the Lease granting the Tenant a preemptive right in violation of the common law rule against perpetuities was *void ab initio* and is unenforceable in our courts. *Building Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) (holding that a void contract "is no contract at all; it binds no one and is a mere nullity"); *Cansler v. Penland*, 125 N.C. 578, 581, 34 S.E. 683, 684 (1899) (stating that "when the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand").

IV. Conclusion

Based on the foregoing, we reverse the orders of the trial court entered 29 October 2013 granting Plaintiff summary judgment and costs; we vacate the 25 April 2014 order denying Defendants' Rule 60(b) motion as moot; and we remand the matter to the trial court, directing it to enter an order granting Defendants' motion for summary judgment on Plaintiff's claims.

REVERSED AND REMANDED in part, VACATED, in part.

Judge DIETZ concurs.

Judge BRYANT concurs in the result only.

BRYANT, Judge, concurring in result only.

I concur in the result reached by the majority in this opinion. I write separately to emphasize that my concurrence is based on the fact that the result reached in the majority opinion—holding the commercial lease in the instant case to be void—is controlled by *New Bar P'ship v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012).

In *New Bar P'ship*, "we conclude[d] that the USRAP [Uniform Rule Against Perpetuities] did not replace the common law RAP as to preemptive rights arising from nondonative transfers such as that at issue here. As such, the USRAP is inapplicable to this appeal." *Id.* at ___, 729 S.E.2d at 683. Due to its reliance on *New Bar P'ship*, the majority opinion concludes that the USRAP is inapplicable to the appeal in the instant case.

I also write separately to express my concern that we should proceed with caution in applying the common law RAP to non-donative transfers, commonly known as commercial leases. When our legislature specifically excluded these types of commercial transactions from the statutory RAP, it reflected an intent that the common law rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements." *Rich*, 355 N.C. at 194, 558 S.E.2d at 79-80 (citations omitted). Clearly, the legislature was making a distinction between donative transfers and commercial transactions. However, as noted in *New Bar P'ship*, "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the common law RAP". *New Bar P'ship*, ___ N.C. App. at ___, 729 S.E.2d at 684 (citation omitted) (holding the right of first refusal violated the common law RAP and, thus, was void). Because the lease in the instant case contained a section that made the preemptive rights under the lease "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties[,]" it went beyond the period of the common law RAP, and therefore, based on our case law, is void and unenforceable.

Because the instant case cannot be distinguished from *New Bar*, I concur in the result reached by the majority.

NEEDHAM v. PRICE

[239 N.C. App. 94 (2015)]

STEPHANIE L. NEEDHAM, Individually, And as "Guardian Ad Litem" for John Doe, Jane Doe and June Doe, Minor Children Plaintiffs
v.
ROY ALAN PRICE, Defendant

No. COA14-706

Filed 20 January 2015

1. Appeal and Error—interlocutory orders and appeals—partial summary judgment

An order granting partial summary judgment was interlocutory and ordinarily could not be appealed. However, the order affected a substantial right because plaintiff could proceed to trial on her individual claims, which overlapped with and arose from the same set of facts as the minor children's claims. A second trial arising from the same facts as plaintiff's individual claims could result in an inconsistent jury decision on overlapping issues.

2. Negligence—partial summary judgment—parent-child immunity—claims barred

The trial court's decision to dismiss the minor children's claims of negligence, premises liability based on ordinary negligence, and negligent infliction of emotional distress were not at issue in an appeal from partial summary judgment. Plaintiff conceded that the doctrine of parent-child immunity would bar the minor children's claims for ordinary negligence.

3. Emotional Distress—intentional—parental injury—claim by minor children—summary judgment

The trial court erred by granting summary judgment against the minor children's claim for intentional infliction of emotional distress (IIED) in an action involving estranged parents and an injury to the mother witnessed by the children. The forecasted evidence was sufficient to raise genuine issues of material fact as to each essential element. The trial court also erred by dismissing the minor children's claim for punitive damages related to the IIED claim.

4. Negligence—gross—parental injury—claim by minor children—summary judgment

The trial court erred by granting summary judgment against the minor children's gross negligence claim in an action involving estranged parents and an injury to the mother witnessed by

the children. The claim for properly alleged wanton conduct, the time and nature of defendant's entry into the residence, his conduct towards plaintiff in the presence of the minor children despite her vulnerable physical condition, and the minor children's resulting injuries forecast evidence sufficient to raise genuine issues of material fact as to each essential element. The trial court also erred by dismissing the minor children's claim for punitive damages stemming from the gross negligence claim.

Appeal by plaintiff from order entered 3 February 2014 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 3 December 2014.

Paul Louis Bidwell and Douglas A. Ruley, for plaintiff-appellant Guardian Ad Litem.

Jack W. Stewart, for defendant-appellee.

ELMORE, Judge.

Plaintiff, Guardian Ad Litem and parent of three minor children, appeals from an order granting defendant's motion for summary judgment against plaintiff on her claims on behalf of the minor children. After careful consideration, we affirm, in part; reverse, in part.

I. Facts

Stephanie L. Needham (plaintiff) and Roy Alan Price (defendant) had engaged in a long-term domestic relationship but were separated at some point before 20 November 2009. Three children were born of the relationship (the minor children). Plaintiff filed a complaint on 26 September 2012 alleging individual claims against defendant and also bringing claims on behalf of her minor children against defendant (the minor children's claims) for negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress (IIED), gross negligence, and punitive damages. In the complaint, plaintiff alleged, in relevant part, the following facts:

> 5. That [plaintiff and the minor children] were occupying a home owned by Defendant . . . when, at approximately 1:25 a.m., Defendant surreptitiously entered the residence through the garage and attic; as Defendant attempted to enter the dwelling area, he caused an attic ladder to unfold

> to the hallway below, striking [plaintiff] on the back of her head, neck and right shoulder and causing her serious and permanent injuries.
>
> 6. That [the] minor children were awakened by the noise from the attic and observed [plaintiff] being struck by the ladder; they recoiled in terror, screaming as [plaintiff] collapsed to the floor crying out in pain; and watched in shock as their father descended the ladder shouting obscenities at their fallen mother, causing them severe emotional distress.
>
> 7. That [plaintiff] sustained injuries in the subject incident including, but not limited to, cervical spine, right upper and lower extremities, left upper and lower extremities, nerve damage, and post-traumatic stress disorder.
>
> 8. That [the] minor children sustained emotional/psychological injuries, including but not limited to, post-traumatic stress disorder, as a direct result of the subject incident.

Defendant filed a motion for summary judgment on all of the minor children's claims, arguing that "there [was] no genuine issue as to any material fact in controversy due to the parent-child immunity doctrine[.]" After a hearing on said motion, the trial court entered an order (the order) granting summary judgment in defendant's favor and dismissing all of the minor children's claims.

II. Analysis

a.) Interlocutory Appeal

[1] We must first address the interlocutory nature of this appeal. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). An order granting partial summary judgment is interlocutory and ordinarily cannot be appealed "because it does not completely dispose of the case[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation and quotation marks omitted).

However, immediate appeal of an interlocutory order is available when it "affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations and quotation marks omitted). Our Supreme Court has noted that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 490-91, 428 S.E.2d 157, 160 (1993) (citation and internal quotation marks omitted). The possibility of a second trial "affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

This appeal clearly arises from an interlocutory order because the trial court would be required to address plaintiff's claims notwithstanding the dismissal of the minor children's claims. However, the order affects a substantial right because should we dismiss this appeal, plaintiff could proceed to trial on her individual claims, which overlap with, and arise from, the same set of facts as the minor children's claims. Thus, if plaintiff later appeals the trial court's dismissal of the minor children's claims, and we were to rule that the trial court erred, then a trial on the minor children's claims could occur. A second trial arising from the same facts as plaintiff's individual claims could result in an inconsistent jury decision on overlapping issues. Accordingly, we hold that the order affects a substantial right and address the merits of plaintiff's arguments on behalf of the minor children.

b.) Summary Judgment

i. Parent-Child Immunity

[2] Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment on the minor children's claims for gross negligence, IIED, and punitive damages. Specifically, plaintiff avers that the doctrine of parent-child immunity does not apply to claims based on willful and malicious acts. We agree.

Plaintiff concedes that the doctrine of parent-child immunity would bar the minor children's claims for ordinary negligence. Thus, the trial court's decision to dismiss the minor children's claims of negligence, premises liability based on ordinary negligence, and negligent infliction of emotional distress are not at 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) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). We must consider "the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]" *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997) (citations omitted).

The parent-child immunity doctrine "bar[s] actions between unemancipated children and their parents based on *ordinary* negligence." *Doe By & Through Connolly v. Holt*, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992) (emphasis in original) (citations omitted). However, the doctrine "has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts." *Id.* at 96, 418 S.E.2d at 514. An act is willful "when it is done purposely and deliberately in violation of law or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason." *Yancey v. Lea*, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001) (citation and quotation marks omitted). Moreover, the terms "willful and wanton conduct" and "gross negligence" have been used interchangeably to describe conduct falling between "ordinary negligence and intentional conduct." *Id.* at 52, 550 S.E.2d at 157 (quotation marks omitted). Thus, the doctrine of parent-child immunity clearly does not bar the minor children's claims of gross negligence and IIED.

ii. Forecast of Evidence

[3] Even though the parent-child immunity doctrine does not bar the minor children's claims of gross negligence and IIED, we must also determine whether plaintiff forecast sufficient evidence of each element of these claims. *See Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992).

The tort of IIED requires a showing of: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 256-57, 354 S.E.2d 357, 359 (1987) (citation and quotation marks omitted). The first element requires conduct that "exceeds all bounds usually tolerated by a decent society." *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 213, 552 S.E.2d 686, 693 (2001) (citation and quotation marks omitted). The second element can be satisfied by showing that a defendant "acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow[.]" *Dickens v. Puryear*, 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (citations and quotation marks

omitted). Finally, the third element is "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27 (citation and quotation marks omitted).

Here, in the light most favorable to plaintiff as supported by her affidavit and complaint, defendant entered the residence at 1:25 a.m. through the garage and attic, waking up and startling the minor children. The minor children were in defendant's presence as they observed plaintiff being struck by a ladder and collapsing to the floor "crying out in pain" while defendant "shout[ed] obscenities" at her. Subsequently, the minor children suffered "emotional/psychological injuries, including but not limited to, post-traumatic stress disorder; and the medical records submitted in discovery support the same." Such forecasted evidence is sufficient to raise genuine issues of material fact as to each essential element of the minor children's IIED claim. *See Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990) (considering "plaintiff's proximity to the . . . act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the . . . act" as factors in determining the viability of an emotional distress claim). Thus, the trial court erred by dismissing the minor children's IIED claim. Consequently, the trial court also erred by dismissing the minor children's claim for punitive damages related to the IIED claim.

[4] With regard to gross negligence, a plaintiff, in addition to pleading the facts on each element of negligence (duty, breach of that duty, proximate cause, and injury), must also forecast sufficient evidence of "wanton conduct[.]" *Clayton v. Branson*, 170 N.C. App. 438, 442-43, 613 S.E.2d 259, 264 (2005) (citation and quotation marks omitted). The "duty" element in an actionable negligence claim "presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955). It is well established that "[p]arents in this State have an affirmative legal duty to protect and provide for their minor children." *State v. Walden*, 306 N.C. 466, 473, 293 S.E.2d 780, 785 (1982).

The minor children's claim for gross negligence in this case properly alleged wanton conduct: "[T]he acts and omissions as set forth above indicate such a reckless indifference to, or conscious disregard for, the

rights and safety of others and, specifically, of [the] Minor Children, sufficient to constitute willful and wanton negligence."

Additionally, the time and nature of defendant's entry into the residence, his conduct towards plaintiff in the presence of the minor children despite her vulnerable physical condition, and the minor children's resulting injuries forecast evidence sufficient to raise genuine issues of material fact as to each essential element of the minor children's gross negligence claim.

Accordingly, the trial court erred by dismissing the minor children's gross negligence claim. In light of our ruling, the trial court also erred by dismissing the minor children's claim for punitive damages stemming from their gross negligence claim.

III. Conclusion

In sum, we affirm the trial court's order granting summary judgment to defendant on the minor children's claims of negligence, premises liability, and negligent infliction of emotional distress. However, we reverse the trial court's dismissal of the minor children's claims for IIED and gross negligence along with the punitive damages related to these remaining claims.

Affirmed, in part; reversed, in part.

Judges STEPHENS and DAVIS concur.

STATE v. BARNETT

[239 N.C. App. 101 (2015)]

STATE OF NORTH CAROLINA
v.
KEITH ANTONIO BARNETT

No. COA14-447

Filed 20 January 2015

Sexual Offenders—registration of address—release from incarceration

Defendant's conviction for failing to register as a sex offender was vacated where there was insufficient evidence to support the charge as alleged in the indictment. The State's evidence at trial showed that defendant registered as a sex offender with the Gaston County Sheriff's Office, was subsequently incarcerated, and never updated his registration to show his address upon his release. Nowhere in the provisions governing release from a penal institution is there a requirement that persons required to register must notify the sheriff in the county where they last registered prior to their incarceration of their address upon release. The State erred by combining the requirements of N.C.G.S. § 14-208.9(a), governing changes in address, with the requirements of N.C.G.S. §§ 14-208.7(a), governing registration upon release from a penal institution.

Appeal by defendant from judgment entered 10 December 2013 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Guy J. Loranger for defendant.

McCULLOUGH, Judge.

Keith Antonio Barnett ("defendant") appeals from a judgment entered upon his convictions for failure to register as a sex offender and resisting a public officer. For the following reasons, we vacate defendant's conviction for failure to register as a sex offender.

I. Background

The record in this case tends to show that defendant pled guilty to and was convicted of taking indecent liberties with a child in Gaston

County Superior Court in 1997. As a result of said conviction, a reportable offense under N.C. Gen. Stat. § 14-208.6(4)(a), defendant was sentenced to an active term of imprisonment and required to register as a sex offender. *See* N.C. Gen. Stat. § 14-208.7 (2013).

At the time of defendant's conviction, N.C. Gen. Stat. § 14-208.7 required defendant to register for a period of 10 years following his release from prison in 1999. *See* N.C. Gen. Stat. § 14-208.7 (1997). However, the statute has since been amended several times, lengthening defendant's registration requirement to a period of at least 30 years following the date of initial county registration. *See* Jessica Lunsford Act for NC effective Dec. 1, 2008, Sec. 8, 2008 N.C. Sess. Laws 2008-117 (lengthening the registration requirement).

On 6 January 2010, defendant pled guilty to and was convicted of failing to register as a sex offender. Defendant received a probationary sentence as part of a plea arrangement.

On 15 February 2010, defendant registered as a sex offender with the Gaston County Sherriff's Office. At that time, defendant completed an offender acknowledgement whereby defendant represented that he understood the registration requirements. Defendant listed his address as 554 South Boyd St., Gastonia, North Carolina.

Subsequent to defendant's registration, defendant was incarcerated from 17 August 2011 to 14 November 2012.

On 1 February 2013, Luther Hester, a Gaston County Sheriff's Office deputy working in the sex offender registration unit, received a telephone call in reference to defendant's whereabouts. Upon receiving the phone call, Hester researched defendant's records and determined that defendant was no longer incarcerated and had not registered as a sex offender anywhere upon his release from prison.

On 6 February 2013, Hester, accompanied by two other deputies, went to the address where the caller informed Hester defendant could be found, 332 North Mountain St., Gastonia, North Carolina. Upon arrival, Hester saw defendant run from the front yard into the house. When Hester approached the house, a woman, who identified herself as defendant's mother, allowed Hester inside to look for defendant. Hester found defendant on the back porch.

When Hester attempted to arrest defendant, defendant resisted and became combative. Following a warning from Hester to defendant that he would use a Taser if defendant did not comply, Hester used his Taser to gain control over defendant and made the arrest.

On 18 February 2013, a Gaston County Grand Jury indicted defendant in case number 13 CRS 51451 of failing to register as a sex offender and in case number 13 CRS 51461 of resisting a public officer. Defendant entered not guilty pleas on 7 May 2013 and his case came on for jury trial in Gaston County Superior Court on 9 December 2013, the Honorable Forest D. Bridges, Judge presiding.

Defendant moved to dismiss the charge of failure to register as a sex offender at the close of the State's evidence and at the close of all the evidence. The trial court denied those motions.

On 10 December 2013, the jury returned verdicts finding defendant guilty of failing to register as a sex offender and resisting a public officer. The trial court consolidated the offenses for judgment and sentenced defendant in the presumptive range to a term of 25 to 39 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends the trial court erred by denying his motion to dismiss the charge of failing to register as a sex offender. Specifically, defendant contends there was no evidence to support the charge as alleged in the indictment and there is a fatal variance between the indictment and the proof submitted to the jury.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"A fatal variance between the allegations of the indictment and the proof is properly raised by a motion to dismiss. Not every variance, however, is sufficient to require a motion to dismiss." *State v. Tyndall*, 55 N.C. App. 57, 61-62, 284 S.E.2d 575, 577 (1981) (citations omitted). "In order for a variance to warrant reversal, the variance must be material. A variance will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is

immaterial, it is not fatal." *State v. Roman*, 203 N.C. App. 730, 733-34, 692 S.E.2d 431, 434 (2010) (quotation marks and citations omitted).

North Carolina's sex offender and public protection registration programs are codified in Chapter 14, Article 27A of the General Statutes. As stated in the Article,

> the purpose of [the] Article [is] to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013). To that end, "[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." N.C. Gen. Stat. § 14-208.7(a).

Within the Article, separate provisions govern when a person is required to register or when a person required to register must update their registry. Pertinent to this case, N.C. Gen. Stat. § 14-208.7(a) provides that "[i]f the person [required to register] is a current resident of North Carolina, the person shall register . . . within three business days of release from a penal institution or arrival in a county to live outside a penal institution[.]" On the other hand, N.C. Gen. Stat. § 14-208.9(a) (2013) provides that

> [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 the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address.

In either case, a person who willfully fails to register in accordance with N.C. Gen. Stat. § 14-208.7(a) or fails to update their registry in accordance with N.C. Gen. Stat. § 14-208.9(a) is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(1) and (2) (2013).

In this case, defendant was indicted for failing to register as a sex offender on the ground that defendant

> unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sexual offender, knowingly and with the intent to violate the provisions of that Article fail to register as a sexual offender, in that the defendant did fail to notify the Gaston County Sheriff's Office, within three business days of his change of address.

The indictment cited N.C. Gen. Stat. § 14-208.11.

As this Court recognized in a previous appeal by defendant, "[t]he three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Barnett*, _ N.C. App. _, _, 733 S.E.2d 95, 98 (2012); *see also State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009). Both below and now on appeal, defendant contends there was no evidence he changed his address.

As shown by the evidence produced by the State at trial, defendant registered as a sex offender with the Gaston County Sherriff's Office on 15 February 2010. At that time, defendant listed his address as 554 South Boyd St. Subsequently, defendant was incarcerated from 17 August 2011 to 14 November 2012. Upon his release from incarceration, defendant never updated his registry to list a different address.

Defendant does not dispute the above, but argues there was no evidence that he ever registered an address other than 554 South Boyd St., or that, upon his release from incarceration, he ever resided at a different address. Out of candor to this Court, defendant notes that, in an opinion by this Court in a prior appeal by defendant, this Court indicated that defendant notified the Gaston County Sheriff's Office of several address changes subsequent to his registration on 15 February 2010. *See Barnett*, _ N.C. App. at _, 733 S.E.2d at 97. Defendant, however, points out that evidence of defendant's prior address changes was never introduced at trial in the current case. Defendant claims the only evidence at trial regarding an address different from 554 South Boyd St. was a change of address form completed at the sheriff's office following his arrest on 6 February 2013 that identified defendant's address as the location where he was arrested on 6 February 2013. Yet, defendant refused to sign the form changing his address from the address where he was arrested to

the jail. Furthermore, the evidence tends to indicate that, to Hester's knowledge, no one attempted to verify that defendant was living at the residence where he was arrested on 6 February 2013. Hester only knew defendant was present at the residence.

Instead of providing evidence that defendant changed addresses, defendant contends the State prosecuted him on the theory that he failed to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" as required by N.C. Gen. Stat. § 14-208.7(a). Defendant contends this factual basis was not alleged in the indictment and his conviction must be overturned.

Upon review of the record, we agree with defendant that there was insufficient evidence presented in the present case to show that defendant no longer resided at 554 South Boyd St. Furthermore, it is evident to this Court from a review of the evidence presented by the State and the jury instructions issued by the trial court, which corresponded with N.C. Gen. Stat. § 14-208.7(a), that defendant's conviction for failing to register as a sex offender was based on his failure to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution." The issues we must now decide are whether such evidence was necessary and whether there existed a fatal variance between the charge alleged in the indictment and the proof at trial.

In response to defendant's arguments, the State contends that there was sufficient evidence to support the charge alleged in the indictment absent evidence of where defendant lived upon his release from incarceration on 14 November 2012. To support its contention, the State points to testimony elicited at trial tending to show that when a person registered as a sex offender is subsequently incarcerated during the period in which they are required to be registered, their address in the sex offender registry is changed to the address of the penal institution where the person is incarcerated. Thus, the State argues that, unavoidably, defendant's address changed when he was released from incarceration on 14 November 2012, triggering the change of address requirements in N.C. Gen. Stat. § 14-208.9(a).

Although defendant's last registered address would have been the penal institution where defendant was incarcerated, the State contends that pursuant to the language of N.C. Gen. Stat. § 14-208.9(a), defendant was still required upon release to "report in person and provide written notice of [his] new address not later than the third business day after the change to the sheriff of the county with whom [defendant] had last registered [prior to his incarceration;]" in this case, Gaston County. Because

the evidence shows that defendant never took steps to update his registration information with the Gaston County Sheriff's Office upon his release from incarceration on 14 November 2012, the State claims there was sufficient evidence to support the charge alleged in the indictment.

We disagree with the State's interpretation of the statutes in Chapter 14, Article 27A, and hold the State errs in combining the requirements of N.C. Gen. Stat. § 14-208.9(a) governing changes in address with the requirements of N.C. Gen. Stat. § 14-208.7(a) governing registration upon release from a penal institution.

It is clear from the language of N.C. Gen. Stat. § 14-208.7(a) that it governs registration upon release from penal institutions. In addition to the requirement in N.C. Gen. Stat. § 14-208.7(a) that the person required to register must register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" N.C. Gen. Stat. § 14-208.8 (2013), which was not addressed in this case, provides for prerelease notification of the registration requirements to those persons incarcerated who are required to register. N.C. Gen. Stat. § 14-208.8 also requires an official of the penal institution to obtain registration information from a person required to register prior to their release and to forward that information to the sheriff of the county where the person expects to reside. Furthermore, N.C. Gen. Stat. § 14-208.11 provides that "[b]efore a person convicted of a violation of [the registration requirements] is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3)." N.C. Gen. Stat. § 14-208.11(b).

Nowhere in the provisions governing release from a penal institution is there a requirement that persons required to register must notify the sheriff in the county where they last registered prior to their incarceration of their address upon release from the penal institution. The notification requirement in N.C. Gen. Stat. § 14-208.9(a) is better suited to serve the purposes of the registration program in the circumstance where a person required to register changes from one address outside of a penal institution to another address outside a penal institution, as that statute has customarily been applied; not in the circumstance in the present case where defendant was released from a penal institution.

In this case, the State's evidence tended to show that defendant failed to update his registration information upon release from a penal institution. Because defendant was indicted on an allegation that he failed to register as a sex offender in that he failed to notify the Gaston County

Sheriff's Office within three business days of his change of address in accordance with the requirements of N.C. Gen. Stat. § 14-208.9, we hold the trial court erred in denying defendant's motion to dismiss. There was insufficient evidence to support such a charge alleged in the indictment.

III. Conclusion

For the reasons discussed above, we vacate defendant's conviction for failing to register as a sex offender.

Vacated.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
VAN LAMAR McKNIGHT

No. COA14-752

Filed 20 January 2015

1. Search and Seizure—investigatory stop of vehicle—reasonable suspicion—motion to suppress

The trial court did not commit plain error by denying defendant's motion to suppress the marijuana found in his vehicle. Even though the trial court's reasoning for denying the motion was incorrect, the ruling was supported by the evidence. Just before stopping defendant's vehicle, officers had seen defendant receive two large boxes from a man for whom they had a warrant to search for evidence of marijuana trafficking.

2. Evidence—irrelevant evidence—plain error review

The trial court erred but did not commit plain error by admitting into evidence contraband found at a residence for which defendant possessed a key and to which he drove his vehicle with boxes containing marijuana. While the contraband was not relevant, there was no plain error because there was sufficient other evidence from which the jury could conclude defendant was trafficking in marijuana.

STATE v. McKNIGHT

[239 N.C. App. 108 (2015)]

Appeal by Defendant from judgment entered 6 December 2013 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 6 November 2014.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for Defendant.

STEPHENS, Judge.

Defendant Van Lamar McKnight was convicted in Wake County Superior Court of one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation. Defendant now appeals from the trial court's denial of his motion to suppress evidence that he alleges was obtained in violation of his Fourth Amendment rights. Defendant also contends that the trial court committed plain error by denying his motion *in limine* to exclude evidence that was both irrelevant and prejudicial. After careful review, we hold the trial court did not err in denying Defendant's motion to suppress, nor did it commit plain error by admitting the evidence Defendant challenges.

I. Facts and procedural history

On 5 August 2013, Defendant was indicted by a Wake County grand jury on one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation. Those charges arose from Defendant's arrest on 14 February 2013 after officers from the Raleigh Police Department ("RPD") stopped and searched his vehicle and discovered more than ten pounds of marijuana concealed in two packages during their ongoing investigation of Defendant's friend, Travion Stokes.

The evidence introduced at Defendant's trial tended to show that in November 2012, the RPD learned from a confidential informant that Stokes, who at the time was on probation for a federal cocaine trafficking conviction, was trafficking in large amounts of marijuana. On 12 February 2013, after conducting several weeks of undercover surveillance and a controlled buy using the confidential informant, RPD Detective James Battle searched a trash can left by the curb at Stokes' residence at 601 Sawmill Road in Raleigh and found a plastic baggie containing less than one-tenth of a gram of marijuana residue. Based on this information, Detective Battle obtained a search warrant for Stokes and his residence.

On the morning of 14 February 2013, Detective Battle and RPD Detective Sarah Goree stationed themselves in unmarked police vehicles near Stokes' residence to conduct pre-raid surveillance prior to executing the search warrant, while RPD Officer Keith Pickens parked his marked patrol car farther away at a nearby intersection as back-up. The officers did not have access to a S.W.A.T. team that day, so their plan was to stop Stokes in his automobile after he left his home and then execute the search warrant for his residence. Around 8:30 a.m., Stokes drove a pickup truck into his driveway, parked at the rear of the house, and went inside. Around 8:45 a.m., Defendant—whom RPD officers had not previously seen during the course of their investigation—arrived at Stokes' home driving a GMC Acadia sport utility vehicle, which he parked in the front. Stokes then came out of the house and the two men removed two large white boxes from Stokes' pickup truck, carried them around to the front of the house, and placed them in the back of Defendant's vehicle. The boxes were sealed shut and did not appear very heavy.

When Defendant got back in his Acadia and drove away, Detective Goree and Sergeant Charles Lynch, another officer in an unmarked vehicle, followed him, as did Officer Pickens at a distance to avoid being seen in his patrol car. The officers followed Defendant for roughly ten to fifteen minutes, during which they did not observe any traffic violations, until Defendant unexpectedly backed his Acadia into a residential driveway at 7202 Shellburne Drive. Detective Goree continued past the driveway and lost visual contact with Defendant. Sergeant Lynch continued past the driveway as well and saw Defendant pull back out into the road without getting out of his car. Officer Pickens, who had not yet reached the driveway, heard over the radio that his colleagues were unable to continue following Defendant, and thereupon activated his patrol car's lights and pulled Defendant over.

Officer Pickens, who later testified that he noticed Defendant seemed slightly nervous but was otherwise acting normally, ordered Defendant out of the Acadia and had him sit on the curb until RPD Detective Kenneth Barber joined them a few minutes later. Detective Barber later testified that upon his arrival, he smelled burnt marijuana through the Acadia's open window and decided to conduct a search. No burnt marijuana was found during the search of Defendant's vehicle, but when the officers inspected the two boxes Defendant had taken from Stokes' house, they discovered that inside each box was another, smaller box containing a shrink-wrapped orange plastic bucket. These buckets, in turn, contained 5.8 and 4.9 pounds of marijuana in sealed plastic bags.

Defendant was arrested and taken to a police station for interrogation, during which Detective Battle found a key among the contents of Defendant's pockets. Detective Battle subsequently discovered the key fit the lock on the front door of the residence at 7202 Shellburne Drive, where he smelled marijuana through the doorframe. After obtaining a search warrant, RPD officers returned to that residence and found 91 grams of marijuana hidden above a kitchen cabinet. They also found paraphernalia including two digital scales, Ziploc bags, and a vacuum food saver machine in the kitchen. In the attic of the home, the officers found a freezer-sealed bag of marijuana, a black trash bag with sealed marijuana inside, and a small orange-red bucket. The officers also searched for documents to show who owned the house and found bank records in the name of Revaune Moe, who had two prior drug arrests, as well as a uniform citation for a man named Cory Robinson and letters addressed to him and a man named Andre Turner. They found no evidence linking Defendant to the house, and he was not charged with possession of any of the drugs recovered there.

When Defendant's trial in Wake County Superior Court began on 2 December 2013, his primary defense was that he did not know there was marijuana in the boxes he received from Stokes. Defendant first moved to suppress the marijuana found in his Acadia, arguing that it was the product of an unconstitutional seizure because the RPD officers lacked reasonable suspicion to stop his vehicle. Defendant's *voir dire* examination of the officers involved in his arrest showed that: (1) prior to arriving at Stokes' home on 14 February 2013, Defendant had not previously been a target of the investigation and was not listed on the search warrant for Stokes' residence; (2) no money changed hands when Defendant accepted the boxes from Stokes; and (3) Defendant had not been driving erratically or committed any traffic violations before being stopped by Officer Pickens. The State opposed the motion to suppress, arguing that: (1) the RPD officers did not initiate a search of Defendant while he was still on Stokes' property due to safety concerns given the lack of a S.W.A.T. team but were still justified in stopping Defendant after he left under a theory that he was taking evidence from a crime scene; and (2) Defendant's backing into the driveway at 7202 Shellburne Drive and then leaving without getting out of his vehicle constituted evasive action sufficient to support a reasonable suspicion that criminal activity was afoot. The trial court denied Defendant's motion, concluding, *inter alia*, that:

> 2. The officers possessed probable cause to search the residence and person of Travion Stokes for

> controlled substances, as evidenced by a lawfully issued search warrant.
>
> 3. The officers determined that their manpower did not permit the safe execution of the search warrant while [D]efendant was on the premises with Travion Stokes, and the observation of the officers of the transfer of two large packages into [D]efendant's vehicle, [D]efendant's evasive action of pulling into a residence momentarily, when viewed in light of the totality of the circumstances, support a finding of a reasonable, articulable suspicion justifying the officers in stopping the [D]efendant's vehicle.

Defendant failed to object when this evidence was introduced at trial.

Defendant also filed both a motion to suppress the evidence found at 7202 Shellburne Drive and a motion in *limine* to exclude it after the State gave notice that it planned to introduce that evidence for the purpose of proving Defendant's knowledge of the contents of the boxes he received from Stokes, given the fact that he "was taking [the boxes] from one residence where [police] found marijuana directly to another residence where they found marijuana," as well as the similarities in packaging between the marijuana found in the Acadia and the marijuana found in the attic. The trial court denied Defendant's motion to suppress because, apart from possessing a key to 7202 Shellburne Drive, Defendant could not establish any basis that would give him a legitimate expectation of privacy at that residence. In his motion in *limine*, Defendant argued that the evidence was irrelevant, prejudicial, and would confuse the issues for the jury because he had not been charged with any crime involving 7202 Shellburne Drive. Defendant also highlighted dissimilarities between the evidence seized from his car and the evidence seized from the attic, including differences in the grade of marijuana, the types of bags containing it, and the colors of the buckets found nearby. The trial court denied Defendant's motion, and Defendant failed to timely object when the evidence was admitted at trial to preserve the issue for review.

Defendant chose to testify at his trial, and although he acknowledged to having pled guilty to possession of marijuana with intent to sell and deliver in 2009, he insisted that he had no knowledge that the boxes he received from Stokes on 14 February 2013 contained marijuana. Instead, he testified that Stokes had called him that morning and said he was running late for a doctor's appointment, asked him to drop off the boxes at 7202 Shellburne Drive as a favor, and given him a key to the residence. Defendant testified that he had known Stokes for about a year and that

the two men had become friends through their shared enthusiasm for motorcycles. Defendant admitted that he had been aware that Stokes was on federal probation for drug charges, but assumed that this actually provided a strong incentive for Stokes to avoid further illegal activity. In any event, Defendant explained, the boxes were already sealed before he received them, Defendant never asked what they contained, and he did not have an opportunity to learn their contents before the RPD pulled him over. Defendant testified that he was unaware that he was being followed when he backed into 7202 Shellburne Drive, and that the reason he left so quickly was that he received a cellphone call from his wife—who was upset because she needed her son's car seat from the back of the Acadia to give to a babysitter so the couple could enjoy a date together—and that even though he was already at his destination and did not want to make another trip, he decided to drive back across town and then return again to 7202 Shellburne Drive to deliver the boxes because it was Valentine's Day.

On 6 December 2013, the jury returned a verdict finding Defendant guilty of both charges against him. The trial court consolidated the counts into a single judgment and sentenced Defendant to a term of 25 to 39 months in prison. Defendant gave oral notice of appeal in open court.

II. Defendant's motion to suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress the marijuana found in the boxes he received from Stokes because the RPD officers who stopped and searched his vehicle lacked reasonable suspicion to do so and thus violated his Fourth Amendment rights. We disagree.

Typically, this Court's review of a denial of a motion to suppress "is strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court's] ultimate conclusions of law," which are then subject to *de novo* review. *State v. Mello*, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009) (citation and internal quotation marks omitted), *affirmed per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010). However, Defendant acknowledges that because he failed to preserve this issue for appellate review by timely objecting when the evidence was admitted at trial, the standard of review is plain error. Under a plain error analysis, Defendant is entitled to a new trial only if he can demonstrate that the trial court committed an error "so fundamental as to

amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Brunson*, 187 N.C. App. 472, 477, 653 S.E.2d 552, 555 (2007) (citation omitted).

The Fourth Amendment protects the "right of the people . . . against unreasonable searches and seizures," U.S. Const. amend. IV, and is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). It applies to seizures of the person, including brief investigatory detentions such as those involved in stopping a vehicle. *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980). It is well established that in order to conduct an investigatory stop, police must have a reasonable suspicion that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968).

As our Supreme Court has explained, "[a]n investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation and internal quotation marks omitted). In reviewing whether a reasonable suspicion to make an investigatory stop exists, this Court "must consider the totality of the circumstances—the whole picture" to determine if the stop was "based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautions officer, guided by his experience and training." *Id.* (citations and internal quotation marks omitted).

In the present case, Defendant argues that the trial court plainly erred in its finding of fact and conclusion of law that his act of turning around in the driveway at 7202 Shellburne Drive constituted evasive action sufficient to support a reasonable suspicion for an investigatory stop of his vehicle. Specifically, Defendant argues that the trial court's findings and conclusions were unsupported by competent evidence, given that neither of the two RPD officers who followed him in unmarked vehicles testified that his conduct provided any indication that he was aware they were following him, let alone that he was driving evasively. In support of his argument, Defendant cites this Court's holding in *State v. White*, 214 N.C. App. 471, 712 S.E.2d 921 (2011), that to support a finding of evasive action, the State must "establish a nexus between [a d]efendant's flight and the police officers' presence." *Id.* at 480, 712 S.E.2d at 928. Since the State failed to establish such a nexus here, Defendant argues that the trial court plainly erred by improperly admitting the only physical evidence that he possessed and transported marijuana.

It is well established under state and federal law that although mere presence in a high crime area is not sufficient to support a reasonable suspicion that an individual is involved in criminal activity, an individual's presence in a suspected drug area coupled with evasive action may provide an adequate basis for the reasonable suspicion necessary for an investigatory stop. *See Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000); *State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722-23 (1992). However, as we explained in *White*, in order for an action to be considered evasive, the State must "establish a nexus between [a d]efendant's flight and the police officers' presence." 214 N.C. App. at 480, 712 S.E.2d at 928. Prior decisions by this Court and our Supreme Court make clear that a defendant cannot be found to have acted evasively unless there is some evidence that he was aware he was being followed by, or in the presence of, a police officer. *See*, *e.g.*, *Butler*, 331 N.C. at 233, 415 S.E.2d at 722 (finding evasive action where "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight"); *State v. Willis*, 125 N.C. App. 537, 539, 481 S.E.2d 407, 409 (1997) (finding evasive action where a defendant behaved nervously and cut across a parking lot on foot after it became "apparent to [him]" that he was being followed).

Here, Defendant's argument about evasive action has some merit. Neither of the two RPD officers who followed him in unmarked cars testified that he acted evasively or that his conduct indicated his awareness of the fact he was being followed. Indeed, as Defendant notes, during the suppression hearing the only testimony indicating evasive driving came from Officer Pickens, who was following the two unmarked police cars at a distance and did not directly observe Defendant until after Defendant had already pulled out of the driveway. When asked about Defendant's driving, Officer Pickens testified:

> Q: Do you remember anything significant about your approach to the vehicle?
>
> A: No. I mean, some of the radio traffic that was being relayed to me, that the [D]efendant was being evasive in the way that he was operating his vehicle. Again, I believe he had maybe realiz[ed] that he was being followed.
>
> [Defendant's counsel]: Objection to that, [Y]our Honor; move to strike.
>
> THE COURT: Sustained.

> A: The information that I was hearing was that the operation of his vehicle was such that he would not be followed any longer by one of the detectives [who] was in one of the unmarked vehicles.

Officer Pickens further testified that he did not personally observe anything unusual about how Defendant operated his vehicle before pulling him over. Thus, we conclude that there is no competent evidence in the record that indicates Defendant was aware that his Acadia was being followed by police. Therefore, because Defendant's act of turning around in the driveway at 7202 Shellburne Drive cannot properly be considered evasive, we hold that the trial court erred in its finding of fact and conclusion of law that Defendant acted evasively.

However, that does not end our inquiry, as our Supreme Court had made clear that "[a] correct decision of a lower court [on a motion to suppress] will not be disturbed on review simply because an insufficient or superfluous reason is assigned." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Even where the trial court's reasoning for denying a defendant's motion to suppress is incorrect, "we are not required on this basis alone to determine that the ruling was erroneous," because "[t]he crucial inquiry for [this Court] is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* (citations and internal quotation marks omitted).

Here, Defendant contends that absent the finding of evasive action, the RPD officers' personal observations of him at Stokes' residence provided no other basis for reasonable suspicion to stop his vehicle. Specifically, Defendant contends that the trial court erred in concluding that the search warrant for Stokes' residence was a factor supporting reasonable suspicion against him because "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 586. Moreover, Defendant contends that the transfer of boxes from Stokes' truck to Defendant's Acadia was also insufficient to support a reasonable suspicion that a drug transaction had occurred, given that the officers never observed any money changing hands that morning and never in their months-long surveillance of Stokes witnessed him sell any marijuana from his home, utilize large boxes to transport it, or interact with Defendant in any way.

We find Defendant's argument unpersuasive. While it is true that an individual's mere presence in an area of expected criminal activity does not by itself give rise to reasonable suspicion, the record before us indicates that Defendant was more than merely present at Stokes' home, insofar as he accepted two large boxes from Stokes, carried them to his Acadia, put them inside, and drove away. Further, Defendant's argument that there was nothing inherently suspicious about those two large boxes ignores the fact that RPD officers had already obtained a warrant to search Stokes and his residence for evidence of marijuana trafficking, which implicitly authorized them to search any container capable of carrying marijuana, including the boxes. *See, e.g.*, *State v. Bryant*, 196 N.C. App. 154, 674 S.E.2d 753, *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009) (holding that officers executing a search warrant may legally seize any object encompassed within its description of items to be searched).

In his brief, Defendant suggests that the scope of the search warrant did not include Stokes' car; however, the warrant was not included in the record on appeal and Defendant does not specifically challenge its validity, nor would he have standing to do so, given the absence of evidence that he either owned or held a possessory interest in Stokes' residence or maintained a reasonable expectation of privacy there. *See, e.g.*, *State v. Rodelo*, __ N.C. App. __, 752 S.E.2d 766, *disc. review denied*, __ N.C. __, 762 S.E.2d 204 (2014) (holding that a defendant who cannot show evidence of either his ownership or possessory interest or a reasonable expectation of privacy lacks standing to challenge an alleged Fourth Amendment violation). But even assuming *arguendo* Defendant was correct in this assertion, the scope of the warrant still included Stokes himself, which means the officers would have had probable cause to search the boxes once they saw Stokes and Defendant take them out of the pickup truck. While the officers chose not to search at that time, due to the unavailability of a S.W.A.T. team and concerns about safety, the mere fact that the boxes were then placed inside Defendant's Acadia did not automatically immunize them from future searches once the vehicle left the property simply because the vehicle was not listed in the warrant. If anything, in light of the totality of the circumstances, given the fact that Stokes was under investigation for marijuana trafficking—which is an offense that by definition involves moving narcotics from one location to another, *see* N.C. Gen. Stat. § 90-95(h)(1) (2013)—Defendant's act of putting two boxes large enough to contain marijuana into his vehicle and then driving away immediately thereafter was more than sufficient to support a reasonable suspicion that he was involved in

criminal activity.[1] That being the case, the officers did not need to wait until Defendant committed a traffic violation or acted evasively to conduct an investigatory stop. Thus, although the trial court's conclusion that Defendant acted evasively was erroneous, we conclude it was also unnecessary to support a finding of reasonable suspicion to conduct an investigatory stop in this case. Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress or plainly err in admitting this evidence at trial.

III. Defendant's motion in limine

[2] Defendant also argues that the trial court committed plain error by admitting into evidence the marijuana and other contraband found at 7202 Shellburne Drive for the purpose of showing his knowledge that the boxes he received from Stokes contained marijuana. Specifically, Defendant contends that this evidence was irrelevant, inadmissible, and prejudicial under Rules 401, 402, and 404(b) of our Rules of Evidence because there was no evidence that he had ever been inside 7202 Shellburne Drive, knew its owner, or possessed or was even aware of the drugs hidden therein. While Defendant's argument has some merit with regards to relevance and admissibility, we do not agree that admission of this evidence was so prejudicial as to constitute an error "so fundamental as to amount to a miscarriage of justice" or "which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555.

Rule 401 of our Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of

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1. In support of his argument to the contrary, Defendant cites this Court's unpublished decision in *State v. Majett*, __ N.C. App. __, 675 S.E.2d 719 (2009) (unpublished), *available at* 2009 WL 1192726. We note first that Rule 30(e)(3) of our Rules of Appellate Procedure provides that this Court's unpublished decisions do not constitute controlling legal authority. Moreover, despite superficial similarities, the present facts are easily distinguishable from those in *Majett*, where police received a tip from an anonymous informant that the defendant was distributing cocaine from his residence, then found crack cocaine on three men whom they saw entering and leaving the defendant's residence. Although the police in *Majett* may well have been able to obtain a warrant to search the defendant's residence, they instead chose to stop the defendant's vehicle immediately, arrest him, and search for drugs, which they subsequently found. In reversing his conviction, this Court held that the stop amounted to an unreasonable seizure because the police lacked probable cause to effectuate a warrantless arrest given the absence of any evidence connecting the defendant's suspected illegal conduct to his vehicle, which had not broken any traffic laws prior to the stop. In the present case, by contrast, the RPD officers properly obtained a search warrant for Stokes' residence, where they directly observed the transfer of boxes to Defendant's Acadia, which provided a sufficient basis for reasonable suspicion for an investigatory stop of his vehicle.

consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). By contrast, irrelevant evidence has no tendency to prove a fact at issue and must be excluded. *See* N.C. Gen. Stat. § 8C-1, Rule 402. However, irrelevant evidence is typically considered harmless "unless [the] defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Moctezuma*, 141 N.C. App. 90, 93-94, 539 S.E.2d 52, 55 (2000).

The issue here, then, is whether the evidence found at 7202 Shellburne Drive increased the probability that Defendant knew that the boxes he received from Stokes contained marijuana. The State argues that this evidence was properly admitted to show Defendant's knowledge under Rule 404(b), which provides that

> [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.

N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant counters that because there was no evidence that he actually or constructively possessed the drugs and other contraband found at 7202 Shellburne Drive, it was improper to admit the evidence as evidence of his knowledge under Rule 404(b). In support of his argument, he cites this Court's holding in *State v. Moctezuma*, *supra*.

In *Moctezuma*, we held that the trial court erred in admitting evidence under Rule 404(b) for the purpose of showing a defendant's knowledge where there was no evidence connecting the evidence to any crime, wrong, or act by the defendant. 141 N.C. App. at 95, 539 S.E.2d at 56. There, a confidential informant told police that three men in a white van with Tennessee license plates would drive to a residence where a large quantity of cocaine was located and then conduct a cocaine deal in a grocery store parking lot. *Id.* at 91, 539 S.E.2d at 54. Pursuant to that tip, police conducted surveillance and followed the van to a trailer where the defendant and another man lived; watched the defendant and two other men exit the van, enter the trailer, and reemerge shortly thereafter; and followed the van to the grocery store before surrounding it and arresting its occupants. *Id.* During the arrest, an officer noticed the defendant, who had been driving the van, place something wrapped in

white tissue to the right of his seat. *Id.* Upon inspection, police found over 136 grams of cocaine in a plastic bag wrapped in white tissue to the right of the drivers' seat. *Id.* When police returned to the trailer, they found two kilos of cocaine and other paraphernalia in a bathroom. *Id.* At trial, the defendant claimed he was not aware there was cocaine in the van or in the trailer. *Id.* at 92, 539 S.E.2d at 54. Over his objections, the State introduced evidence of the cocaine found in the trailer to show the defendant's awareness that there had been cocaine inside the van. *Id.*

On appeal to this Court, we held that the trial court erred in admitting the cocaine from the trailer under Rule 404(b), reasoning that because there was no evidence that the defendant was aware of the cocaine in the trailer that he shared with another man, that evidence could not constitute proof of his awareness of cocaine in the van, thus rendering it irrelevant and inadmissible. As we explained,

> Rule 404(b) speaks of "[e]vidence of other crimes, wrongs, or acts." Here, there are no crimes, wrongs, or acts with which [the] defendant is connected. There was no evidence introduced at trial to directly link [the] defendant to the drugs seized at the trailer in which he occupied a bedroom. [The d]efendant was not charged with any offense in connection with the drugs seized at the trailer, and [the] defendant consistently denied any knowledge of such drugs.
>
> Further, the circumstantial evidence presented at trial—the fact that drugs belonging to other people were discovered at the trailer [the] defendant shared with others—was too weak to support an inference of knowledge on his part. . . . Under these circumstances, we find that there was insufficient evidence to show that [the] defendant knew about the drugs seized at the trailer.

Id. at 94-95, 539 S.E.2d at 56.

In the present case, with regards to the issues of relevance and admissibility, we find strong parallels between the marijuana and other contraband found at 7202 Shellburne Drive and the cocaine found in the trailer in *Moctezuma*. Although the State contends that the contraband found at 7202 Shellburne Drive should be admissible to prove Defendant's knowledge because of its similarity to the marijuana found in the boxes Defendant received from Stokes, as we explained in *Moctezuma*, "Rule 404(b) speaks of evidence of other crimes, wrongs, or acts," but here, "there are no crimes, wrongs, or acts" to connect that

contraband with Defendant. *See id.* (internal quotation marks omitted). Here, as in *Moctezuma*, Defendant was not charged with any offense in connection with the contraband found at 7202 Shellburne Drive, nor is there any evidence that Defendant actually or constructively possessed that contraband or even knew of its existence. Indeed, there is no evidence Defendant had ever previously visited 7202 Shellburne Drive, and when police searched the residence, they found no evidence that connected Defendant to it. Moreover, as Defendant repeatedly emphasized at trial, the contraband found at 7202 Shellburne Drive was notably dissimilar from the contraband found in his vehicle insofar as the marijuana was of a different grade and the buckets were a different color. Under these circumstances, we find insufficient evidence to show that Defendant knew about the drugs found at 7202 Shellburne Drive. Consequently, we do not believe that evidence was either relevant or admissible to show Defendant's knowledge of the contents of the boxes he received from Stokes, and we therefore hold that the trial court erred in denying Defendant's motion *in limine* to exclude it.

Defendant further contends that the erroneous admission of this evidence was so prejudicial to him as to constitute plain error, thus warranting a new trial. Defendant again relies on *Moctezuma* to support his argument. There, in reversing the defendant's conviction, we held the erroneous admission of irrelevant evidence to be prejudicial because "the jury could have easily concluded, given the value and quantity of the seized drugs, as well as the time spent at trial examining such, that [the] defendant was a high level drug trafficker." *Id.* at 95, 539 S.E.2d at 56. Defendant argues that the same logic should apply here, and further supports his argument by citing prior cases in which this Court has found that irrelevant evidence that leads to the spurious conclusion that the accused is linked to a huge drug trafficking operation can be prejudicial. *See, e.g.*, *State v. Cuevas*, 121 N.C. App. 553, 557-58, 468 S.E.2d 425, 428, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996) (holding that the trial court erred by admitting irrelevant evidence that the defendant who was charged with cocaine trafficking had a stamp on his passport indicating that he had visited Colombia approximately two months before his arrest, as it tended to mislead the jury as to the level of his involvement in drug trafficking, but nevertheless affirming his conviction because the properly admitted evidence against him was sufficiently overwhelming to make it "unlikely that a different result would have occurred at trial but for the introduction of the passport."). However, given the record before us, we do not agree that the trial court's error was "so fundamental as to amount to a miscarriage of justice" or that it "probably resulted in the jury reaching a different

verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555.

Defendant's argument ignores a critical distinction between the facts here and what made the erroneous admission of irrelevant evidence so prejudicial in *Moctezuma*—specifically, the radical disparity between the quantity of narcotics found when Moctezuma was arrested and the quantity found elsewhere that was erroneously admitted into evidence under Rule 404(b). In *Moctezuma*, the defendant was arrested driving a vehicle that contained roughly 136 grams—or, about four ounces—of cocaine, but the trial court subsequently admitted evidence that police had recovered over four *pounds* of cocaine from his trailer. 141 N.C. App. at 95, 539 S.E.2d at 56. The erroneously admitted contraband taken from the defendant's shared home was prejudicial because it magnified the amount of cocaine purportedly associated with him by a factor of roughly 16, thus leaving the jury to draw the inference that he was some kind of drug kingpin. *Id.* By contrast, there is no such prejudicial disparity in the present case, given that Defendant was arrested with over ten pounds of marijuana in his vehicle, while the police found far less marijuana in their search of 7202 Shellburne Drive. In other words, even without the erroneously admitted evidence, the jury could still have concluded that Defendant was a high level drug trafficker or otherwise involved in a large drug trafficking operation based on the relevant and properly admitted evidence before it.

Defendant nevertheless insists that he was prejudiced by the trial court's error, emphasizing that the only contested issue at his trial was his knowledge that the boxes he received from Stokes contained marijuana and that, apart from the contraband found at 7202 Shellburne Drive, the State's evidence on this point was weak at best. However, this Court has previously recognized that in narcotics prosecutions, "[i]n the absence of a confession by [the] defendant that [he knew the boxes contained marijuana], the State's proof of [the knowledge] element must of necessity be circumstantial." *State v. Nunez*, 204 N.C. App. 164, 168, 693 S.E.2d 223, 226 (2010). Moreover, "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 (2005) (citation and internal quotation marks omitted).

In the present case, when Defendant took the stand to deny any knowledge of what was in those boxes, he testified that he knew Stokes was on federal probation for drug trafficking but agreed to do him a favor by transporting two large boxes without inquiring about their contents to an address he had never previously visited. He also admitted to having

pled guilty to possession of marijuana with intent to sell and deliver in 2009. Whether or not Defendant knew that the boxes contained marijuana was a credibility determination for the jury, and although these facts do not by themselves prove his guilt, they certainly provided sufficient grounds for the jury to infer that Defendant *should* have known what he was getting himself into.

We therefore conclude that the trial court's erroneous decision to admit irrelevant evidence was not "so fundamental as to amount to a miscarriage of justice" and did not "probably result[] in the jury reaching a different verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555. Accordingly, we hold that the trial court did not commit plain error in denying Defendant's motion to exclude the evidence found at 7202 Shellburne Drive.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
JASON KEITH WILLIFORD

No. COA14-50

Filed 6 January 2015

1. Search and Seizure—motion to suppress DNA evidence—discarded cigarette butt—shared parking lot

The trial court did not err in a first-degree murder, first-degree rape, and misdemeanor breaking or entering case by denying defendant's motion to suppress DNA evidence obtained from a discarded cigarette butt found in a shared parking lot located in front of defendant's four-unit apartment building. The parking lot was not part of the curtilage of defendant's apartment and thus he did not have a reasonable expectation of privacy. After defendant voluntarily abandoned the cigarette butt, its subsequent collection and analysis by law enforcement did not implicate defendant's constitutional rights.

2. Judgments—clerical error—remand unnecessary

It was unnecessary to have a first-degree murder, first-degree rape, and misdemeanor breaking or entering case remanded to

correct a clerical error when the judgment already indicated twice that defendant was sentenced to life imprisonment based upon a conviction for a Class A felony.

Appeal by defendant from judgments entered 7 June 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Law Offices of John R. Mills NPC, by John R. Mills, for defendant-appellant.

CALABRIA, Judge.

Jason Keith Williford ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree murder, first degree rape, and misdemeanor breaking and entering. We find no error.

I. Background

Late in the evening on 5 March 2010, defendant broke into the home of John Geil ("Geil") in Raleigh, North Carolina. On that date, Kathy Taft ("Taft") and her sister, Dina Holton ("Holton"), were staying in Geil's home while Taft recovered from a recent surgery. Geil was out of town, and so the two women were in his home alone.

Defendant entered Taft's bedroom and struck her in the head with a blunt object multiple times. He then removed her clothing and raped her before exiting the home. Holton heard noises in the house during the night, but did not discover what had happened to Taft until the next morning.

In the morning on 6 March 2010, Holton went to the bedroom where she had last seen Taft, and she discovered Taft completely nude and bleeding from the head. Holton called 911, and emergency medical services transported Taft to the hospital. At the hospital, a nurse noticed signs of trauma around Taft's vagina and blood on her anus. As a result, hospital personnel collected a rape kit in order to obtain DNA samples. Taft underwent emergency neurosurgery, but ultimately died from her head wounds on 9 March 2010.

The DNA samples from the rape kit were tested and determined to contain male DNA. As a result, law enforcement officers from the

Raleigh Police Department ("RPD") canvassed the area around Geil's home and attempted to obtain DNA samples from male residents. When RPD Detective Zeke Morris ("Det. Morris") reached the home of defendant, who lived nearby, defendant did not invite Det. Morris inside, as all of his neighbors had done, but only spoke briefly with him. Det. Morris returned later to seek a sample of defendant's DNA, and defendant refused to provide the sample.

After defendant's refusal, members of the RPD Fugitive Unit began conducting surveillance on him in an attempt to obtain his DNA. On 15 April 2010, RPD Officer Gary L. Davis ("Officer Davis") parked his unmarked vehicle in a parking lot directly adjacent to defendant's multi-unit apartment building while defendant was shopping at a nearby grocery store. When defendant returned, Officer Davis observed defendant smoking a cigarette as he exited his vehicle. Defendant then finished the cigarette and dropped the butt onto the ground in the parking lot. Shortly thereafter, RPD Officer Paul Dorsey ("Officer Dorsey") entered the parking lot. Officer Dorsey approached defendant and spoke to him in order to distract him while Officer Davis retrieved the cigarette butt. After securing the butt, the officers left the apartment building.

Subsequent DNA testing revealed that defendant's DNA was a match for the DNA collected from the rape kit and from the crime scene. Consequently, defendant was arrested and indicted for first degree murder, first degree rape and first degree burglary. On 16 December 2010, the State notified defendant that it intended to rely upon evidence of aggravating circumstances and seek a sentence of death for the charge of first degree murder.

On 26 August 2011, defendant filed a motion to suppress the DNA evidence which was collected from the cigarette butt recovered from the parking lot. In his motion, defendant contended that the cigarette butt was discarded in an area which constituted the curtilage of his apartment and that defendant never surrendered his privacy interest in the cigarette butt. Defendant argued that under these circumstances, Officer Davis's retrieval and subsequent analysis of the cigarette butt without a warrant violated his constitutional rights.

Defendant's motion was heard on 20 February 2012. On 9 March 2012, the trial court entered an order denying the motion to suppress. The court concluded that the parking lot where Officer Davis recovered the cigarette butt was outside the curtilage of defendant's apartment and that defendant had voluntarily discarded it.

Defendant was tried by a jury beginning 16 May 2012 in Wake County Superior Court. On 1 June 2012, the jury returned verdicts finding defendant guilty of first degree murder, first degree rape, and the lesser-included offense of misdemeanor breaking and entering. On 7 June 2012, the jury recommended that defendant be sentenced to life imprisonment without the possibility of parole. Based upon this recommendation, the trial court sentenced defendant to life without parole for the first degree murder charge. Defendant also received a consecutive sentence of a minimum of 276 months to a maximum of 341 months for the first degree rape charge and a concurrent sentence of 45 days for the misdemeanor breaking and entering charge. Defendant appeals.

II. Motion to Suppress

[1] Defendant argues that the trial court erred by denying his motion to suppress the DNA evidence obtained from the discarded cigarette butt. Specifically, defendant contends: (1) that the cigarette butt was discarded in the curtilage of his dwelling; (2) that he never abandoned his possessory interest in the cigarette butt; and (3) that the DNA on the cigarette butt was improperly tested without a warrant. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Since defendant does not challenge any of the trial court's findings, "our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005).

A. Curtilage

Defendant first argues that Officer Davis's seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment. "Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is 'afforded the most stringent Fourth Amendment protection.'" *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 49 L. Ed. 2d 1116, 1130, 96 S. Ct. 3074, 3084 (1976)).

"The United States Supreme Court has . . . defined the curtilage of a private house as 'a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.' " *State v. Washington*, 134 N.C. App. 479, 483, 518 S.E.2d 14, 16 (1999) (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L. Ed. 2d 226, 235, 106 S. Ct. 1819, 1825 (1986)). The United States Supreme Court has further established that the "curtilage question should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35, 107 S. Ct. 1134, 1139 (1987).

Although this Court has previously utilized the *Dunn* factors to determine whether certain areas are located within a property's curtilage, *see, e.g.*, *State v. Washington*, 86 N.C. App. 235, 240-42, 357 S.E.2d 419, 423-24 (1987), we have never done so in the specific context of multi-unit dwellings. A federal appeals court which considered this issue in that context noted that "[i]n a modern urban multi-family apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control." *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). This is because "none of the occupants can have a reasonable expectation of privacy in areas that are also used by other occupants." *State v. Johnson*, 793 A.2d 619, 629 (N.J. 2002) (internal quotation and citation omitted).

Thus, in *United States v. Stanley*, the United States Court of Appeals for the Fourth Circuit held that "the common area parking lot on which [the defendant]'s automobile was parked was not within the curtilage of his mobile home." 597 F.2d 866, 870 (4th Cir. 1979). In reaching this conclusion, the *Stanley* Court relied upon the following factors: (1) that "[t]he parking lot was used by three other tenants of the mobile home park;" (2) that the parking lot "contained parking spaces for six or seven cars. No particular space was assigned to any tenant;" and (3) that "[a]lthough on the day of the search the Cadillac was parked in a space close to [the defendant]'s home, that space was not annexed to his home or within the general enclosure surrounding his home." *Id.* Other courts have also reached the same conclusion based upon similar facts. *See, e.g.*, *Cruz Pagan*, 537 F.2d at 558 ("In sum, we hold that the agents' entry into the underground parking garage of El Girasol Condominium did not violate the fourth amendment. . . ."); *United States v. Soliz*, 129 F.3d 499, 503 (9th Cir. 1997) (Common parking area in an apartment

complex which "was a shared area used by the residents and guests for the mundane, open and notorious activity of parking" was not curtilage.), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895, 913 n.4 (9th Cir. 2001) (en banc); *Commonwealth v. McCarthy*, 705 N.E.2d 1110, 1114 (Mass. 1999) ("Because the defendant had no reasonable expectation of privacy in the visitor's parking space, the space was not within the curtilage of the defendant's apartment."); and *State v. Coburne*, 518 P.2d 747, 757 (Wash. Ct. App. 1973) ("The vehicle was parked in an alley parking lot available to all users of the apartments. The area where the car was parked is not a 'curtilage' protected by the Fourth Amendment."). *But see Joyner v. State*, 303 So.2d 60, 64 (Fla. Dist. Ct. App. 1974) (holding that "parking areas usually and customarily used in common by occupants of apartment houses, condominiums and other such complexes with other occupants thereof constitute a part of the curtilage of a specifically described apartment or condominium or other living unit thereof").

In the instant case, the trial court's unchallenged findings indicate that the shared parking lot where defendant discarded the cigarette butt was located directly in front of defendant's four-unit apartment building, that the lot was uncovered, that it included five to seven parking spaces used by the four units, and that the spaces were not assigned to particular units. The court further found that the area between the road and the parking lot was heavily wooded, but that there was no gate restricting access to the lot and there were no signs which suggested either that access to the parking lot was restricted or that the lot was private. Applying the *Dunn* factors to these findings, we conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept." *Washington*, 134 N.C. App. at 483, 518 S.E.2d at 16 (internal quotation and citation omitted). Thus, defendant's constitutional rights were not violated when Officer Davis seized the discarded cigarette butt from the parking lot without a warrant. This argument is overruled.

B. Possessory Interest

Defendant next contends that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a

third party. However, it is well established that "[w]here the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." *State v. Cromartie*, 55 N.C. App. 221, 224, 284 S.E.2d 728, 730 (1981) (internal quotations, citation, and brackets omitted). Moreover, "[w]hen one abandons property, '[t]here can be nothing unlawful in the Government's appropriation of such abandoned property.' " *Id.* at 225, 284 S.E.2d at 730. (quoting *Abel v. United States*, 362 U.S. 217, 241, 4 L. Ed. 2d 668, 687, 80 S. Ct. 683, 698 (1960)). In the instant case, we have already determined that defendant had no reasonable expectation of privacy in the parking lot, and thus, by dropping the cigarette butt in the lot, he is deemed to have abandoned any interest in it. This argument is overruled.

C. DNA Testing

Finally, defendant argues that even if law enforcement lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing the butt for his DNA because defendant had a legitimate expectation of privacy in his DNA. Defendant cites *Maryland v. King*, ___ U.S. ___, 186 L. Ed. 2d 1, 133 S. Ct. 1958 (2013) in support of his argument. In *King*, the United States Supreme Court considered whether the warrantless, compulsory collection and analysis of a DNA sample from individuals who had been arrested for felony offenses violated the Fourth Amendment. *Id.* at ___, 186 L. Ed. 2d at 17, 133 S. Ct. at 1966. The Court held that this warrantless search was reasonable because of the state's significant interest in accurately identifying the arrestee. *Id.* at ___, 186 L. Ed. 2d at 32, 133 S. Ct. at 1980.

King is inapplicable to the instant case. In *King*, the defendant's DNA sample had been directly obtained by law enforcement in a compulsory seizure that was indisputably a Fourth Amendment search. The *King* Court only decided whether that search was reasonable. In contrast, in this case, defendant had abandoned his interest in the cigarette butt, without any compulsion from law enforcement, and thus, we must first determine whether the extraction of defendant's DNA from the abandoned butt constituted a search at all. This Court has specifically held that "[t]he protection of the Fourth Amendment against unreasonable searches and seizures does not extend to abandoned property." *State v. Eaton*, 210 N.C. App. 142, 148, 707 S.E.2d 642, 647 (2011). While we have not yet applied this general principle to the retrieval of DNA from abandoned property, courts in other jurisdictions have relied upon

it to conclude that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment. *See*, *e.g.*, *People v. Gallego*, 117 Cal. Rptr. 3d 907, 913 (Cal. Ct. App. 2010) ("By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon. ... On these facts, we conclude that a reasonable expectation of privacy did not arise in the DNA test of the cigarette butt, and consequently neither did a search for Fourth Amendment purposes."); *Raynor v. State*, 99 A.3d 753, 767 (Md. 2014) ("[W]e hold that DNA testing of . . . genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color."); and *State v. Athan*, 158 P.3d 27, 37 (Wash. 2007) (en banc) ("There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. ... The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment."). We find these cases persuasive, and thus, we hold that once defendant voluntarily abandoned the cigarette butt in a public place, he could no longer assert any constitutional privacy interest in it. Accordingly, the extraction of his DNA from the butt did not constitute a search for purposes of the Fourth Amendment. This argument is overruled.

III. Judgment

[2] Defendant argues that his judgment includes a clerical error, in that the trial court failed to check the "Class A Felony" box in the portion of the judgment that explains why defendant was sentenced to life imprisonment without parole. However, the judgment indicates that defendant was sentenced for a Class A felony in two other locations. Thus, we find it unnecessary to remand this case for the judgment to indicate, for a third time, that defendant was sentenced to life imprisonment based upon a conviction for a Class A felony.

IV. Conclusion

Pursuant to the factors in *Dunn*, the shared parking lot located in front of defendant's four-unit apartment building was not part of the curtilage of defendant's apartment. Since defendant did not have a reasonable expectation of privacy in the parking lot, he abandoned his cigarette butt by discarding it there. After defendant voluntarily abandoned

the cigarette butt, its subsequent collection and analysis by law enforcement did not implicate defendant's constitutional rights. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JANUARY 2015)

IN RE A.B. No. 14-901	Cumberland (12JA311)	Affirmed
PATTISON OUTDOOR ADVER., LP v. ELEVATOR CHANNEL, INC. No. 14-580	Mecklenburg (13CVS17582)	Affirmed
POWELL v. CHRISTOPHERSON No. 14-659	Wake (12CVS16552)	No Error
REARDON v. BROWN No. 14-488	Gaston (01CVD2484)	Affirmed
RUTLAND v. SMITH No. 14-849	Guilford (13CVS7526)	Affirmed
STATE v. NORRIS No. 14-361	Cleveland (12CRS50344) (12CRS50425)	No error; remand for reconsideration of restitution.
STATE v. REESE No. 14-593	Guilford (03CRS96775-88)	No Error
STATE v. SEWELL No. 14-269	Durham (12CRS61669)	Affirmed in part, reversed in part.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JANUARY 2015)

GOODWIN v. CAGC INS. CO. No. 14-445	Wake (12CVS1270)	Reversed and Remanded
IN RE C.M. No. 14-900	Onslow (12JA112-113)	Affirmed
IN RE D.C. No. 14-739	Wake (09JB533)	Affirmed in part, Reversed and Remanded in Part
IN RE D.H.T. No. 14-792	Iredell (11JT5) (11JT6)	Affirmed
IN RE K.G.T. No. 14-654	Wake (13SPC6864)	Vacated and Remanded
IN RE R.L.W. No. 14-899	Wake (12JT183)	Affirmed
IN RE S.B. No. 14-898	Cumberland (10JT558-559)	Affirmed
IN RE Z.K.M. No. 14-801	Randolph (11JT75-77)	Affirmed
ROSE v. POTTS No. 14-611	Cumberland (11CVS8966)	Reversed
SMOKY MOUNTAIN SANCTUARY PROPS. OWNERS ASS'N, INC. v. SHELTON No. 14-112-2	Haywood (10CVS1452)	Dismissed
STATE v. CHANDLER No. 14-1045	Durham (11CRS3668)	Reversed and Remanded
STATE v. CLARK No. 14-691	Mecklenburg (11CRS205286)	Vacated and Remanded
STATE v. CREDLE No. 14-794	Forsyth (12CRS55206) (13CRS1773)	No Error
STATE v. HEAVNER No. 14-514	Lincoln (12CRS53308-09)	No Error

STATE v. HERBIN No. 14-607	Guilford (13CRS24624) (13CRS82953)	No Error
STATE v. LOWERY No. 14-777	Gaston (13CRS62066)	No Error
STATE v. MOORE No. 14-620	Guilford (11CRS82467-69) (11CRS82722-28) (11CRS86304) (11CRS86306) (11CRS88574)	No Error
STATE v. MORRIS No. 14-619	Cabarrus (12CRS54772) (13CRS1190)	No Error
STATE v. MORRISON No. 14-247	Mecklenburg (10CRS253344-45) (10CRS253347-48)	No Error
STATE v. POOLE No. 14-689	Person (12CRS51878)	No Error
STATE v. RUNYON No. 14-817	Brunswick (12CRS53763)	Dismissed
STATE v. SMITH No. 14-888	Guilford (11CRS33240) (11CRS72307) (11CRS72308-09)	No Error
STATE v. THOMAS No. 14-841	Johnston (14CRS372-373)	Affirmed

COMBS v. ROBERTSON

[239 N.C. App. 135 (2015)]

MYRA LYNNE COMBS, PLAINTIFF
v.
MICHAEL D. ROBERTSON, COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANT

No. COA14-709

Filed 3 February 2015

Motor Vehicles—driving while impaired—license revocation—exclusionary rule inapplicable

The trial court erred by reversing the Department of Motor Vehicles' revocation of plaintiff's driver's license. Even though police violated plaintiff's Fourth Amendment rights by initiating a traffic stop without reasonable suspicion, the exclusionary rule does not apply to license revocation proceedings in North Carolina. There was sufficient evidence that the officer had reasonable grounds to believe plaintiff had been driving while impaired.

Appeal by respondent from order entered 4 April 2014 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 5 November 2014.

Randolph & Fischer, by J. Clark Fischer, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondent-appellant.

DIETZ, Judge.

This case serves as a reminder that, unless our Supreme Court holds otherwise, the Fourth Amendment's exclusionary rule does not apply in civil proceedings such as driver's license revocation hearings, even if those proceedings could be viewed as quasi-criminal in nature.

In 2013, police violated Petitioner Myra Lynne Combs's Fourth Amendment rights by stopping her car without reasonable suspicion. Combs smelled of alcohol, had bloodshot eyes, and failed a field sobriety test. But she refused to submit to a breath test both at the stop and later at the police station. The State then charged her with driving while impaired.

Because the traffic stop was unconstitutional, all evidence derived from the stop was suppressed in Combs's criminal case, resulting in

dismissal of the charges. But the Division of Motor Vehicles (DMV) pressed ahead, revoking Combs's driver's license for her refusal to submit to a breath test. Combs challenged that revocation, arguing that the officer did not have "reasonable grounds" to believe she was impaired (the standard for license revocation under the implied consent laws). The gist of Combs's argument is that, because the stop was unconstitutional, DMV should not be permitted to rely on evidence gathered from that stop to revoke her driver's license.

Combs's argument poses a fair question: how can law enforcement use evidence that was suppressed because of a Fourth Amendment violation to later revoke her driver's license? The answer, according to several published decisions of this Court, is that the exclusionary rule—a bedrock principle of criminal law—does not apply to license revocation proceedings.

Without the exclusionary rule, we must reverse the trial court and affirm DMV's revocation of Combs's driver's license. During the traffic stop, there was ample evidence from which an officer could find reasonable grounds to believe Combs was driving while impaired. Thus, Combs can prevail on appeal only if this evidence were excluded from consideration and, under our Court's precedent, it is not. Accordingly, we reverse the trial court and affirm the final agency decision revoking Combs's driving privileges.

Facts and Procedural History

On 6 January 2013, Officer David Grubbs of the Mount Airy Police Department received an anonymous report of a possible drunk driver on Highway U.S. 52 North. The caller reported that a blue Ford Explorer had been weaving in the roadway. Officer Grubbs proceeded to the intersection of Rockford Street and U.S. 52 to intercept the vehicle as it exited the highway. At the intersection, Officer Grubbs observed a vehicle matching the description given by the caller. Officer Grubbs and a second officer got behind the suspect vehicle and followed it. While he followed the vehicle, Officer Grubbs did not observe it weaving in the roadway as the anonymous caller had described. But after several turns, Officer Grubbs saw the vehicle make what he believed was a "slight cross of the center" line of the roadway (this side road did not have a painted center line). Officer Grubbs continued to follow the vehicle until it turned into a driveway. At that point, Officer Grubbs initiated a traffic stop.

Officer Grubbs approached the vehicle and spoke to the driver, Petitioner Myra Lynne Combs. There were no other passengers in the

vehicle. Officer Grubbs detected a strong odor of alcohol and observed that Combs's eyes were bloodshot. Officer Grubbs asked Combs if she had been drinking, and she admitted that she had a beer earlier in the evening. He then asked her to step out of her vehicle to perform field sobriety tests. As Combs exited her vehicle, Officer Grubbs noticed that she swayed. The officer conducted several field sobriety tests with Combs and noted that she did not perform to NHTSA standards. During the "horizontal gaze nystagmus" test, Officer Grubbs noted that Combs displayed lack of smooth pursuit, maximum deviation, and onset prior to forty-five degrees with both eyes. During the walk and turn test, Combs stopped walking, missed heel to toe, stepped off the line, and used her arms for balance. And during the one leg stand test, Combs swayed while balancing, used her arms for balance, and put her foot down.

Based on her performance in the field sobriety tests, Officer Grubbs asked Combs to take a portable breath test. She refused. Officer Grubbs then placed Combs under arrest for the implied consent offense of impaired driving and took her to the Mount Airy Police Department. At the Police Department, Officer Evans, a certified chemical analyst, informed Combs of her implied consent rights pursuant to N.C. Gen. Stat. § 20-16.2(a) (2013), and Combs signed an implied consent rights form. Combs advised Officer Evans that she wished to contact a witness or attorney. Officer Evans provided her with a phone book and gave her thirty minutes to make phone calls. Combs was unable to get in contact with anyone. At the end of the thirty minute period, Officer Evans activated the testing instrument to perform a chemical analysis of Combs's breath. Once the instrument was ready, Officer Evans asked Combs to submit a sample of her breath for chemical analysis. Combs refused to do so.

Ultimately, the State charged Combs with driving while impaired. On Combs's motion, the Surry County District Court suppressed all evidence from the traffic stop. The court concluded that Officer Grubbs violated Combs's Fourth Amendment rights because he "lacked a reasonable articulable suspicion to stop defendant's vehicle." As a result, the court ruled that all evidence obtained during the stop was subject to the exclusionary rule. With all evidence from the stop excluded, the State dismissed its case.

DMV then sent Combs a letter notifying her that it was revoking her driving privileges based on her willful refusal to submit to chemical analysis under N.C. Gen. Stat. § 20-16.2. Combs requested an administrative hearing before DMV, which was held on 27 September 2013. There, Combs's counsel argued that DMV was estopped from revoking Combs's

license because the evidence justifying the breath test resulted from an unconstitutional traffic stop. The hearing officer rejected this argument and continued with the hearing. DMV issued its final order on 7 October 2013, affirming the revocation of Combs's driving privilege based on detailed findings of fact and conclusions of law.

On 16 October 2013, Combs filed a Complaint and Petition in Surry County Superior Court seeking review of DMV's order. After hearing arguments, the trial court entered an order on 4 April 2014 reversing DMV's decision. The order contains no analysis, simply stating that "there is insufficient evidence in the record to support the Findings of Fact of Respondent's decision." DMV timely appealed on 21 April 2014.

Analysis

DMV argues that the trial court erred in reversing the final agency decision because the agency record plainly contains sufficient evidence to support the findings of fact. We agree.

In an appeal from a DMV hearing to superior court under N.C. Gen. Stat. § 20-16.2(e), the superior court acts not as the trier of fact, but as "an appellate court." *Johnson v. Robertson*, ___ N.C. App. ___, ___, 742 S.E.2d 603, 607 (2013). The superior court's review "shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20.16-2(e).

Here, the trial court made a general statement that there was "insufficient evidence in the record to support the Findings of Fact," but did not specify which of DMV's forty-six findings of fact was not supported by sufficient evidence. Combs focused her argument on whether the officer had reasonable grounds to believe she had committed an implied consent offense. Combs contended that, because the district court in her criminal case found that the officer lacked reasonable suspicion to stop her and excluded all evidence resulting from the stop, the officer did not have reasonable grounds to believe she had committed an implied consent offense. Although the trial court did not explain which particular agency fact findings were unsupported, we assume it agreed with Combs's argument.

This argument is precluded by our case law. This Court has held that whether an officer had "reasonable and articulable suspicion for the initial stop is not an issue to be reviewed" in a license revocation hearing.

Hartman v. Robertson, 208 N.C. App. 692, 695, 703 S.E.2d 811, 814 (2010). "[T]he only inquiry with respect to the law enforcement officer is the requirement that he ha[ve] reasonable grounds to believe that the person had committed an implied-consent offense." *Id.* (internal quotation marks omitted). "[T]he propriety of the initial stop is not within the statutorily-prescribed purview of a license revocation hearing." *Id.* at 696, 703 S.E.2d at 814.

Thus, the exclusionary rule, which the district court applied in Combs's criminal case, is inapplicable here. Indeed, this Court repeatedly has rejected attempts to invoke the exclusionary rule in a license revocation proceeding. *See Hartman*, 208 N.C. App. at 698, 703 S.E.2d at 816; *Quick v. N.C. Div. of Motor Vehicles*, 125 N.C App. 123, 127, 479 S.E.2d 226, 228 (1997). As this Court explained in *Quick*, "[w]hen determining whether revocation of petitioner's license was proper, we are not concerned with the admissibility or suppression of evidence." 125 N.C. App. at 125-26, 479 S.E.2d at 228 (internal quotation marks omitted). "The question of the legality of his arrest . . . [is] simply not relevant to any issue presented in the hearing to determine whether [the respondent's] license was properly revoked." *Id.* at 126, 479 S.E.2d at 228 (internal quotation marks omitted).

In light of this precedent, this appeal presents only a single, permissible question: whether there is sufficient evidence in the record to support the agency's finding that Officer Grubbs had reasonable grounds to believe an implied consent offense occurred—*i.e.*, whether there were reasonable grounds for the officer to believe Combs had been driving while impaired. We hold that there is ample evidence in the record to support that finding.

Officer Grubbs testified that he smelled a strong odor of alcohol when he approached Combs in her vehicle. He also testified that Combs's eyes were bloodshot. Combs admitted that she had been drinking earlier in the evening. When Combs exited her vehicle to perform a field sobriety test, she swayed noticeably. Finally, Officer Grubbs testified that Combs failed all three parts of the sobriety test. This evidence readily supports the hearing officer's finding that reasonable grounds existed to believe Combs was drunk. On appeal, Combs points to several facts, such as the presence of white-out in certain areas of the officer's initial report, to challenge the credibility of the officer's testimony at the hearing. But neither the superior court nor this Court is permitted to weigh the credibility of witnesses. *See Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011). The hearing officer found Officer Grubbs's

testimony credible, and we are bound by that fact finding. As a result, we must reverse the trial court and affirm the final agency decision.

We pause to note that the question of whether the exclusionary rule applies to license revocation proceedings has divided our sister states. *Compare Fishbein v. Kozlowski*, 743 A.2d 1110, 1119 (Conn. 1999) (concluding that due process does not require application of exclusionary rule); *Martin v. Kansas Dep't of Revenue*, 176 P.3d 938, 949-53 (Kan. 2008) (holding that the exclusionary rule should not apply); *Powell v. Sec'y of State*, 614 A.2d 1303, 1306-07 (Me. 1992) (holding that the exclusionary rule should not be applied); *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 334-35 (Mo. 1999) (holding that the exclusionary rule should not be applied); *Holte v. North Dakota State Highway Comm'r*, 436 N.W.2d 250, 252 (N.D. 1989) (refusing to extend the exclusionary rule to civil proceedings); *and Dep't of Trans. v. Wysocki*, 535 A.2d 77, 79 (Pa. 1987) (holding that the exclusionary rule does not apply); *with Olson v. Comm'r of Pub. Safety*, 317 N.W.2d 552, 556 (Minn. 1985) (holding Fourth Amendment protections applied to license revocation proceeding); *Pooler v. Motor Vehicles Div.*, 755 P.2d 701, 703 (Or. 1988) (holding validity of arrest within the scope of administrative license suspension proceeding); *and Vermont v. Lussier*, 757 A.2d 1017, 1025-27 (Vt. 2000) (holding that the exclusionary rule applies in civil license suspension proceedings). All of these cases were decided by the states' highest courts. Our Supreme Court has not yet addressed this issue but, as explained above, this Court has. Because one panel of this Court cannot overturn another, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), if the application of the exclusionary rule to these civil proceedings warrants further consideration, it must be done in our Supreme Court.

Conclusion

For the reasons discussed above, we must reverse the trial court.

REVERSED.

Judges BRYANT and DILLON concur.

FEHRENBACHER v. CITY OF DURHAM

[239 N.C. App. 141 (2015)]

DOLLY FEHRENBACHER, MELVIN FEHRENBACHER, AARON C. CROOM, DOROTHY CROOM, STUART PIMM, JULIA PIMM, LARRY KENSIL AND SUSAN KENSIL, AND GOOD NEIGHBORS OF 751, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

CITY OF DURHAM, A NORTH CAROLINA MUNICIPALITY, AND DURHAM COUNTY, A NORTH CAROLINA COUNTY, PHILIP POST & ASSOCIATES, INC., GREEK ORTHODOX COMMUNITY OF DURHAM, NORTH CAROLINA, INCORPORATED, AND SPRINTCOM, INC., RESPONDENTS

No. COA14-712

Filed 3 February 2015

1. Constitutional Law—due process—missing audio testimony—equipment malfunction

Petitioners were not deprived of their right to due process as established by N.C.G.S. § 160A-388(e2)(2) and § 160A-393(i) and (j) based on the record provided by respondent City of Durham missing testimony before the Board due to an equipment malfunction. The record adequately conveyed the substance of the missing audio testimony. Further, N.C.G.S. § 160A-393(i) provides that the record need only contain an audio recording of the meeting if such a recording was made.

2. Evidence—photographic simulations—monopine tower—not part of record

The trial court did not err when it requested SprintCom to provide photographic simulations of the proposed monopine tower that were submitted with its original application but were not part of the record before the Board of Adjustment. N.C.G.S. § 160A-393(i) provides that the parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record or that matters other than those specified be included.

3. Cities and Towns—municipal ordinance—concealed wireless communication facility—monopine tower

The trial court did not err by affirming the Board of Adjustment's determination that SprintCom's proposed monopine tower qualified as a concealed wireless communication facility (WCF) as defined by Unified Development Ordinance section 16.3. SprintCom's proposed monopine design served a secondary function that helped camouflage the tower's function as a WCF and was aesthetically compatible with the church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees.

Appeal by Petitioners from order entered 20 March 2014 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 6 November 2014.

The Brough Law Firm, by Robert E. Hornik, Jr., for Petitioners.

Styers & Kemerait, PLLC, by Karen M. Kemerait, for Respondents Philip Post & Associates, Inc.; Greek Orthodox Community of Durham, North Carolina, Inc.; and SprintCom, Inc.

Office of the City Attorney, by Senior Assistant City Attorney Donald T. O'Toole, for Respondent City of Durham.

Durham County Attorney Bryan Wardell for Respondent Durham County.

STEPHENS, Judge.

This is a case about a giant fake pine tree and what it means to conceal the aesthetic externalities of modernizing our State's telecommunications grid. The Petitioners are a group of homeowners who object to the Durham City-County Board of Adjustment's decision to approve construction of a 120-foot-tall cell tower on the property of St. Barbara Greek Orthodox Church, literally across Highway 751 from their backyards. The Respondents include the City of Durham and Durham County, which approved the plans; the Greek Orthodox Community of Durham, which owns the land where the tower will be built; telecommunications conglomerate SprintCom, which will build, own, and operate the tower; and Philip Post & Associates, Inc., which filed the initial application to build the tower on behalf of SprintCom. Petitioners contend that the trial court, which granted *certiorari* to hear their appeal pursuant to N.C. Gen. Stat. §§ 160A-393 and 153-349, erred as a matter of law in affirming the Board of Adjustment's determination that SprintCom's proposed cell tower, which is designed as a "monopine" in order to blend in with a nearby grove of trees, qualifies as a concealed wireless communications facility as defined by Section 16.3 of Durham's Unified Development Ordinance. Petitioners also argue that the trial court erred by requesting and accepting photographic simulations from SprintCom that were not part of the record before the Board of Adjustment, and that the record provided in response to the trial court's grant of *certiorari* was inadequate. After careful review, we hold that the trial court did not err in affirming the Board of Adjustment.

I. Facts and Procedural History

On 5 January 2012, Respondent City of Durham received an application from Philip Post & Associates, Inc., acting on behalf of SprintCom, seeking approval pursuant to Durham's Unified Development Ordinance ("UDO") to construct a 120-foot-tall cell tower on a leased portion of a five-acre lot owned by the Greek Orthodox Community of Durham. The property, which is home to the St. Barbara Greek Orthodox Church of Durham, is located within the City of Durham's corporate limits at 8306 Highway 751, in an area zoned Rural/Residential.

The plans for the proposed tower utilize a monopine design, which is intended to give the tower the appearance of a tall pine tree, rather than a cell tower, so that it blends in with a grove of actual pine trees already standing on the Church property and qualifies as a concealed wireless communications facility ("WCF") under Durham's UDO. Section 16.3 of the UDO defines a concealed WCF as:

> A [WCF], ancillary structure, or WCF equipment compound that is not readily identifiable as such, and is designed to be aesthetically compatible with existing and proposed uses on a site. A concealed facility may have a secondary function including, but not limited to the following: church steeple, windmill, bell tower, clock tower, cupola, light standard, flagpole with or without a flag, or tree. A non-concealed [WCF] is one that is readily identifiable such as a monopole or lattice tower.

Durham Unified Dev. Ordinance art. 16, § 3 (2006). Section 5.3.3N of the UDO regulates the construction and placement of WCFs and provides that a proposed cell tower that meets the definition of a concealed WCF provided in section 16.3 is subject to an administrative site plan approval process, whereas a tower that does not meet the definition of a concealed WCF can only be approved after obtaining a minor special use permit, which requires a quasi-judicial evidentiary hearing. *Id.* at art. 5, § 3.3N.

On 6 July 2012, the Durham City-County Development Review Board ("DRB") reviewed SprintCom's application and approved it by a vote of eight to one. Petitioners appealed DRB's decision to the Durham City-County Board of Adjustment. The Board of Adjustment heard Petitioners' appeal on 22 October 2012 and remanded the matter back to DRB for further consideration in light of defects and deficiencies in Respondents' application.

On 13 November 2012, SprintCom requested an official interpretation from Durham City-County Planning Director Steven L. Medlin regarding whether or not its proposed monopine tower meets the definition of a concealed WCF provided by the UDO. On 10 January 2013,[1] Planning Director Medlin concluded that SprintCom's proposed monopine tower does, in fact, satisfy UDO section 16.3's definition of a concealed WCF based on the following facts:

> 1) The American Planning Association (APA) is a primary source of defining "best practice" in the field of urban and regional planning. An August, 2011, edition of "Zoning Practice" . . . regarding telecommunications issues states that " . . . in rural and suburban areas, towers are effectively concealed as trees and are nearly indistinguishable from the real thing (apart from being taller than nearby trees)." Based on this standard the monopine tower design clearly mee[t]s the threshold of not being "readily identifiable" as a wireless communications facility.
>
> 2) Since the current wireless communications facility (WCF) review and approval standards were put in place in Durham (in 2004), there have been fifteen (15) new WCF towers constructed in Durham. . . . Thirteen (13) of these have been monopines of equal or lesser design quality to the monopine tower proposed [in the present case]. As such, approval of the proposed design is consistent with over eight years of practice in Durham.

On 6 February 2013, Petitioners filed a timely appeal from Planning Director Medlin's interpretation to the Board of Adjustment.

On 28 May 2013, the Board of Adjustment held a hearing at which several of the Petitioners testified that their opposition to SprintCom's proposed monopine tower was rooted in concerns about public health and safety, given the presence of two high pressure gas transmission lines already running across the Church property, as well as the tower's potential adverse impact on their property values. Petitioners presented photographs of a test they performed by filling balloons with helium and raising them to an altitude of 120 feet to illustrate how the proposed

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1. As the result of an apparent clerical error, Planning Director Medlin's interpretation is dated "5 November 2012," which is impossible given that SprintCom did not ask for his opinion until eight days later. Petitioners and their counsel received copies of Planning Director Medlin's interpretation on or about 10 January 2013.

monopine tower will be twice as high as the surrounding trees on the Church property, the tallest of which currently stands at 60 feet. They also testified that the tower's base will be five times wider than the diameter of the largest trees now present in the area, many of which will need to be cleared before construction can commence. Based on its size and visibility from their homes, Petitioners contended that SprintCom's proposed monopine tower cannot possibly meet the UDO's definition of a concealed WCF. Nevertheless, the Board of Adjustment voted unanimously to uphold Planning Director Medlin's official interpretation.

On 17 July 2013, pursuant to N.C. Gen. Stat. §§ 160A-388 and 153A-349, Petitioners appealed the Board of Adjustment's decision to Durham County Superior Court by a petition for review in the nature of *certiorari*. When their appeal came to be heard on 10 March 2014, Petitioners argued that the Board's decision was arbitrary, capricious, not supported by substantial competent evidence in the record, and affected by errors of law. The crux of their argument was that the Board erred in concluding that SprintCom's proposed monopine tower meets the definition of a concealed WCF provided by section 16.3 of the UDO. Alternatively, due to a recording malfunction that caused the first third of the 28 May 2013 Board of Adjustment hearing to go unrecorded, Petitioners contended that the record before the trial court was inadequate, failed to comply with the requirements of N.C. Gen. Stat. § 160A-393(i) and the Board's own Rules of Procedure, and deprived them of due process of law. Petitioners also objected when the trial court directed SprintCom's counsel to submit additional photographic simulations—which were originally included in its application to the City of Durham—of what the proposed monopine tower would look like.

On 19 March 2014, based on the record, the oral arguments of the parties, and the photographic simulations, the trial court issued an order affirming the Board of Adjustment's decision that SprintCom's proposed monopine tower meets the definition of a concealed WCF provided in section 16.3 of the UDO. The trial court found as facts that SprintCom's proposed monopine tower "is not readily identifiable as a cell tower" and "will be aesthetically compatible with the existing uses on the St. Barbara Greek Orthodox Church Property since it will be located in the middle of a grove of existing pine trees adjoining Highway 751." Thus, the trial court concluded as a matter of law that the Board of Adjustment's decision was not arbitrary, capricious, or erroneous, and dismissed Petitioners' appeal accordingly. Petitioners timely appealed to this Court.

II. Standard of Review

Our Supreme Court has made clear that the task of a court reviewing a decision of a municipal body performing a quasi-judicial function, such as the Board of Adjustment's decision here, includes:

> (1) Reviewing the record for errors [of] law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. Of Comm'rs of the Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "Where the appealing party contends that the decision was unsupported by the evidence or was arbitrary and capricious, the trial court applies the whole record test." *Welter v. Rowan Cnty Bd. of Comm'rs*, 160 N.C. App. 358, 361, 585 S.E.2d 472, 475 (2003) (citation and internal quotation marks omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Amanini v. N.C. Dept. of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation and internal quotation marks omitted). "The whole record test does not allow the reviewing court to replace the Board'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*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

However, if the appealing party contends the decision was based on an error of law, the trial court employs a *de novo* review. *See In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998). "Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted; alterations

in original). "Moreover, [t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (citation and internal quotation marks omitted; alterations in original).

When this Court reviews the decision of a trial court reviewing a municipal board's decision, we

> examine[] the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Welter, 160 N.C. App. at 362, 585 S.E.2d at 476 (citation and internal quotation marks omitted).

III. Analysis

A. Inadequate Record

[1] Petitioners first argue that the record provided by Respondent City of Durham to the trial court was so inadequate as to deprive them of their right to due process as established by N.C. Gen. Stat. § 160A-388(e2)(2) and § 160A-393(i) and (j). We disagree.

Our General Statutes guarantee that "[e]very quasi-judicial decision [by a municipal board of adjustment] shall be subject to review by the superior court by proceedings in the nature of *certiorari* . . . ." N.C. Gen. Stat. § 160A-388(e2)(2)(2013). Section 160A-393 lays out the process for *certiorari* review of a quasi-judicial decision and provides in relevant part that "[t]he court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with subsection [(i)][2] of this section." N.C. Gen. Stat. § 160A-393(j). Subsection (i) provides in relevant part that

> [t]he record shall consist of all documents and exhibits submitted to the decision-making board whose decision is

2. Although the text of N.C. Gen. Stat. § 160A-393(j) actually refers to subsection (h), we note that this appears to be a typographical error, given that subsection (i) addresses the contents of the record, whereas subsection (h) provides the rules governing motions to intervene.

> being appealed, together with the minutes of the meeting or meetings at which the decision being appealed was considered. Upon request of any party, the record shall also contain an audio or videotape of the meeting or meetings at which the decision being appealed was considered if such a recording was made.

N.C. Gen. Stat. § 160A-393(i).

In the present case, Petitioners contend that their ability to present the trial court with an accurate record of the proceedings below was prejudiced due to a combination of Respondent City of Durham's "minimalist approach to minute-keeping" and a recording malfunction that caused the first third of the testimony from the Board of Adjustment's three-hour hearing on 28 May 2013 to go unrecorded. Specifically, Petitioners emphasize that the recording malfunction resulted in the inadvertent exclusion of substantial portions of their own testimony from the record, a problem exacerbated by the fact that the minutes of the Board's meeting do not include any summary of the evidence or arguments they presented. Moreover, Petitioners insist that because subsection (i) provides that "an audio or videotape of the meeting or meetings at which the decision being appealed was considered" shall be included in the record if any party so requests, *see id.*, and because the trial court requested "the complete record . . . including all minutes, audiotapes, videotapes and transcripts of all meetings and hearings regarding the appeal as may exist," they have been deprived of their right to due process and both the trial court and this Court have been deprived of a meaningful opportunity to review their case. As a result, Petitioners contend this Court should reverse the trial court's decision and remand the matter back to the Board of Adjustment for a new, full hearing. In support of their argument, Petitioners rely on this Court's decision in *Welter*.

Petitioners' reliance on *Welter* is misplaced. In *Welter*, we declined to interpret a zoning ordinance provision, and remanded the case back to the trial court, because relevant portions of the ordinance "necessary for a proper interpretation" of the portions at issue were not included in the record on appeal. 160 N.C. App. at 363, 585 S.E.2d at 477. Here, by contrast, Petitioners do not contend that any pertinent portions of the UDO are missing from the record. Although a substantial portion of their testimony before the Board was not recorded due to an equipment malfunction, the record prepared by Respondents did include a copy of Petitioners' appeal to the Board. That appeal included, *inter alia*, an affidavit from Petitioner Dolly Fehrenbacher providing information

about, and photographs of, the trees already standing on the Church property and the balloon test she and her neighbors conducted. Because Petitioners have not specifically identified any other competent or substantial evidence that might be missing from the record as a result of the recording malfunction and which would have prevented the trial court from fully reviewing the merits of their claim, we conclude that the record adequately conveyed the substance of their missing audio testimony. Moreover, because Petitioners' argument that the record fails to comply with the requirements articulated in subsection (i) depends on a selective reading of the statute that ignores its final clause—which makes clear that the record need only contain an audio recording of the meeting "if such a recording was made"—we conclude this argument is without merit. *See* N.C. Gen. Stat. § 160A-393(i).

B. Improperly included photographic simulations

[2] Petitioners next contend that the trial court erred when it requested SprintCom to provide photographic simulations of the proposed monopine tower that were submitted with its original application but were not part of the record before the Board of Adjustment. We disagree.

In support of this argument, Petitioners rely on a narrow reading of the interplay between sections 160A-393(i) and (j). As already discussed, subsection (i) establishes the contents of the record for *certiorari* review, including all materials considered by the decision-making board. Subsection (j), on the other hand, provides the trial court with discretion to supplement the record "with affidavits, testimony of witnesses, or documentary or other evidence" on a limited range of issues including whether the parties have standing, whether conflicts of interest compromised the Board's impartiality, violations of procedural due process rights, and allegations that the Board exceeded its statutory authority. *See* N.C. Gen. Stat. § 160A-393(j). Thus, because SprintCom's photographic simulations were not part of the record before the Board of Adjustment and do not fall within the parameters of subsection (j), Petitioners claim they have been prejudiced by a violation of statutory procedure and request that this Court reverse the trial court's determination and remand the matter back to the Board of Adjustment.

We note that here again, Petitioners rely on a selective reading of subsection (i), one that conveniently ignores its provision that "[t]he parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record *or that matters other than those specified herein be included*." N.C. Gen. Stat. § 160A-393(i) (emphasis added). In other words, subsection (j) is not the only provision

of the statute that vests discretionary authority in the trial court to supplement the record. Therefore, it was not improper for the trial court to request that SprintCom submit photographic simulations that were included in its original application for the court's *de novo* consideration of whether the Board erred in its determination that the proposed monopine tower qualifies as a concealed WCF. Finding no violation of statutory procedure, we need not address Petitioners' claims of prejudice, and we accordingly conclude that this argument is without merit.

C. Definition of concealed WCF

[3] Finally, Petitioners contend that the trial court erred in affirming the Board of Adjustment because its determination that SprintCom's proposed monopine tower qualifies as a concealed WCF as defined by UDO section 16.3 was both arbitrary and capricious, and erroneous as a matter of law. We disagree.

"Questions involving the interpretation of ordinances are questions of law," and in reviewing the trial court's review of the Board of Adjustment's decision, this Court applies a *de novo* standard and may freely substitute its judgment for that of the trial court. *See Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 530–31, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). When reviewing an interpretation of a municipal ordinance, we apply the general rules of statutory construction. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001). In doing so, "[t]he basic rule is to ascertain and effectuate the intention of the municipal legislative body." *Id.* at 303-04, 554 S.E.2d at 638 (citation and internal quotation marks omitted). As with statutory construction, where the language of an ordinance is "plain and unambiguous, the court need look no further." *Id.* (citation omitted). Where the language of an ordinance is ambiguous, our well-founded principles of statutory construction dictate that,

> [f]irst, we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. . . . Second, words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations. . . . Additionally, we find instructive this Court's use of the long-standing rule of statutory construction: *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another.

Fort v. Cnty. of Cumberland, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355, *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012) (citations and internal quotation marks omitted).

In the present case, turning first to the UDO itself for evidence of the legislative municipal body's intent, we note that when Durham's Planning Department implemented its current WCF review and approval standards in 2004, it sought to balance the goals of "[p]rotect[ing] the unique natural beauty and rural character of the City and County while meeting the needs of its citizens to enjoy the benefits of wireless communication services." Durham Unified Dev. Ordinance art. 5, § 3.3N-7. Thus, Section 16.3 of the UDO incentivizes the construction of concealed WCFs, which it defines as

> [a] [WCF], ancillary structure, or WCF equipment compound that is not readily identifiable as such, and is designed to be aesthetically compatible with existing and proposed uses on a site. A concealed facility may have a secondary function including, but not limited to the following: church steeple, windmill, bell tower, clock tower, cupola, light standard, flagpole with or without a flag, or tree. A non-concealed [WCF] is one that is readily identifiable such as a monopole or lattice tower.

Id. at art. 16, § 3. Here, while acknowledging that SprintCom's proposed monopine design is consistent with the examples of concealed WCF designs enumerated in the ordinance's second sentence, Petitioners insist that the ordinance requires a site-specific determination, and that under such an approach, the monopine fails to meet the definition provided by the first sentence in two related ways. Specifically, Petitioners argue that: (1) because it is undeniably larger than any of the trees already standing on the Church property, the proposed monopine tower will be readily identifiable as a WCF, and (2) because the only recognized "use" of the Church property is as a church, the proposed monopine tower is not aesthetically compatible with any existing or proposed uses on the site. While we agree with Petitioners' general point that the UDO does appear to call for a site-specific determination, given its express requirement that a WCF must be aesthetically compatible with existing uses in order to qualify as concealed, we are not persuaded by Petitioners' specific arguments about this WCF at this site.

(1) Readily identifiable

On the one hand, Petitioners contend the record clearly and unequivocally demonstrates that SprintCom's proposed monopine tower will be

readily identifiable because at a height of 120 feet, it will stand twice as tall as the tallest surrounding trees on the Church property, while its base will be more than five times greater in diameter than that of an average tree. However, Petitioners' premise, which treats "readily identifiable" as a term synonymous with "visible," is undermined by the final sentence of the ordinance, which sheds light on what the UDO means by "readily identifiable" through providing two specific examples of non-concealed WCFs. To wit, "a monopole or lattice tower" would be considered "readily identifiable" as a WCF, which is sensible because no steps would be taken to give it a secondary function that could camouflage its function as a WCF. By contrast, SprintCom's proposed tower will utilize a monopine design that has the secondary function of a tree by featuring authentic looking bark and branches and, as noted in Planning Director Medlin's official interpretation, is recommended by the American Planning Association as "nearly indistinguishable from the real thing (apart from being taller than nearby trees)."

Petitioners counter that simply looking like a pine tree is not sufficient because the monopine will stick out like a sore thumb due to its height, and will thus still be readily identifiable as a WCF. Of course, this argument ignores the photographic simulations that SprintCom provided to the trial court demonstrating that from many vantage points the monopine will not be visible while from others it will have the appearance of an unusually tall tree. We also note that this monopine's proposed height is within the maximum height limitation set by the UDO for Rural/Residential zoning districts, *see* Durham Unified Dev. Ordinance art. 5, § 3.3N-13a(1), while the fact that its base will be five times wider than an average tree's is irrelevant, given that the base will be concealed from sight by actual trees.

Further, Petitioners' argument revolves around a more colloquial construction of the term "readily identifiable" than the UDO provides, one that by ignoring the full text of subsection 16.3, begs the question: *readily identifiable to whom, exactly?* There is no evidence in the record to support the inference implicit in Petitioners' argument that a reasonable person's typical reaction to the sight of an unusually tall pine tree is to conclude that he or she has just spotted a WCF. While we recognize that the record does not include Petitioners' full testimony from the Board of Adjustment hearing due to the aforementioned recording malfunction, we are not convinced that Petitioners' own perceptions of SprintCom's proposed monopine tower would be the proper vantage point from which to judge whether or not the tower is readily identifiable as a WCF. If anything, the way Petitioners use the term "readily identifiable" implies a lack of prior knowledge by the viewer, insofar as

it suggests that an object or its function would be obvious or immediately apparent upon first glance, whereas Petitioners themselves already are and likely always will be acutely aware of the fact that SprintCom's proposed monopine tower is not actually a tree. In any event, the UDO's plain language makes clear that the test here is not whether or how quickly a longtime resident or passing motorist would notice this giant fake pine tree's true nature; rather, the test is whether SprintCom's proposed monopine design serves a secondary function that helps camouflage the tower's function as a WCF. Because we conclude that it does, we hold that SprintCom's proposed monopine tower is not readily identifiable as a WCF.

(2) Aesthetic compatibility

Petitioners argue further that SprintCom's proposed monopine tower is not aesthetically compatible with any existing or proposed uses on the Church property. In support of this argument, Petitioners highlight Planning Director Medlin's testimony that the only current "use" of the Church property is as a church, and they also emphasize that trees are not considered "uses" under the UDO. However, this argument depends on the erroneous presumption that SprintCom's proposed monopine tower is readily identifiable as a WCF. Moreover, while Petitioners may be correct that natural trees are not considered "uses" under the UDO, the second sentence of the definition of a concealed WCF provided in section 16.3 explicitly states that "a concealed [WCF] may have a secondary function including, but not limited to . . . [a] tree." Durham Unified Dev. Ordinance art. 16, § 3. When this Court inquired during oral arguments about the Church property's broader surroundings, the parties explained that the property is located in a developing, rural residential neighborhood, surrounded by houses and trees. In light of the evidence in the record that monopine towers generally resemble tall trees, we conclude that SprintCom's proposed monopine tower's secondary function as a tree is indeed aesthetically compatible with the Church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees. In other words, we believe that by focusing so narrowly on "uses," Petitioners' argument misses the proverbial forest for the literal monopine. Accordingly, we hold that the trial court did not err in affirming the Board of Adjustment's determination that SprintCom's proposed monopine tower qualifies as a concealed WCF as defined by UDO section 16.3.

AFFIRMED.

Judges STEELMAN and DAVIS concur.

GLASS v. ZAFTRIN, LLC

[239 N.C. App. 154 (2015)]

PHILLIP A. GLASS, FIDUCIARY
v.
ZAFTRIN, LLC, UPSET BIDDER

No. COA14-907

Filed 3 February 2015

Mortgages and Deeds of Trust—foreclosure—upset bid—bidder defaulting—costs or resale

Where the highest bidder at a foreclosure sale defaulted on its bid, and the sale price at a subsequent sale exceeded the defaulted bid plus the costs of resale, the defaulting bidder was entitled to a refund of its entire deposit. The language of N.C.G.S. § 45-21.30(d) (2013) is clear: a bidder in default is liable only to the extent that the final sale price is less than his bid plus the costs of resale. As the final sale price in this case clearly exceeded the defaulting bid plus the costs of resale, the trial court erred in holding the defaulting bidder liable for the costs of resale.

Appeal by Zaftrin, LLC, upset bidder from judgment entered 6 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 7 January 2015.

No appellee brief filed.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for appellant.

STEELMAN, Judge.

Where the highest bidder at a foreclosure sale defaulted on its bid, and the sale price at a subsequent sale exceeded the defaulted bid, plus the costs of resale, the defaulting bidder was entitled to a refund of its entire deposit.

I. Factual and Procedural Background

On 28 February 2006, James and Robbin Osborne (the Osbornes) procured a loan from New Century Mortgage Corporation. This loan was secured by a deed of trust on real property located in Caldwell County. On 7 March 2012, the note and deed of trust were assigned to Deutche Bank National Trust Company (DB). DB appointed Phillip A. Glass (Glass) as substitute trustee. Upon the Osbornes' default in payments due under the note, DB directed Glass to commence foreclosure proceedings. On

7 May 2013, the Clerk of Court in Caldwell County ordered foreclosure, and a public sale was held on 4 June 2013. At that foreclosure sale, DB was the highest bidder, in the amount of $220,000.00. After the receipt of upset bids, Glass resold the property at a public sale on 13 August 2013. The highest bidder at that sale was Zaftrin, LLC (Zaftrin), in the amount of $315,000.00. Zaftrin paid a deposit of $15,750.00 into the office of the Clerk of Court.

On 11 September 2013, Zaftrin notified Glass that it was unable to proceed with purchase of the property, thus defaulting on its bid. Glass moved the Court for an order to resell the property. On 19 November 2013, DB was the highest bidder, in the amount of $350,000.00.

After the resale was confirmed, Zaftrin sought a refund of its deposit. On 7 January 2014, Glass moved that the Clerk of Court disburse the deposit to Zaftrin, less the costs of resale, $1,469.80, a net disbursement of $14,280.20. The Clerk of Court granted Glass' motion. On 30 January 2014, Zaftrin filed a response to the motion, asserting that N.C. Gen. Stat. § 45-21.30(d) does not provide for the deduction of the costs of resale where the resale price is higher than the defaulting bid. On 5 March 2014, the Clerk of Court ruled that Zaftrin was entitled to a full refund of its deposit.

On 9 April 2014, Glass appealed the Clerk of Court's ruling to the Superior Court of Caldwell County. On 6 June 2014, the trial court ordered the Clerk of Court to disburse $1,469.80, the costs of resale, to Glass, and the remaining balance of $14,280.20 to Zaftrin.

Zaftrin appeals.

II. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

III. Analysis

In its sole argument on appeal, Zaftrin contends that the trial court erred in awarding Glass the costs of resale from its deposit. We agree.

The disposition of a defaulting bidder's deposit is governed by N.C. Gen. Stat. § 45-21.30(d):

> A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable

> *to the extent that the final sale price is less than his bid plus all the costs of the resale.* Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, *if any*, for which the defaulting bidder remains liable under this section.

N.C. Gen. Stat. § 45-21.30(d) (2013) (emphasis added). The language of the statute is clear. A bidder in default is liable only to the extent that the final sale price is less than his bid plus the costs of resale.

In support of its argument, Zaftrin cites to our Supreme Court's decision in *Harris v. American Bank & Trust Co.*, 198 N.C. 605, 152 S.E. 802 (1930). In *Harris*, the plaintiff made the high bid at a foreclosure sale of $6,000.00, and deposited $1,000.00 with the Clerk of Court. Plaintiff subsequently defaulted, and on resale, the property sold for $6,500. Plaintiff brought an action to have his deposit refunded. The trial court ordered the Clerk of Court to refund the deposit. Defendant appealed. The Supreme Court examined the applicable statute,[1] and observed that plaintiff's deposit "was a guarantee that there would be no loss occasioned if he be declared the purchaser at the resale; he was so declared and did not comply, but there was no loss, as the property brought more on resale." *Id.* at 610, 152 S.E. at 804. The Supreme Court held that, due to the fact that the resale price was high enough to exceed both the defaulting bid and the costs of resale, the defendant, "in law or equity, has no claim to the $1,000 [deposit], under the facts and circumstances of this case." *Id.*

In the instant case, the final sale price was $350,000.00. Zaftrin's defaulting bid was $315,000.00, and the costs of resale was $1,469.80. Zaftrin would only be held liable if the sum of these two items, $316,469.80, exceeded the final sale price, $350,000.00. As the final sale price clearly exceeded Zaftrin's defaulting bid plus the costs of resale, the trial court erred in holding Zaftrin liable for the costs of resale. The decision of the trial court is reversed, and this matter is remanded to the trial court for entry of an order directing the Clerk of Superior Court of Caldwell County to return to Zaftrin its entire $15,750.00 deposit.

REVERSED AND REMANDED.

Judges DIETZ and INMAN concur.

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1. We note that *Harris* was decided pursuant to C.S. § 2591, a precursor to N.C. Gen. Stat. § 45-21.30. We hold that the reasoning of *Harris* is applicable to the present case.

IN RE A.B.

[239 N.C. App. 157 (2015)]

IN THE MATTER OF A.B. AND J.B.

No. COA14-541

Filed 3 February 2015

1. Termination of Parental Rights—findings—internally inconsistent

The findings of fact in a termination of parental rights case were internally inconsistent and the case was remanded where the court concluded that "it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children." There were additional concerns because the factor of financial assistance to the potential adoptive parents seemed to outweigh the close emotional bonds between the respondent-mother and children and her efforts to regain custody of the children.

2. Termination of Parental Rights—remand—evidence from subsequent hearing

In a termination of parental rights case remanded for inadequate findings, the trial court could consider the limitation of a subsequent hearing in making its new findings of fact and conclusions of law and could in its discretion consider additional evidence and arguments from the parties. A party cannot seek relief from a non-existent order; DSS's motion for relief was treated according to its substance as a motion to reopen the evidence, instead of a Rule 60 motion.

Appeal by respondent-mother from order entered 27 January 2014 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals on 25 November 2014.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate Attorney Keith S. Smith, for petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant mother.

Parker Poe Adams & Bernstein LLP, by Deborah L. Edney, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from an order entered 27 January 2014 that terminated her parental rights to her minor children A.B. ("Alexis") and J.B. ("Jacob").[1] Because the trial court's order is internally inconsistent and thus unreviewable by this Court, we reverse the order and remand this matter to the trial court for the entry of a new order.

I. Background

The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") initiated the underlying juvenile case by filing a petition on 8 September 2010, alleging the juveniles were neglected and dependent. DSS asserted that respondent had an extensive history of taking Jacob to the emergency room for unnecessary treatment and that she was beginning to show a similar pattern with Alexis. DSS further stated that Alexis had recently been hospitalized because she had consumed some of Jacob's seizure medicine, suggesting that respondent had given the medicine to Alexis. Additionally, DSS reported that respondent was overwhelmed and overly stressed from parenting the juveniles, missed numerous appointments to address Jacob's behavioral issues, was unemployed and struggled financially, and had difficulty following doctors' instructions when providing routine treatments to the children at home. DSS took non-secure custody of the juveniles that same day.

On or about 5 November 2010, DSS entered into a mediated agreement with respondent, establishing a case plan for reunification with the juveniles. Respondent's case plan required her to: (1) continue participating in an anger management program and demonstrate the skills learned; (2) complete parenting classes and demonstrate the skills learned; (3) maintain legal and stable employment providing sufficient income to meet the juveniles' basic needs; (4) maintain an appropriate, safe, and stable home for herself and the juveniles; (5) maintain weekly contact with her social worker; (6) cooperate with the guardian ad litem; and (7) attend the juveniles' medical and therapy appointments when able to do so. DSS and respondent also agreed to supervised visitation with the juveniles three times per week and a tentative holiday visitation plan.

After hearings on or about 7 January and 17 February 2011, the trial court entered an adjudication and disposition order holding that Alexis and Jacob were neglected juveniles. The court adopted concurrent goals of reunification and guardianship and set forth a case plan for

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

respondent. The trial court adopted the mediated case plan developed by the parties and specifically directed respondent to undergo a complete psychological evaluation, obtain a domestic violence evaluation, and participate in counseling services or therapy.

DSS worked towards reunification of the juveniles with respondent, but in review and permanency planning orders entered 13 May and 31 August 2011, the trial court found respondent needed to further address her mental health and anger management problems. In a permanency planning order entered 19 January 2012, the court found that respondent had made some positive changes in that she was managing her anger, was "emotionally balanced" around the juveniles, and had realized that she needed "batterer's intervention treatment." But the court found that respondent still needed to complete her parenting capacity evaluation, show she could manage her mental health problems, and complete her domestic violence program. The court further found that there were no likely prospects for guardianship or permanent custody of the juveniles and set the permanent plan for the juveniles as reunification or adoption.

On 25 April 2012, the trial court entered a permanency planning order that ceased further efforts towards reunification of the juveniles with respondent, concluding respondent had failed to alleviate the conditions that caused the juveniles to be placed in the care and custody of DSS. The court directed that a Child Family Team ("CFT") meeting be held within thirty days of the order to develop recommendations for a permanent placement for the juveniles, and that DSS refrain from moving to terminate respondent's parental rights until after the court received the recommendations from the CFT. The trial court entered an order on 27 June 2012, directing DSS to proceed with an action terminating respondent's parental rights to the juveniles.

DSS filed petitions to terminate respondent's parental rights to the juveniles on 25 July 2012. DSS alleged grounds existed to terminate respondent's parental rights based on neglect, abandonment, failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and willful failure to pay a reasonable portion of the cost of care for the juveniles while they were placed outside of her home. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (7) (2013). The trial court heard the petitions on 25 March and 11 April 2013. At the conclusion of the hearing, the court found one ground to terminate respondent's parental rights: failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody. However, the court concluded that terminating

respondent's parental rights was not in the best interests of the juveniles and directed respondent's counsel to prepare a proposed order for the court and circulate the order to all parties.

On 23 September 2013, before the trial court had entered an order on the termination petitions, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60. *See id.* § 1A-1, Rule 60 (2013). DSS asked that the trial court reconsider its best interests conclusion based on allegations that respondent had misled the court by providing inaccurate information and testimony at the termination hearing, and that she had failed to comply with her case plan since the termination hearing. The trial court allowed the motion and held an additional hearing on 1 October and 4 November 2013 in which it allowed DSS to present additional dispositional evidence as to the best interests of the juveniles.

By order entered 27 January 2014, the trial court terminated respondent's parental rights to the juveniles. The Court found that respondent had failed to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and concluded that it was in the juveniles' best interests to terminate her parental rights. Respondent filed timely notice of appeal.

II. Termination Order

A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B-1109(e) (2013). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (quotation marks omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, *X.Z.*,

194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

"If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a)." *D.H.*, ___ N.C. App. at ___, 753 S.E.2d at 734. The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

[1] Respondent argues that the trial court erred in concluding that she had not made reasonable progress towards correcting the conditions that led to the removal of the juveniles from her care. Respondent contends that the trial court's findings of fact are contradictory and do not support its conclusions of law. Respondent further argues that the trial court's conclusion of law that it is in the juveniles' best interests to terminate respondent's parental rights is internally contradictory. We agree and remand this matter to the trial court for the entry of a new order.

The trial court concluded that respondent willfully left the juveniles in foster care for more than twelve months without showing the court that she made reasonable progress toward correcting the conditions that led to the removal of the juveniles from her home. *See* N.C. Gen. Stat. § 7B-1111(a)(2). In working toward reunification with the juveniles, respondent was directed to: (1) complete a parenting education program and demonstrate the skills learned; (2) complete a domestic violence counseling and batterer's intervention program; (3) obtain a psychological evaluation and fully engage in therapy; (4) maintain appropriate visitations with the juveniles; (5) maintain appropriate and safe housing; (6) maintain employment; and (7) maintain contact with DSS. The court's order is silent regarding respondent's history of contact with DSS during the case and indicates that the court is satisfied with respondent's progress in the area of parenting education, but the court's findings on respondent's progress in the areas of visitation and employment are contradictory. The court identified mental health and domestic violence as its primary concerns regarding respondent's progress towards correcting the conditions that led to the removal of the juveniles from her care,

but it made contradictory findings regarding her progress in those areas as well.

The court made the following findings that support its conclusion that respondent failed to make reasonable progress toward addressing her mental health problems:

> 20. The respondent mother has engaged in therapy; however, the respondent mother's participation in therapy has not been consistent.
>
> . . . .
>
> 26. . . . [That during therapy that started in October 2010, respondent] was not completely forthcoming about the circumstances that brought the children into custody or the issues of violence in her relationships with [Mr. P.] or [Mr. C.] and that [respondent's therapist, Ms. Linda Avery,] concluded that [respondent] had not made discernible progress in achieving goals that they had set for treatment.
>
> 27. . . . That the [respondent] mother voluntarily withdrew herself from services with Ms. Linda Avery contrary to clinical recommendations.

However, the court also made findings of fact contradicting those above:

> 26. That [respondent] has cooperated and began outpatient psycho-therapy with Linda Avery on October 21, 2010; acknowledging that she needed to work on anger issues, understanding her diagnosis of mood disorder and that she wanted to regain custody of her children. . . .
>
> 27. That from the time that [respondent] began seeking mental health services, even with Ms. Avery, she acknowledged that her anger was having a negative impact on her relationships, her ability to parent her children and her life. That she could recognize that she had difficult relationships and that she externalized the blame for the difficulties in those relationships, but had expressed a desire to gain control of her emotions so that she could better parent her children. . . .
>
> 28. That the mother did appropriately seek out outpatient therapy with James McQuiston in May[] 2012 and has

consistently participated in sessions with him since May 16, [2012]. Mr. McQuiston and [respondent] developed goals of reducing destructive use of anger by building skills to communicate and engaging in more constructive relationships. Mr. McQuiston testified that [respondent] has attended ten (10) sessions and that she has participated consistently with his recommendations for services and that he has observed her make progress in improving trust and recognizing the need to change. She has developed a practice of using specific tools to change her pattern of destructive decisions and has demonstrated the ability to recognize problems[,] choosing to discuss and confront them, examine them and engage in constructive processes to resolve the conflict.

29. That [respondent] has since May 2012 cooperated with medication management for her mental health.

30. That [respondent] did voluntarily participate in a psychological evaluation with Dr. Lisa Bridgewater. That Dr. Bridgewater reviewed relevant history from records of the Department of Social Services, Carolina Medical Center for both [Jacob] and [Alexis], Youth and Family Services, Family Legacy, Carolina Parenting Solutions, FIRST screening, BHC-CMC Randolph, as well as interviewed collateral contacts GAL, Amy Cole and GAL attorney, Melissa Livesay.

31. That Dr. Bridgewater then conducted a clinical interview with [respondent] and performed assessment tests including the Minnesota Multiphasic Personality inventory, Millon Clinical Multiaxial Inventory and the Child Abuse Potential Inventory. Lastly Dr. Bridgewater interviewed and observed [respondent] interacting with her children.

32. That ultimately, Dr. Bridgewater concluded that [respondent's] tests did not reveal a significant pathology and her responses indicated social avoidance as well as [a] good deal of self-doubt. That [respondent's] responses indicate chronic depression as well as periods of anxiety and reached a diagnostic impression that [respondent] suffered from a mood disorder and a tendency to be aggressive and overly reactive when she feels threatened.

> Dr. Bridgewater attributed these tendencies to her childhood history including coercive abuse and inconsistent parenting and concluded that [respondent's] symptoms could be alleviated by consistent engagement of ongoing therapy to address issues from her childhood which continue to impact her mood and ability to cope with relationships with others.
>
> 33. That Dr. Bridgewater also concluded that it is possible that the repeated hospital visits that [respondent] made for [Jacob] may have presented due to her becoming overwhelmed and that under stress she may have panicked over [Jacob's] symptoms or exaggerated them in an attempt to obtain help and respite.
>
> 34. That [respondent] during the termination [of] parental rights proceedings by her testimony had demonstrated thoughtful insight into her mental health and recognizes the self-defeating cycles her aggressive coping styles have created in her life and accepts responsibility for her failure to provide a safe and nurturing environment for [Jacob] and [Alexis] in the Summer and Fall of 2010.
>
> . . . .
>
> 42. That [respondent] has[,] for a substantial period of time and [at] least since the filing of the termination of parental rights petition[,] been able to manage her medical condition with the assistance of her physicians to a degree that she has been able to maintain employment, academic study and participate in therapeutic services with Mr. James McQuiston.

Similarly, the court made the following findings regarding respondent's lack of progress in addressing her domestic violence issues:

> 21. The respondent mother has been enrolled in a domestic violence batterer's program on two occasions since the Court ordered her engagement and compliance. The respondent mother has not completed the domestic violence batterer's program.
>
> . . . .
>
> 36. That the mother began [New Options for Violent Actions ("NOVA")] treatment on three (3) separate

> occasions prior to November 2012 and that she was unsuccessfully discharged and terminated in January 2012, May 2012 and September 2012 due to excessive absences.

But again, the court made substantial findings contradictory to its ultimate conclusion:

> 25. That the mother . . . did accept a referral to anger management, attended group sessions and successfully completed the program.
>
> . . . .
>
> 35. Initially, [respondent] was not forthcoming about issues of Domestic Violence. However, she ultimately acknowledged instances of domestic violence in 2010 with [Mr. P.] and instances in 2010, July 2011, and August with [Mr. C]. After [respondent] had been properly assessed and screened for the issues of domestic violence, she was found to be a predominant aggressor who was not appropriate for victim services, but could benefit from [batterer's] intervention treatment program and was referred to NOVA, a state certified [batterer's] intervention program in Mecklenburg County.
>
> . . . .
>
> 37. Mr. Tim Bradley of NOVA testified that accountability for the acts of domestic violence is critical to change the pattern of violent behavior and that [respondent] has demonstrated that she takes responsibility for her role in the violence in her relationship with [Mr. C.] and other people with whom she has had violent encounters.
>
> 38. That [respondent] understands the signs of an abusive or coercive relationship. That she demonstrates thoughtful insight into the impact of her children and understands that abusive and violent relationships impact children regardless of their direct proximity [to] the conflict.
>
> . . . .
>
> 41. That [respondent] has suffered from medical issues including Lupus, broken wrists and blood clots over the period of time that the children have been in custody as well as a pregnancy with [another child,] conditions

> [which] have at times interfered with her progress and services coordinated for the purposes of assisting her in alleviating the conditions that [led to] the children coming into Department of Social Services' custody.
>
> . . . .
>
> 47. That [respondent] has demonstrated for well over a year the ability to manage her mood and communicates to resolve conflict in a peaceful constructive manner and has made significant improvement in her parenting style.
>
> . . . .
>
> 51. That Tim Bradley of NOVA is not providing direct counseling to [respondent] or [Mr. C.] but has had interactions with both of them in his capacity as case manager. In Mr. Bradley's opinion [respondent] has not developed enough relationship skills to be in an intimate partner relationship with [Mr. C]. That she has insights about it on some occasions and needs to develop a better ability to recognize [it] in healthy conversations early on to avoid later conflict or to remove herself to prevent altercations. That the observations of Mr. Bradley are not inconsistent with the Court['s] findings that [respondent] has exercised caution in intimacy; instead obtaining a non-intimate relationship[,] thereby limiting the risk of violence between herself and [Mr. C.,] has substantially ameliorated this risk of domestic violence as evidenced by the fact that there is no evidence of aggressive or violent encounters between them since 2011.

It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance. But here, the trial court's ultimate conclusion of law concerning the best interests of the juveniles is also internally inconsistent. The court concluded that "it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children." Certainly, the trial court did not terminate respondent's parental rights under a belief that doing so would harm the juveniles and that emotional harm would be in their best interests.

Petitioner seeks to explain this illogical conclusion of law in its brief as follows:

> The petitioner drafted in error Matter of Law #3 "That it is in the best interest of the juveniles to have their mother's parental rights terminated *in that severing the legal relationship would be emotionally unhealthy and damaging to the children.*" . . . The trial court ordered the petitioner to draft the termination order and amend the prior order prepared by [respondent's] trial counsel. The petitioner failed to edit the Matter of Law #3 to read as ordered by the trial court.

While we appreciate the candor of petitioner's counsel in attempting to take responsibility for this clearly improper conclusion of law, this argument cannot remedy the problem. First, the order is the responsibility of the trial court, no matter who physically prepares the draft of the order. *See In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) (holding that, in an abuse, neglect, or dependency proceeding, a trial court has a legal duty to enter a timely written order); N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (requiring a judge's signature on judgments). Second, counsel's representations regarding the preparation of the order are not matters of record, because a brief is not a source of evidence which this Court can consider. *See Builders Mut. v. Meeting Street Builders*, ___ N.C. App. ___, ___, 736 S.E.2d 197, 200 (2012) ("[M]atters discussed in a brief but not found in the record will not be considered by this Court."). We also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation. Considering the lack of adequate staff to address the increasing number of cases heard by our District Courts, some mistakes are inevitable.

If the only problem in the order was one poorly worded conclusion of law, we might be able to determine that this conclusion of law contains a clerical error that could be remedied by a direction to correct it on remand. But the internal inconsistencies of the order go far beyond one sentence. As noted above, there are contradictory findings as to respondent's mental health care and her domestic violence issues. In contradiction to its ultimate conclusions regarding grounds for termination and the juveniles' best interests, the court found:

> 44. . . . [T]he Court has not been presented with sufficient evidence to find the substantial probability of the repetition of neglect to reach that ground [i.e., neglect]. There was no evidence presented during the termination of parental rights proceedings that there is a substantial likelihood of repetition of neglect.
>
> . . . .
>
> 48. . . . [T]hat the safety risks and the conditions that led to the children's removal have been ameliorated to the point that the benefits of allowing an ongoing legal relationship with [respondent] outweigh the risks to the children's safety. For this reason, the Court does not find it appropriate to sever their legal relationships with her.

Since neglect was the only ground for adjudication of the children,[2] and the respondent's problems that caused her to neglect the children were the very conditions that led to the children's removal from respondent, it is difficult to understand why the trial court would find that there was "no evidence" of a substantial likelihood of repetition of neglect while also finding that respondent had not made progress in eliminating the conditions that led to the removal of the children.

Another troubling aspect of the order is the extent of its apparent reliance upon the financial benefits conferred upon the Bryants, the potential adoptive parents, by adoption instead of guardianship. The trial court found as follows:

> 82. [I]f the Bryant[s] were appointed as guardians or court-appointed custodians of the juveniles, they would not be eligible for any kind of support or assistance except for anything [for which] they would qualify based on income. They would possibly be eligible for TANF benefits and they might be able to seek child support from the respondent-mother and respondent fathers.
>
> . . . .
>
> 84. The vendor payments of $2400 per year along with the adoption stipend of $400 to $600 per month per child would provide substantial financial assistance that would

2. In the termination order, the trial court found that, on 17 February 2011, the children were adjudicated neglected and dependent. But, on 17 February 2011, the trial court found only neglect.

> ensure and provide additional stability for the home of the juveniles and the Bryant[s]. Adoption would support the permanent arrangement with the Bryant[s].

N.C. Gen. Stat. § 7B-1110 sets forth the factors that the trial court should consider in determining if termination is in the best interest of the children:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2013).

In its findings regarding best interests, the main addition to the evidence presented at the 1 October and 4 November 2013 hearing, which was not presented at the first hearing, was the information regarding the financial assistance available to the Bryants if they adopted the children. In fact, the trial court found that

> *[P]reviously there was no evidence concerning the availability of financial assistance* for the Bryant[s] or the extent that such assistance would ensure safe, stable and permanence [(sic)] for [Jacob] and [Alexis] in their care. The department has provided evidence of the availability and the extent that such assistance would assist the Bryant[s].

(Emphasis added.)

Thus, perhaps because of the inconsistencies in the other findings as addressed above, this finding regarding the availability of additional financial assistance due to adoption *seems* to be the factor that tipped

the "best interest" scales in favor of termination of parental rights, despite its prior conclusion that termination would *not* be in the best interests of the children.[3] We have been unable to find any case where the financial benefits conferred upon the potential adoptive parents based solely upon adoption, as opposed to an award of guardianship or custody, constituted a "relevant consideration" in determining the best interests of the children under N.C. Gen. Stat. § 7B-1110(a)(6). We note that N.C. Gen. Stat. § 7B-1111(a)(2), which is the ground upon which the trial court terminated respondent's rights, does not permit the trial court to terminate the parental rights of a parent "for the sole reason that the parents are unable to care for the juvenile on account of their poverty." *Id.* § 7B-1111(a)(2). It is true that the trial court did not terminate based upon respondent's poverty, but instead it terminated at least in part based upon the financial benefits that would accrue to the potential adoptive parents arising from termination and adoption. We do not mean to imply that the financial circumstances of the potential adoptive parents are irrelevant, since subsection (2) directs the trial court to consider the "likelihood of adoption" and the financial capability of the potential adoptive parents may be a factor in making this determination. We understand that ultimately the financial assistance to the potential adoptive parents may help them complete the adoption and will benefit the children. But in this particular order, where the factor of financial assistance to the potential adoptive parents seems to outweigh the close emotional bonds between the respondent-mother and children and her efforts, although imperfect, to regain custody of the children, these findings raise additional concerns about the internal consistency of the order.

III. Rule 60 Motion

[2] On 23 September 2013, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60, which is entitled "Relief from judgment or order." *See id.* § 1A-1, Rule 60. Although respondent did not appeal from the trial court's order allowing DSS's Rule 60 motion, she argues that some of the trial court's findings in the order on appeal were based upon evidence taken at the hearing which was held as a result of the order allowing this motion and that the evidence and findings from this hearing went beyond the scope of the trial court's order.

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3. We realize that may not have been the trial court's intent, considering the inconsistencies, but we are addressing the order as it now stands.

We first note that the order was not properly based upon Rule 60. On 23 September 2013, the trial court had not yet entered a judgment or order as it had not yet reduced its findings and conclusions to writing. *See id.* § 1A-1, Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Because a party cannot seek relief from a non-existent order, we treat DSS's motion according to its substance as a motion to reopen the evidence, instead of a Rule 60 motion. *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).

It is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested. *State v. Shutt*, 279 N.C. 689, 695, 185 S.E.2d 206, 210 (1971), *cert. denied*, 406 U.S. 928, 32 L. Ed. 2d 130 (1972). Respondent did not object to DSS's motion and has not argued on appeal that the order should not have been entered. The trial court allowed DSS's motion to reopen the evidence but expressly limited the 1 October and 4 November 2013 hearing to dispositional evidence regarding the best interests of the juveniles. In addition, in response to an objection to hearsay during the hearing, the trial court noted that it "only granted the motion to reopen evidence on best interest, not grounds, and so all of this evidence [was] only being considered for that portion of the proceedings[.]"

Respondent argues that, at the 1 October and 4 November 2013 hearing, the trial court also considered adjudicatory evidence and made additional findings as to respondent's compliance with her case plan, which was beyond the scope of the trial court's order allowing additional evidence as to best interests. It does appear that the evidence at this hearing went beyond the scope of the trial court's order. But respondent did not object to the presentation of any specific evidence as being beyond the scope of the order, so she has waived any arguments on appeal in this regard. *See* N.C.R. App. P. 10(a)(1). Because of the internal inconsistencies in the order on appeal, we cannot discern which portions of the evidence the trial court relied upon in making its findings and conclusions. Since we must reverse and remand to the trial court for entry of a new order addressing both adjudication and disposition, the trial court should consider the limitation of the 1 October and 4 November hearing in making its new findings of fact and conclusions of law and may in its discretion consider additional evidence and arguments from the parties. *See In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3, *disc. rev. denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

IV. Conclusion

The contradictory nature of the trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law that (1) respondent failed to make reasonable progress toward correcting the conditions that led to the removal of the juveniles from her care and custody, and (2) terminating respondent's parental rights is in the juveniles' best interests. Accordingly, we reverse the termination order and remand to the trial court for entry of a new order clarifying its findings of fact and conclusions of law.

Because we must reverse and remand this matter to the trial court, we do not address respondent's remaining arguments on appeal. The trial court may receive additional evidence on remand, within its sound discretion. *Id.*, 652 S.E.2d at 3.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

IN THE MATTER OF I.D.

No. COA14-759

Filed 3 February 2015

Child Abuse, Dependency, and Neglect—adjudication on the pleadings—inappropriate

The Henderson County District Court erred by entering an adjudication order finding a child to be an abused and neglected juvenile without taking evidence. The court's adjudication was based solely upon the Department of Social Services' verified petition. Respondent's failure to object is immaterial because the trial court's adjudication order amounts to a judgment on the pleadings, which is inappropriate in a proceeding to determine whether a juvenile is abused, neglected, or dependent.

Appeal by respondent-mother from orders entered on 5 December 2013 and on or about 1 May 2014 by Judges Athena Brooks and Ward Scott in Henderson and Buncombe County District Courts. Heard in the Court of Appeals on 9 December 2014.

Buncombe County Department of Social Services by Matthew J. Putnam, for petitioner-appellee.

Appellate Defender Staples Hughes by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant mother.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from adjudication and disposition orders in which the trial court concluded that her minor child, I.D. ("Irene"), is an abused and neglected juvenile.[1] Because the trial court failed to conduct a proper adjudication hearing to determine the allegations in the juvenile petition, we reverse and remand.

I. Background

On 16 September 2013, the Henderson County Department of Social Services ("HCDSS") filed a petition alleging that Irene was an abused and neglected juvenile. Irene was placed with her father, who was separated from respondent. After a brief hearing on 7 November 2013, the Henderson County District Court entered an adjudication order on 5 December 2013, concluding that Irene was an abused and neglected juvenile. The court then transferred this case to Buncombe County, in which both parents and the juvenile resided, and ordered that the Buncombe County Department of Social Services ("BCDSS") replace HCDSS as the petitioner in this case.

After a hearing on 28 January 2014, the Buncombe County District Court entered a disposition order on or about 1 May 2014. The court adopted the recommendations of BCDSS and ordered that respondent-mother complete a parenting program, undergo a parenting capacity evaluation, and complete a comprehensive clinical assessment focusing on mental health. The court also ordered that the "the respondent mother shall have no contact with [Irene], but the respondent mother shall contact [Irene's] therapist to determine when visitation would be appropriate." Respondent filed a timely notice of appeal.

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

II. Adjudication Order

Respondent contends that the Henderson County District Court erred in entering its adjudication order solely upon the allegations in the petition and without taking any evidence. We agree.

Section 7B-802 of the North Carolina General Statutes provides: "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802 (2013). This Court has held that "[a]s the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002) (quoting *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 396 (2000)). Accordingly, "[j]ust as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect." *Thrift*, 137 N.C. App. at 563, 528 S.E.2d at 396.

Here, HCDSS put on no evidence at the adjudicatory hearing; instead, after informing the court that the parents did not consent to any findings of fact, HCDSS merely asked that the court accept its verified petition as its evidence. The court then adjudicated Irene to be an abused and neglected juvenile, basing its ruling solely upon HCDSS's verified petition.

Irene's guardian ad litem contends that respondent invited this error, and BCDSS asserts that respondent stipulated that the petition's allegations were true. But respondent neither invited this error nor stipulated that the petition's allegations were true; rather, respondent failed to object to the trial court's consideration of the verified petition as evidence. Respondent's failure to object is immaterial, because the trial court's adjudication order amounts to a judgment on the pleadings, which is inappropriate in a proceeding to determine whether a juvenile is abused, neglected, or dependent. *See id.*, 528 S.E.2d at 396.

III. Conclusion

For the foregoing reasons, we reverse the court's adjudication order and remand this matter for further proceedings. Because we reverse the court's adjudication order, we must also reverse the disposition order. *See In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011).

In light of our holding, we need not address the additional arguments raised by respondent on appeal. *See id.*, 718 S.E.2d at 713.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

GILBERT E. SILVA, EMPLOYEE-PLAINTIFF
v.
LOWES HOME IMPROVEMENT, EMPLOYER, SELF-INSURED, SEDGWICK CLAIMS MANAGEMENT SERVICES, SERVICER, DEFENDANT

No. COA14-662

Filed 3 February 2015

1. Workers' Compensation—penalty for late payment—expiration of time for appeal

The Industrial Commission did not err in a workers' compensation action by ruling that plaintiff was not entitled to a penalty for untimely payment of disability benefits. There is a statutory fee for late payment, with a provision for appeal, but appeal is not defined. Under N.C.G.S. § 97-18(e), "appeal" includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court. The Commission properly determined here that the time for appeal expired fifteen days after the mandate issued and the time to file for a petition for discretionary review ended.

2. Workers' Compensation—education expenses—independent action by plaintiff

The Industrial Commission did not abuse its discretion in a Worker's Compensation case by denying reimbursement of plaintiff's educational expenses where plaintiff admitted that he was not referred but was just trying to do something about his situation and there was no additional evidence regarding the reasonableness of these expenses.

3. Workers' Compensation—accounting fees—not part of life plan

The Industrial Commission did not err by denying reimbursement of plaintiff's accounting fees where plaintiff testified that he

asked his accountant to prepare a compilation of amounts allegedly owed to him in connection with his workers' compensation claim, including medical expenses, travel expenditures, and temporary total disability payments. There was no evidence that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense was medically necessary because of plaintiff's specific injuries.

4. Workers' Compensation—attorney fees—reasonable grounds to defend

The Industrial Commission did not err by failing to make an award of attorney's fee pursuant to N.C.G.S. § 97-88.1 where it appeared that defendant had reasonable grounds to defend plaintiff's claims.

Appeal by Plaintiff from opinion and award entered 3 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2014.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for Plaintiff-appellant.

Moore & Van Allen PLLC, by Anthony T. Lathrop and E. Taylor Stukes, for Defendant-appellee.

DILLON, Judge.

Gilbert E. Silva ("Plaintiff") appeals from the North Carolina Industrial Commission's ("the Commission") opinion and award. For the following reasons, we affirm.

I. Background

This present appeal represents the third appeal to this Court on this matter.

On 26 May 2001, Plaintiff sustained a compensable work injury while employed with Lowes Home Improvement ("Defendant"). Plaintiff returned to work following his injury. In 2002, however, he was terminated from his employment, and Defendant ceased paying him workers' compensation benefits.

Thereafter, Plaintiff filed a Form 33 requesting a hearing to reinstate his workers' compensation benefits; however, Defendant denied liability

on the basis that Plaintiff's employment was terminated for reasons unrelated to his work injury.

On 28 September 2004, the Commission ordered Defendant to pay ongoing disability compensation at the rate of $459.14 per week from 16 April 2002 to the present and all medical expenses related to his compensable injury. Following appeal by Defendant, this Court remanded to the Commission for further findings as to Plaintiff's continued disability. *See Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 625 S.E.2d 613 (2006).

On remand, the Commission again ordered Defendant to pay ongoing disability compensation at the rate of $459.14 per week from 16 April 2002 to the present, all medical expenses related to his compensable injury, and attorney's fees. Defendant again appealed, and this Court affirmed the Commission's award. *See Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009).

On 7 July 2009, Defendant paid Plaintiff a lump sum payment in the amount of $221,158.84 for the temporary total disability benefits that had accrued since 16 April 2002; and since 7 July 2009, Defendant has made payments to Plaintiff in the amount of $459.14 per week to the present.

On 6 July 2012, Plaintiff filed a motion for additional relief, contending, *inter alia*, that he was entitled to (1) a 10% penalty for Defendant's late payment of the lump sum amount following the second appeal to this Court; (2) reimbursement for certain other expenses; and (3) recovery of attorney's fees. Following a hearing on the matter, a deputy commissioner filed his opinion and award, denying Plaintiff's motion. On 3 March 2014, the Commission affirmed the deputy commissioner's opinion and award with minor modifications. Plaintiff filed timely notice of appeal from the Commission's opinion and award.

II. Analysis

On appeal, Plaintiff contends that the Commission erred (1) in concluding that he was not entitled to a 10% penalty due to Defendant's untimely payment of disability benefits following the second appeal to this Court; (2) in not awarding reimbursement for certain expenses; and (3) in not awarding attorney's fees to Plaintiff. We address each argument below.

A. 10% Late Penalty

[1] A 10% penalty is imposed under N.C. Gen. Stat. § 97-18(e) (2013) if compensation is not paid within 14 days of it becoming due. Specifically, under G.S. 97-18(e), where an appeal has been taken, compensation

"shall become due 10 days from the day following expiration of **the time for appeal** from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. . . ." *Id.* (emphasis added). Further, G.S. 97-18(g) provides, in pertinent part, that if an installment is "not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof[.]" *Id.*

Here, the mandate from this Court's opinion from the second appeal awarding Plaintiff benefits issued on 8 June 2009. Defendant paid the benefits on 7 July 2009. Plaintiff argues that the benefits were due on 18 June 2009, ten days after this Court's mandate; that Defendant was required to pay the benefits by 2 July 2009, within 14 days of when the payment was due, to avoid the 10% late penalty; and that since Defendant did not pay the benefits until 7 July 2009, Plaintiff was entitled to the 10% penalty.

Defendant argues that "the time for appeal" under G.S. 97-18 did not expire until the time to petition the Supreme Court for discretionary review of this Court's opinion had expired, which would have been 23 June 2009, fifteen days after the mandate pursuant to N.C.R. App. P. 15(b).

Questions of statutory interpretation are questions of law and are reviewed *de novo* by an appellate court. *Applewood Props., LLC v. New South Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013). "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." *Id.* (citation omitted).

In interpreting G.S. 97-18(e), this Court has stated that "[i]t follows that when an employer has been ordered to pay compensation pursuant to an award, but maintains an appeal, payment will not become due until the party waives the right to appeal or all appeals have been exhausted." *Norman v. Food Lion, LLC*, 213 N.C. App. 587, 591, 713 S.E.2d 507, 510 (2011). The question before us is whether the "appeal[,]" as used in G.S. 97-18, includes only an appeal of right or whether it also includes petitions for discretionary review. We note that the Workers' Compensation Act does not define "appeal[.]"

Black's Law Dictionary supports the broader interpretation. Specifically, this source includes in the definition of "appeal" two different subcategories, "appeal by application[,]" which is "[a]n appeal for which permission must first be obtained from the reviewing court[,]" and "appeal by right[,]" which is "[a]n appeal to a higher court from

which permission need not be first obtained." Black's Law Dictionary, 94 (7th ed. 1999).

Our relevant statutes support the proposition that an "appeal by application" such as a petition for discretionary review would be considered an appeal pursuant to G.S. 97-18(e).

Turning to our statutes, N.C. Gen. Stat. § 7A-31 (2013) provides for discretionary review from the Industrial Commission and states in subsections (b) and (c) that this review is an "appeal[.]" Therefore, we hold that "appeal" under G.S. 97-18(e) includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court.

As applied to the present case, the mandate for *Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009) was issued on 8 June 2009, pursuant to N.C.R. App. P. 32(b). The Commission properly determined that the time for appeal expired 23 June 2009, fifteen days after the mandate issued and the time to file for a petition for discretionary review ended, pursuant to N.C. Gen. Stat. § 7A-31 and N.C.R. App. P. 15; the first installment was due 3 July 2009, 10 days following the expiration of the time for appeal, pursuant to G.S. 97-18(e); to avoid the penalty, payment had to be made by 17 July 2009, fourteen days after payment became due, pursuant to G.S. 97-18(g); and Defendant avoided the penalty by making payment on 7 July 2009. As Defendant's payment was not untimely, the Commission did not err in failing to provide a 10% late penalty pursuant to G.S. 97-18(g). Plaintiff's argument is overruled.

B. Compensation for expenses

Plaintiff next contends that the trial court erred in not compensating him for educational expenses and accountant's fees. "[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183, 639 S.E.2d 429, 432 (2007) (citation, brackets, ellipsis, and quotation marks omitted). Unchallenged findings of fact, however, "are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

1. Educational Expenses

[2] Plaintiff argues that the Commission erred in not reimbursing him for educational expenses. Defendant responds that Plaintiff failed to

carry his burden by producing sufficient evidence to show that his educational expenses were incurred to improve his chances of employment and there was no evidence that these educational expenses were recommended by a rehabilitation or medical professional as part of an individualized rehabilitation plan.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation to workers "who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). Additionally, "the Industrial Commission may order necessary treatment." N.C. Gen. Stat. § 97-25 (c).

The Worker's Compensation Act's definition of "medical compensation" includes "vocational rehabilitation . . . and other treatment . . . 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 . . . ." N.C. Gen. Stat. § 97-2(19) (emphasis added). "In construing N.C.G.S. §§ 97-25 and 97-2(19), it appears that the Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability." *Foster v. U.S. Airways Inc.*, 149 N.C. App. 913, 923, 563 S.E.2d 235, 242, *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

Here, the trial court found that Plaintiff was seeking reimbursement for $513.31 in educational expenses from classes taken at Vance-Granville Community College and for a North Carolina Process Tech Certification Fee. However, it found that Plaintiff took these classes "in an effort to regain some kind of employment that [he] could accomplish with his injuries[,]" and "admitted that he was not referred but 'just was trying to do something about his situation.' " No additional evidence, including testimony from any rehabilitation professional or medical provider was submitted regarding the reasonableness of these expenses nor of the expenses for the North Carolina Process Tech Fee. For instance, there are not findings or evidence in the record showing that any medical or rehabilitative professional recommended Plaintiff's educational pursuits as part of a rehabilitation plan or that those educational pursuits were reasonably necessary to effect a cure, give relief, or will lessen a claimant's period of disability. Accordingly, we conclude that the Commission did not abuse its discretion in denying reimbursement of Plaintiff's educational expenses.

2. Accountant's fees

[3] Plaintiff argues that the Commission erred in denying reimbursement of his accounting fees because our Courts have recognized a

broad definition of the term "medical compensation" in N.C. Gen. Stat. §§ 97-2(19) and 97-25. Though accounting fees are not expressly included in the definition of "medical compensation" in N.C. Gen. Stat. § 97-2(19), Plaintiff contends that such fees are analogous to a "life care plan" in which calculations of future expenditures are made and were found to be compensable in *Timmons, v. North Carolina Depart. Of Transp.*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999) and *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 495, 665 S.E.2d 781, 786-87 (2008).

In *Timmons*, the Court concluded that there was sufficient evidence presented "to support a finding by the Commission that preparation of a life care plan was a rehabilitative service necessary to give relief to the paraplegic claimant within the meaning of N.C.G.S. § 97-25." 351 N.C. at 182, 522 S.E.2d at 65. This evidence included testimony from a rehabilitation specialist that "strongly recommended the development of a life care plan to evaluate plaintiff's present and future needs" as her "spinal cord injuries require[d] constant monitoring of bowel/bladder, skin, orthopedic issues, neurological issues, and respiratory issues, as well as physical therapy and occupational therapy" but she had not been consistently receiving the care that she needed on a regular basis. *Id.*

In *Scarboro*, a life care plan was prepared for the plaintiff by a nurse and certified life care planner which recommended that he be provided with lawn care services because of his disability and his neurologist agreed that these recommendations were reasonably and medically necessary. 148 N.C. App. at 489-90, 665 S.E.2d at 783. The Commission "denied plaintiff compensation for lawn care services and ordered defendants to reimburse plaintiff for the costs associated with preparing his life care plan[,]" concluding that even though "[e]xtraordinary and ususual expenses" are compensable as "other treatment" in G.S. 97-25, lawn care expenses recommended by the life care plan are ordinary expenses of life and not "[e]xtraordinary and ususual expenses" incurred as a result of his work-related injury. *Id.* at 490-91, 665 S.E.2d at 784. We affirmed, holding that evidence presented by the defendant supported the conclusion that lawn care expenses were ordinary expenses. *Id.* at 492-94, 665 S.E.2d at 784-85. This conclusion also supported the Commission's other conclusion that lawn care expenses did not rise to the level of being "other treatment" in G.S. 97-25, stating that "just because the life care plan was determined to be a reasonable medical expense, defendants are not necessarily required to pay for each item mentioned in the plan." *Id.* at 493-94, 665 S.E.2d at 785-86.

In the present case, the Commission made the following finding regarding the accounting fees:

> 9. With respect to the $2,860.00 sought by Plaintiff for the services of Mitchell and Nemitz, CPA, Plaintiff testified that he asked his accountant to prepare a compilation of amounts allegedly owed to him in connection with his workers' compensation claim, including medical expenses, travel expenditures, and temporary total disability payments. No additional evidence was submitted regarding the reasonableness of these expenses.

Based on this finding, the Commission concluded that "[i]nsufficient evidence exists to determine that Plaintiff's incurred accounting expenses constitute a necessary medical or rehabilitative service; therefore, Plaintiff is not entitled to have Defendant reimburse him for his accounting expenses. N.C. Gen. Stat. §§ 97-2(19) and 97-25."

We conclude that the Commission did not err in its conclusion. We note that unlike either *Timmons* or *Scarboro*, there was no evidence presented here that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense is medically necessary because of Plaintiff's specific injuries. Accordingly, Plaintiff's argument is overruled.

C. Attorney's fees

[4] Lastly, Plaintiff argues that the Commission erred in not awarding him attorney's fees.

"If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2013). We have further stated that "[w]hether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*. . . . The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Ruggery v. N.C. Dep't. of Correction*, 135 N.C. App. 270, 273-74, 520 S.E.2d 77, 80-81 (1999).

In his motion, Plaintiff made several claims against Defendant. Defendant responded and disputed on multiple grounds Plaintiff's contentions and included supporting documents, including letters showing their attempts to respond to Plaintiff's requests and Plaintiff's need to provide further documentation for payment. At the hearing before the deputy commissioner and, shortly thereafter, the parties were able to resolve the majority of their differences; and the only remaining

issues to resolve were (1) how much Plaintiff was owed for reimbursement expenses; (2) sanctions against Defendant for late payment of the lump sum payment; (3) attorney's fees award; and (4) sanctions against Defendant for defending its claims without reasonable grounds. Therefore, it appears that Defendant had reasonable grounds to defend Plaintiff's claims. Accordingly, we overrule Plaintiff's argument that the Commission erred in failing to make an award of attorney's fee pursuant to G.S. 97-88.1.

III. Conclusion

For the foregoing reasons, we affirm the Commission's opinion and award.

AFFIRMED.

Judge BRYANT and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
DENNIS HOWARD NEWSON

No. COA14-302

Filed 3 February 2015

1. Constitutional Law—competency to stand trial—disruptive behavior did not raise bona fide doubt

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by finding that defendant was competent to proceed to trial or by relying on a doctor's report finding defendant competent to proceed. The mere fact that defendant's disruptive behavior continued throughout trial did not necessarily raise a bona fide doubt about his competence.

2. Constitutional Law—right to counsel—waiver—self-representation

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by determining that defendant knowingly and voluntarily waived his right to counsel and by not making any further inquiry under *Edwards*, 554 U.S. 164 (2008).

3. Criminal Law—motion for mistrial—alleged jury prejudice—defendant's voluntary misconduct

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by denying defendant's motion for a mistrial on the ground that the jury was allegedly prejudiced against him. However, where a defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain.

Appeal by Defendant from judgments entered 30 May 2012 by Judge Tanya T. Wallace in Superior Court, Cumberland County. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook and Assistant Appellate Defender Anne M. Gomez, for Defendant.

McGEE, Chief Judge.

Dennis Howard Newson ("Defendant") appeals his conviction of assault with a deadly weapon on a government official and two counts of communicating threats. Defendant contends he was not competent to stand trial or represent himself *pro se* and asks for a new trial. We disagree.

I. Background

Defendant had a personal confrontation with Hoke County Sheriff Hubert Peterkin ("Sheriff Peterkin") and other law enforcement officers at the Fayetteville Western Sizzlin restaurant on 10 March 2010. The details of that confrontation are set out in *State v. Newson*, __ N.C. App. __, 753 S.E.2d 399 (2013) (unpublished). Two weeks later, on 23 March 2010, Defendant was indicted for (1) assault with a firearm or other deadly weapon on a Government officer or employee; (2) assault with a deadly weapon with intent to kill; and (3) two counts of communicating threats. Subsequently, Defendant's competency to stand trial was questioned.

Dr. Nicole Wolfe ("Dr. Wolfe"), a forensic psychiatrist at Dorothea Dix Hospital, completed a competency evaluation with Defendant on an inpatient basis in June and July of 2010. Dr. Wolfe diagnosed Defendant

as having a personality disorder, not otherwise specified, with narcissistic and obsessive features. During a subsequent competency hearing in August 2010, Defendant often rambled and interrupted the trial court. Nonetheless, based on Dr. Wolfe's report, the trial court found Defendant competent to stand trial.

The trial court held a second competency hearing in April 2011. During that hearing, Defendant was combative, disruptive, and went off on tangents. The trial court again reviewed Dr. Wolfe's report and noted that:

> [Defendant] is well-versed in legal matters; he had no difficulty readily and thoroughly identifying the roles of various players in the courtroom; he understands plea-bargaining and jury matters; [Defendant] is viewed as comprehending his situation in reference to these proceedings and understanding the nature and object of the proceedings; he has the ability to assist in his defense in a rational and a reasonable manner if he so chooses; he is viewed as capable of proceeding to trial. I would agree with and further note that he has the ability to represent himself [even though] he has exhibited – well, what I would characterize as deliberately obstreperous and, perhaps, mendacious behavior[.]

The trial court held a third competency hearing in June 2011. Pursuant to N.C. Gen. Stat. § 15A-1242, the trial court conducted a full colloquy with Defendant and determined that Defendant was not only competent to stand trial but that he knowingly and voluntarily waived his right to counsel at trial. During the remainder of the hearing, Defendant made a number of "nonsensical and irrelevant" motions and was combative.

Several months later, Defendant's competency was brought into question again. At a hearing in September 2011, Defendant stated his name was "Noble Dennis Ali" and that he was from South Africa. Defendant also declared himself a "national citizen" and claimed that the trial court lacked jurisdiction over him. Defendant also argued he was entitled to "consulate" and that "consulars" in South Africa were waiting to be called to intervene in the case. At the conclusion of this hearing, the trial court ordered Defendant to be examined at Central Regional Hospital to determine his capacity to proceed.

In November and December of 2011, Dr. Mark Hazelrigg ("Dr. Hazelrigg"), a forensic psychologist at Central Regional Hospital, completed a second competency evaluation on Defendant. Dr. Hazelrigg

diagnosed Defendant as having "a mental disorder, which is manifested in loud, fast speech, which is poorly organized, culminating in illogical/nonsensical statements, as well as apparent delusions." Dr. Hazelrigg advised the trial court that Defendant was incompetent to proceed. The trial court held another competency hearing in February 2012, and adjudicated Defendant incompetent to proceed.

Defendant was then transferred to the Adult Admissions Unit at Cherry Hospital. During Defendant's month-long inpatient stay at Cherry Hospital, he refused to take medications or otherwise participate in therapy of any kind. Nonetheless, Defendant's treating physician, Dr. Paul Kartheiser ("Dr. Kartheiser"), reported that "there was a lack of significant symptomology which [might] represent [an] Axis I [psychiatric] disorder and that the difficulties that the patient demonstrated were more attributable to characterological factors and a volitional unwillingness to participate more fully in the diagnostic evaluation or in all likelihood his legal situation." Dr. Kartheiser sought a second opinion from Cherry Hospital's clinical director, Dr. Jim Mayo, who reported that "no clear Axis I [psychiatric disorder] is present and that [Defendant's] current behaviors reflect [a] severe Axis II [personality disorder], primarily narcissistic with obsessional and antisocial features".

Dr. Steven D. Peters ("Dr. Peters"), a forensic psychologist at Cherry Hospital, conducted a third competency evaluation with Defendant in March 2012. After interviewing Defendant, reviewing Defendant's medical records, and consulting with Dr. Kartheiser, Dr. Peters compiled a forensic report on Defendant ("Dr. Peters' report"). Dr. Peters' report states: "It is the consensus of the psychiatric staff [at Cherry Hospital] that [Defendant] is invested in manipulating the legal system and that he has volitional control over his actions." Dr. Peters' report goes on to refer to Defendant's behavior as "malingering" and further states that:

> [Defendant] currently is psychiatrically stable, demonstrates sufficient knowledge and comprehension of the court system[.] [I]t is my professional opinion that he is Competent to Proceed. [Defendant] has a significant history of dramatization and acting out for effect, but is able to function adequately at this time. For the most part[,] his unusual or bizarre behavior is under conscious control and is in the service of manipulation. Whether [Defendant] will choose to proceed appears to be a relevant question, more so than if he has the capacity to proceed. He appears to be less motivated to proceed and is more invested [in] prolonging his engagement with the legal system. It is felt

> that he could proceed, if he was so interested. He can be held to the same standards of conduct as any other individual and can benefit from having consequences to his actions as anyone else. Mr. Newson will require clear and firm limits when it comes to his court room behavior, with significant consequences for his on-going efforts to play the system or otherwise manipulate the process.

A final competency hearing was held by the trial court on 7 May 2012. Although Defendant was able to participate in court proceedings and examine witnesses throughout that hearing, he was combative, disruptive, and went off on tangents. After Defendant cross-examined Dr. Peters *pro se*, at length and often through repetitive or irrelevant questioning, the trial court stopped Defendant's cross-examination of Dr. Peters. By order dated 8 May 2012, and based upon Dr. Peters' report and testimony, the trial court found Defendant competent to stand trial.

Defendant's trial began 21 May 2012. The first day of trial was largely spent reviewing a number of Defendant's *pro se* pretrial motions. Defendant's brief states that Defendant was "rude, rambled, [and] talked over the trial court" during that time. After the trial court denied several of Defendant's motions, Defendant made a request for counsel. The next day, the trial court noted that Defendant "has repeatedly hired and fired [his] attorneys . . . and that the only reasons whereby [Defendant] told the [c]ourt yesterday that he desired to have an attorney was because many of his motions were denied after being heard by the [c]ourt." Nonetheless, the trial court appointed standby counsel for Defendant ("Standby Counsel").

Sheriff Peterkin was on the witness stand for the majority of the third day of trial. During Sheriff Peterkin's direct examination by the State, Defendant was able to make timely objections, and one of Defendant's objections was sustained by the trial court. Defendant's cross-examination of Sheriff Peterkin progressed logically, although Defendant's lines of questioning focused mostly on matters that were not entirely relevant to Defendant's case, such as other disputes Defendant had with Sheriff Peterkin. Defendant also was able to argue against numerous objections made by the State during cross-examination, and Defendant's arguments were frequently successful. However, as the day progressed, Defendant interrupted the trial court with increasing frequency and became more combative.

Before continuing the following day with Sheriff Peterkin's testimony, the trial court noted that

> [t]his morning as the jury gathered, the jury addressed the bailiff and said, We need to talk to the Judge. And the bailiff answered, as he should have, What's the matter? Is there something wrong? And there [was] – the reply of one of the jurors was that, We have jobs. How long is this going to take? And he's rambling. The bailiff, as he should have, cut everything off. I cannot talk to the jury, but I need to inform you what was said, and I don't know who they were talking about when they said, "he's rambling," but I felt like everybody needed to have notice of that.

Nonetheless, Defendant continued his lengthy cross-examination of Sherriff Peterkin, and the trial court repeatedly warned Defendant about continuing to ask already-answered or irrelevant questions. Eventually, the trial court exercised its discretion under Rule 611 of the North Carolina Rules of Evidence and cut off Defendant's cross-examination of Sherriff Peterkin. *See* N.C. Gen. Stat. § 8C-1, Rule 611 (2013) ("The [trial] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time[] and [] protect witnesses from harassment or undue embarrassment.").

This pattern continued into the fifth day of trial. Defendant interrupted the proceedings, argued with witnesses, and repeatedly asked irrelevant questions. The trial court also stopped Defendant's direct and redirect examinations of Chief Deputy Gary Hammond ("Chief Hammond"), one of the law enforcement officers present at the Western Sizzlin on 10 March 2010.

On the sixth day of trial, near the end of the trial court's morning break, Defendant notified the trial court that he needed to use the facilities and that he also had hemorrhoids, which needed treatment. Although Defendant had previously been warned about delaying the proceedings by waiting to use the facilities until the end of breaks, the trial court granted Defendant's request and allowed Defendant extra time to seek medical attention. However, Defendant did not return to the courtroom when instructed, and the trial court found that Defendant was "making efforts to delay and obstruct this hearing from occurring." After an hour and a half, of what was supposed to be a fifteen-minute break, Defendant did return to the courtroom, but only after Standby Counsel informed Defendant that the trial court would close his case if he did not return to the courtroom.

Defendant next called Sheriff Peterkin to the stand for a second time, and the trial court again cut off Defendant's examination due to his asking irrelevant or already-answered questions. Defendant then called Chief Hammond to testify for a second time. Defendant's disruptive behavior continued. At one point during Chief Hammond's testimony, Juror Ten stood up in the jury box, and the trial court excused the jury from the courtroom. Defendant then began a "tirade" directed at the trial court. Although the trial court asked Defendant whether he had anything relevant to ask Chief Hammond, it received no direct response from Defendant. The trial court again stopped Defendant's examination of Chief Hammond.

The trial court then received a note from the jury and the following transpired:

> THE COURT: This is what the jury has asked[:] How much longer must we continue to hear the same questions? Juror number ten got up because he thought we were about to be asked to leave. All right. He's just had it. All right. Did you hear what the jury had to say, Mr. Defendant? How much longer must we continue to hear the same questions? And juror ten got up because he thought we were about to be asked to leave. Did you hear that, Mr. Newson? Mr. Newson, did you hear that?
>
> DEFENDANT: (No response.)
>
> THE COURT: Let the record reflect the defendant refuses to answer the questions of the [c]ourt. Let's have the jury come back into the court.

On the seventh day of trial, Defendant called numerous people to the stand who were not in the courtroom. At one point, Juror Two stood up and began waving his hand in the air. Defendant then decided to testify on his own behalf. However, the process of being sworn took an inordinate amount of time. Defendant wanted to consult Standby Counsel beforehand; he then insisted on placing numerous items on the evidence table while also ignoring the trial court's direction to proceed with being sworn; he refused to place his left hand on a Bible; and he would not raise his right hand to affirm that he would testify truthfully. At that time, both Juror Two and Juror Ten stood up and began waving their hands. The State pointed this out to the trial court and Juror Two began to speak. The trial court replied: "All Right. That's fine[,]" and the proceedings continued.

Defendant's actual testimony on direct examination focused largely on what Defendant saw as a tumultuous relationship between himself and Sheriff Peterkin, and the events at the Western Sizzlin on 10 March 2010. Although Defendant's testimony was rambling and often irrelevant, it followed a generally logical progression and lasted for more than an hour. The trial court had instructed Defendant to organize his testimony into a question-answer format, with Defendant asking a question and then answering it. Defendant maintained this format throughout his own direct examination, until his testimony was cut off by the trial court.

During the State's cross-examination of Defendant, Juror Two and Juror Ten stood up and raised their hands, indicating the jury needed a break, and the jury was excused from the courtroom. The jury then sent a note to the judge, who read the following out loud:

> I am tired of constant interruptions of the – [pause] – oh, okay – of the [c]ourt for his amusement and his allowance to continue with commentary after told to shut up; I feel it is a mockery of the judicial system at the expense of all of – times and means to make a living; I am not amused; I think the courtroom should be controlled by the judge and not let the dialogue continue; if the defendant is incapable of following the order of the [c]ourt, as other attorneys, then he should not be allowed to represent himself; I will not sit through another name-calling session to show blatant disrespect to you or other – something – serving as law abiding citizens.

In response, Defendant moved for "a mistrial for bias and prejudice" by the jurors. The trial court denied Defendant's motion. The jury returned to the courtroom. The State's cross-examination of Defendant resumed but deteriorated rapidly. Juror Two again stood up. The trial court ordered Defendant from the courtroom and noted that Defendant was "a malingerer, someone who acts out for dramatic effect[.]" Defendant had to be forcibly removed from the courtroom. The trial court rested Defendant's case in his absence.

Defendant was allowed to return to the courtroom for the charge conference. During the charge conference, Defendant did not interrupt the trial court and made a logical — albeit somewhat misinformed — argument regarding the jury instructions he preferred, and he was able to cite both case law and a relevant North Carolina statute in support of his position. Defendant also expressed his view that the trial court was trying to "railroad" him.

Closing arguments followed and were unrecorded. However, the court reporter noted the following:

> The defendant made an argument to the jurors. Following several objections which were sustained by the [c]ourt and during the playing of a video, the following transpired: Juror Number 2 . . . stood and demonstrated frustration.

Defendant continued to make his closing arguments and eventually had to be cut off by the trial court. Defendant then asked for a glass of water.

During the State's closing arguments, Defendant interrupted by protesting about the amount of water he was given. Defendant was again removed from the courtroom, but not before throwing his cup of water on the floor. After the State completed its closing argument, the trial court excused the jury and instructed Standby Counsel to confer with Defendant as to whether Defendant wished to be present – and silent – in the courtroom for the jury instructions. Standby Counsel left the courtroom, conferred with Defendant, returned, and indicated that Defendant did wish to be present for the jury instructions, although "as an officer of the Court, [Standby Counsel did] not believe it would be proper to relay [Defendant's] specific message to" the trial court.

Defendant was present during the trial court's lengthy instructions to the jury and remained silent. Defendant then made timely objections to the jury instructions, which were denied.

The jury found Defendant guilty of assault with a deadly weapon on a government official, assault with a deadly weapon, and two counts of communicating threats. The trial court arrested judgment on the charge of assault with a deadly weapon, noting that the elements of assault with a deadly weapon fit within the elements of assault with a deadly weapon on a government official, and entered judgments on 30 May 2012. Defendant filed a *pro se* petition for a writ of certiorari with this Court on 3 June 2013 to review his conviction, which this Court granted.

II. Defendant's Competence to Stand Trial

[1] Defendant first challenges the trial court's finding that he was competent to proceed to trial and argues that the trial court could not have properly relied on Dr. Peters' report by finding him competent to proceed. Defendant argues that Dr. Hazelrigg's findings should have been determinative. We note that this argument was abandoned by Defendant's appellate counsel during oral arguments. Regardless, in spite of Dr. Hazelrigg's earlier medical opinion that Defendant experienced some

kind of delusional disorder, Defendant has not presented this Court with any authority indicating that Dr. Hazelrigg's lone medical opinion was conclusive of Defendant's competence, especially in light of the medical opinions of numerous other doctors that Defendant was malingering. At the very least, the trial court's determination that Defendant was competent to proceed was not, as Defendant argues, entirely "unsupported by the evidence." In light of Defendant's lack of a meaningful argument on this point, and his abandonment on appeal, the trial court's finding of competence receives deference from this Court. *See State v. Chukwu*, __ N.C. App. __, __, 749 S.E.2d 910, 917 (2013).

Alternatively, Defendant contends that the trial court should have instituted, *sua sponte*, another competency hearing in light of Defendant's behavior at trial. Defendant did not affirmatively raise this issue with the trial court during trial. Thus, Defendant has failed to preserve this argument for review. *See* N.C.R. App. P. 10(a)(1). However, this Court previously has invoked Rule 2 of the North Carolina Rules of Appellate Procedure to review the unpreserved issue of whether a *pro se* defendant was competent to stand trial. *See State v. Robertson*, 161 N.C. App. 288, 290–91, 587 S.E.2d 902, 904 (2003). As such, we elect to address Defendant's arguments in the exercise of our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure.

This Court held the following in *Chukwu*:

> Trial courts have a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent. On review, this Court must carefully evaluate the facts in each case in determining whether to reverse a trial judge for failure to conduct *sua sponte* a competency hearing where the discretion of the trial judge, as to the conduct of the hearing and as to the ultimate ruling on the issue, is manifest. Further:
>
> Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide doubt inquiry*. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

> While the trial court's finding of competency receives deference, other findings and expressions of concern about the temporal nature of [a] defendant's competency may raise a bona fide doubt as to a defendant's competency. We thus review the record to determine (i) whether there is a bona fide doubt as to Defendant's competency and (ii) whether Defendant's competency was temporal in nature.

__ N.C. App. at __, 749 S.E.2d at 917 (internal quotation marks and citations omitted).

Defendant argues that his generally disruptive and "obstreperous" behavior at trial raises a bona fide doubt about his competence at trial. Specifically, Defendant argues that, because similar behavior led Dr. Hazelrigg to conclude that Defendant suffered from an incapacitating mental illness, the trial court necessarily was required to institute, *sua sponte*, a competency hearing when faced with his behavior at trial.

As a preliminary matter, Defendant's behavior at trial generally did not deviate greatly from his conduct at the competency hearings in August 2010, April 2011, June 2011, and May 2012, wherein Defendant was found competent to proceed or represent himself. Moreover, Dr. Hazelrigg's prior medical opinion finding Defendant incompetent to stand trial may be "relevant" to a bona fide doubt inquiry into Defendant's competence, *see id.*, but his opinion alone is not necessarily conclusive. The trial court also had access to the medical opinions of four other doctors who believed Defendant's generally disruptive behavior was volitional. In fact, it was the consensus of the clinical staff at Cherry Hospital that Defendant was a malingerer who was "invested in manipulating the legal system[.]" Thus, the mere fact that Defendant's disruptive behavior continued throughout trial also does not necessarily raise a bona fide doubt about Defendant's competence. In spite of Defendant's behavior, Defendant still made motions and objections, examined witnesses, introduced evidence, and made arguments on his own behalf throughout most of the proceedings.

Perhaps most illuminating was Defendant's conduct near the end of trial. Indeed, Defendant's behavior during that time — which twice necessitated his being forcibly removed from the courtroom — was the most extreme behavior Defendant exhibited that appears in the record. And yet, immediately after exhibiting such behavior, Defendant was sufficiently in control of his faculties to participate in the charge conference and then later sit silently through eleven recorded pages of

trial transcript as the trial court instructed the jury. Following both the charge conference and jury instructions, Defendant was able to make logical — albeit somewhat misinformed — arguments to the trial court regarding his objections to the jury instructions that were given.

At the very least, there is no meaningful evidence in the record to suggest Defendant was experiencing a mental illness that manifested in such an acutely temporal fashion as to explain Defendant's outbursts near the end of trial, which were then followed by Defendant sitting quietly in court and participating in the proceedings only minutes later. As such, Defendant's continuously disruptive and "obstreperous" behavior at trial did not raise a bona fide doubt about his competence, *see id.*, and we find that the trial court did not manifestly abuse its discretion by not instituting, *sua sponte*, additional competency proceedings at trial.

III. Defendant's Competence to Proceed *Pro Se*

[2] Defendant further contends that, even if he was competent to stand trial, the trial court erred by allowing him to waive counsel and represent himself. In support of this position, Defendant relies primarily on *Indiana v. Edwards*, 554 U.S. 164, 174, 171 L.Ed.2d 345, 355 (2008), which held that "the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial — on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." Specifically, Defendant notes that the trial court did not make an express inquiry under *Edwards* at trial.

Our Supreme Court held in *State v. Lane*, 365 N.C. 7, 22, 707 S.E.2d 210, 119 (2011), that where a defendant,

> after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . .; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards*. . . . [Only then will the trial court] make findings of fact to support its determination that the defendant is unable to carry out the basic tasks needed

> to present his own defense without the help of counsel [pursuant to *Edwards*].

(citations and internal quotation marks omitted). Thus, in the present case, because the trial court *granted* Defendant's motion to proceed *pro se*, *Edwards* is inapplicable, and we need only examine whether "the trial court properly conducted a thorough inquiry and determined that [D]efendant's waiver of his constitutional right to counsel was knowing and voluntary." *Id.* at 23, 707 S.E.2d at 220.

Defendant acknowledges that the trial court conducted a full counsel-waiver colloquy with him during the June 2011 competency hearing and determined that Defendant knowingly and voluntarily waived his right to counsel at trial. *See* N.C. Gen. Stat. § 15A-1242 (2013). However, Defendant further argues in his brief that the trial court should have conducted an additional counsel-waiver colloquy with him at trial. In support of this contention, Defendant also relies primarily on *Edwards*, which we have already determined is inapplicable in the present case. Otherwise, Defendant presents this Court with a plethora of authority, from North Carolina and elsewhere, wherein appellate Courts remanded similar cases – that were decided before *Edwards* – so that the trial courts could make findings as to whether they would have denied the defendants' motions to proceed *pro se* if they had known at the time that the Constitution permitted them to do so. However, the present case was decided *after Edwards* and the trial court is presumed to know the law as it existed when it granted Defendant's motion to proceed *pro se*. *See Moore v. W O O W, Inc.*, 253 N.C. 1, 6, 116 S.E.2d 186, 189 (1960) ("The law arises upon the facts alleged, and the [trial] court is presumed to know the law." (citations omitted)). Therefore, we find that the trial court did not err in its determination that Defendant knowingly and voluntarily waived his right to counsel, nor did the trial court err by not making any further inquiry under *Edwards*.

IV. Juror Bias

[3] Defendant contends that the trial court erred by denying his motion for a mistrial on the ground that the jury was prejudiced against him. Members of the jury did seem to be frustrated with Defendant, as demonstrated through their notes to the trial court and the fact that some members stood up several times in apparent exasperation during the proceedings. However, where a defendant was "prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989). Because we find that Defendant was competent at trial, any possible bias by the jury

would have arisen from Defendant's volitional conduct.[1] Therefore, the trial court did not err when it denied Defendant's motion for a mistrial.

No error.

Judges STEPHENS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
THOMAS LEE ROYSTER

No. COA14-736

Filed 3 February 2015

Penalties, Fines, and Forfeitures—drug money—writ of certiorari denied—appeal dismissed

Defendant's petition for writ of certiorari was denied and his appeal from the forfeiture of $400 was dismissed in a felonious possession of marijuana case. Defendant acknowledged that he failed to give timely notice of appeal, and further, he had no right to appeal the issue of forfeiture.

Appeal by defendant from judgment entered on 8 November 2013 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 November 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney Generals Michael E. Bulleri and Kimberly N. Callahan, for the State.

Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

STROUD, Judge.

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1. We note that the jury asked to review, and did review, specific pieces of evidence before rendering its verdict. Moreover, on the charge of assault with a deadly weapon with intent to kill, the jury only found Defendant guilty of the lesser-included offense of assault with a deadly weapon. If anything, these facts suggest that the jury actually was impartial and deliberate while rendering its verdict, even if some of its members were frustrated with Defendant.

Thomas Lee Royster ("defendant") appeals from a judgment entered upon a plea agreement in which he pled guilty to felonious possession of marijuana. Defendant argues that the trial court erred in ordering him to forfeit $400. We dismiss the appeal.

I. Background

Around 3:00 p.m. on 23 July 2012, while in a marked police car, Officers Shawn Soloman and Justin Coleman observed defendant driving in the parking lot of a Charlotte hotel. Officer Soloman observed that defendant had a rigid posture, avoided making eye contact with him, and appeared to be pretending to use a cell phone. Officer Soloman checked the North Carolina Division of Motor Vehicle's records and discovered that defendant's vehicle had an inspection violation and that its tag had expired. After defendant exited his vehicle, Officer Soloman approached him on foot and asked him for his driver's license. Defendant responded that his driver's license was in his vehicle and walked back to his vehicle.

Defendant searched for his driver's license with the driver's side door open. After defendant presented his driver's license, Officer Soloman detected a slight odor of marijuana but could not localize it at that point. Officer Soloman returned to the police car with defendant's driver's license, and Officer Coleman walked over to the driver's side door of defendant's vehicle. A breeze began blowing and then Officer Coleman noticed a strong odor of unburned marijuana coming from defendant's vehicle. After Officer Coleman informed Officer Soloman of the odor, Officer Soloman asked defendant for consent to search his vehicle, and defendant consented. During the search, behind the glove box Officer Coleman discovered a bag of fresh, green marijuana and a digital scale with a green leafy substance on it. When they searched defendant, the officers also discovered and seized $400 in cash. Officer Soloman arrested defendant.

On or about 10 December 2012, a grand jury indicted defendant for possession of a controlled substance, possession of drug paraphernalia, and possession with intent to sell or deliver a controlled substance. *See* N.C. Gen. Stat. §§ 90-95(a)(1), (d)(4), -113.22 (2011). On 11 April 2013, defendant moved to suppress the evidence of marijuana. After a hearing on 25 July 2013, the trial court orally denied the motion. At a hearing on 8 November 2013, defendant pled guilty of felony possession of marijuana pursuant to a plea agreement. *See id.* § 90-95(d)(4). In the plea agreement, the State dismissed the remaining charges, and defendant reserved his right to appeal the trial court's order denying his motion to suppress. On 8 November 2013, pursuant to the plea agreement, the

trial court sentenced defendant to four to fourteen months' imprisonment but suspended the sentence and placed defendant on twenty-four months' supervised probation.

At the 8 November hearing, the prosecutor requested that defendant forfeit the $400 in cash that the officers had seized. Although the record is unclear, it appears that the trial court ordered that defendant forfeit the $400 pursuant to N.C. Gen. Stat. § 90-112(a)(2) (2013).

At the 8 November hearing, defendant's counsel stated that he "strongly believe[s] on the face of the law that [defendant] will prevail on appeal." The trial court also noted at the hearing that defendant had reserved his right to appeal the court's order denying his motion to suppress. But defendant never gave notice of appeal.

At a hearing on 23 January 2014, defendant's counsel mistakenly stated that he had already given notice of appeal. The State did not contradict defendant's counsel's statement. The trial court then appointed a public defender to represent defendant on appeal.

II. Jurisdiction

Defendant acknowledges that he failed to give timely notice of appeal but urges that we grant his petition for writ of *certiorari*, because he lost his right to appeal due to "failure to take timely action[.]" *See* N.C.R. App. P. 21(a)(1). Defendant does not argue another basis for granting his petition.

In criminal cases, a party entitled to appeal a judgment must take appeal by either (1) giving oral notice of appeal at trial; or (2) filing written notice of appeal with the clerk of superior court and, within fourteen days, serving copies of that notice on all adverse parties. N.C.R. App. P. 4(a); *State v. Gardner*, ___ N.C. App. ___, ___, 736 S.E.2d 826, 829 (2013). But when a party loses his right to appeal due to "failure to take timely action," we may issue, in our discretion, a writ of *certiorari* to permit review "in appropriate circumstances[.]" N.C.R. App. P. 21(a)(1); *see also Gardner*, ___ N.C. App. at ___, 736 S.E.2d at 829.

Defendant's sole argument on appeal is that the trial court erred in ordering him to forfeit $400, in contravention of N.C. Gen. Stat. § 90-112(a)(2) (discussing forfeitures under the North Carolina Controlled Substances Act). Defendant argues that his appeal is taken pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b), 15A-1444, and 15A-1446(d)(18) (2013). But N.C. Gen. Stat. § 7A-27(b) does not provide a route for appeals from guilty pleas, and N.C. Gen. Stat. § 15A-979(b), which grants a defendant who pleads guilty the right to appeal an order

denying his motion to suppress, is inapplicable here because defendant does not appeal the trial court's denial of his motion to suppress. *See* N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2011). N.C. Gen. Stat. § 15A-1444, defendant's next basis for appeal, provides in pertinent part:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.
>
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
>
> . . . .
>
> (d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.
>
> . . . .
>
> (g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

N.C. Gen. Stat. § 15A-1444. Defendant does not challenge on appeal the trial court's determination that his sentence falls within the presumptive range. Defendant thus has no right to appeal under N.C. Gen. Stat. § 15A-1444(a1). *Id.* § 15A-1444(a1); *Mungo*, 213 N.C. App. at 403, 713 S.E.2d at 544. Additionally, defendant has no right to appeal under N.C. Gen. Stat. § 15A-1444(a2), because defendant's sole argument on appeal does not concern any of the three issues listed in subsection (a2). *See* N.C. Gen. Stat. § 15A-1444(a2). Defendant does not contend that the trial court violated N.C. Gen. Stat. §§ 15A-1340.14, -1340.17, -1340.21, or -1340.23; rather, defendant argues that the trial court violated N.C. Gen. Stat. § 90-112(a)(2) of the Controlled Substances Act. *See id.* §§ 15A-1340.14, -1340.17, -1340.21, -1340.23, 90-112(a)(2) (2013). Accordingly, we hold that defendant has no right to appeal this issue of forfeiture. *See* N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003); *State v. Nance*, 155 N.C. App. 773, 774-75, 574 S.E.2d 692, 693-94 (2003).

Defendant's reliance on *State v. Davis* is misplaced. 206 N.C. App. 545, 551, 696 S.E.2d 917, 921 (2010). There, the defendant's sentence fell outside of the presumptive range, thus satisfying N.C. Gen. Stat. § 15A-1444(a1). *Id.* at 548, 696 S.E.2d at 919-20. In contrast, here, defendant's sentence falls within the presumptive range.

Defendant finally contends that N.C. Gen. Stat. § 15A-1446(d)(18) provides a right to appeal this issue of forfeiture. N.C. Gen. Stat. § 15A-1446, which is entitled "Requisites for preserving the right to appellate review" provides in pertinent part:

> (a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.
>
> . . . .
>
> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> . . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446. We hold that subsection (d) does not create a right of appeal; rather, it lists various issues which may be preserved for appellate review absent an objection. *See id.* § 15A-1446(d); *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010) (discussing subsection (d)(18)). In other words, although defendant has not waived the issue of forfeiture, he has no right to appeal it under section 15A-1446(d)(18). Having reviewed all of defendant's bases for appeal, we hold that defendant never had a right to appeal the issue of forfeiture.

Because defendant never had a right to appeal the issue of forfeiture, we hold that he did not lose his right to appeal due to "failure to take timely action[.]" *See* N.C.R. App. P. 21(a)(1). Because defendant did not lose his right to appeal due to "failure to take timely action," we deny defendant's petition for writ of *certiorari*. *See id.*; N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *Jamerson*, 161 N.C. App. at 529-30, 588 S.E.2d at 547; *Nance*, 155 N.C. App. at 775, 574 S.E.2d at 693-94.

III. Conclusion

For the foregoing reasons, we deny defendant's petition for writ of *certiorari* and dismiss defendant's appeal.

DISMISSED.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
MARCUS WADDELL

No. COA14-528

Filed 3 February 2015

Evidence—prior crimes or bad acts—exposing self in public—intent—plan—absence of mistake

The trial court did not err in a felony indecent exposure case by allowing testimony from two adult women at trial who described previous instances where defendant allegedly exposed himself in public. N.C.G.S. § 8C-1, Rule 404(b) testimony was admissible to show evidence of intent, plan, or absence of mistake because defendant had shown a pattern of exposing himself to adult females in the courthouse area in downtown Fayetteville. Further, the trial court's decision to not exclude the testimony under Rule 403 was not manifestly unsupported by reason.

Appeal by Defendant from judgment entered 18 September 2013 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for Defendant.

McGEE, Chief Judge.

Marcus Waddell ("Defendant") appeals his conviction of felony indecent exposure, which involved Defendant publically exposing himself in the presence of a fourteen-month-old male child. Defendant contends that the trial court impermissibly allowed testimony of two adult women at trial who described previous instances where Defendant allegedly exposed himself in public. We disagree.

I. Background

At the time the following events occurred, Victoria Hardin ("Ms. Hardin"), an adult woman, worked at a law firm on Dick Street in downtown Fayetteville, located several blocks from the Cumberland County

courthouse ("the courthouse"). Ms. Hardin left work on 25 July 2012 at approximately 4:30 in the afternoon, accompanied by her mother and fourteen-month-old son. While they made their way to Ms. Hardin's car, a man, identified at trial as Defendant, approached Ms. Hardin with his pants down, called out to get her attention, and began shaking his penis at her and moving his hand "up and down." Ms. Hardin and her mother quickly entered Ms. Hardin's car, along with Ms. Hardin's son. As Ms. Hardin attempted to put her car in reverse, Defendant moved behind the car and began doing jumping jacks. Defendant then walked down Dick Street and was apprehended by the police shortly thereafter.

At trial, the State presented testimony from two adult women who reported other instances of Defendant exposing himself in public. The trial court allowed this testimony under N.C. Gen. Stat. § 8C-1, Rule 404(b) to show intent, plan, or absence of mistake by Defendant ("the 404(b) testimony"). The jury found Defendant guilty of felony indecent exposure. Defendant appeals.

II. Analysis

The elements of felony indecent exposure are that an adult willfully expose the adult's "private parts" (1) in a public place, (2) "in the presence of" a person less than sixteen years old, and (3) "for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-190.9(a1) (2013). On appeal, Defendant requests a new trial on the grounds that the trial court erred by admitting the 404(b) testimony.

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b) of the North Carolina Rules of Evidence." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158–59 (2012). Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment[,] or accident" by a defendant, although such evidence "is not admissible to prove the character of [the defendant] in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). The rule also is "constrained by the requirements of similarity and temporal proximity" between the earlier acts and the offense with which the defendant is charged.[1] *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002) (citation omitted). In order to satisfy the similarity

1. Defendant's arguments on appeal apply only to the similarity prong of 404(b), and we will limit our analysis accordingly. N.C. R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

prong of Rule 404(b), "the similarities need not be unique and bizarre." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation and quotation marks omitted). A prior incident is sufficiently similar if there are "some unusual facts present in both crimes[.]" *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (citation and quotation marks omitted). Testimony offered pursuant to Rule 404(b) may be inadmissible if the details it will reveal are entirely "generic to the act" it describes. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

Defendant first challenges the 404(b) testimony on the grounds that this testimony provided only "generic features of the charge of indecent exposure." In support of this contention, Defendant relies on *Al-Bayyinah*. In *Al-Bayyinah*, the defendant was charged with attempted robbery of a particular grocery store. *Id.* at 151–52, 567 S.E.2d at 121. The trial court allowed 404(b) testimony of previous robberies of the same store, but that testimony revealed only that the culprit in the previous robberies "wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it." *Id.* at 155, 567 S.E.2d at 123. On appeal from the defendant's conviction for the robbery, our Supreme Court found that this 404(b) testimony merely described facts "generic to the act of robbery," noted that the earlier robberies were factually dissimilar from the one being tried, and held that this 404(b) testimony was therefore admitted in error. *Id.* at 155–57, 567 S.E.2d at 123–24.

However, our Court has allowed 404(b) testimony that describes "common locations, victims, [and] type of crime," between previous and present instances of unlawful conduct. *State v. Gordon*, __ N.C. App. __, __, 745 S.E.2d 361, 364, *disc. review denied*, __ N.C. __, 749 S.E.2d 859 (2013). For instance, in *Gordon*, which involved a robbery in a Wal-Mart parking lot, previous instances of the *Gordon* defendant committing similar robberies was held admissible under Rule 404(b) where

> [e]ach of these incidents occurred in or in the vicinity of a Wal–Mart parking lot; that each of the victims in this matter were female and alone; that each of the incidents involved a common law robbery, the purse snatching, a grab and dash type of crime; that these incidents occurred within six weeks of one another, one in Statesville, one in Mooresville, which are approximately [twenty] miles apart; and in each incident, the alleged perpetrator of the crime . . . was a black male.

Id. Similarly, in the present case, the 404(b) testimony indicated that (1) Defendant exposed himself to adult women, who were either alone or in pairs, (2) he did so in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and (3) each instance involved Defendant exposing his genitals with his hand on or under his penis. Just as in *Gordon*, this 404(b) testimony revealed numerous unique details of "common locations, victims, [and] type of crime" that rose above facts "generic to the act" of public exposure. Defendant's argument is without merit.

Defendant also contends that the incidents described in the 404(b) testimony are fundamentally dissimilar to Defendant's public exposure on 25 July 2012 because the 404(b) testimony came from adult women, whereas the purported "victim" in the present case is a fourteen-month-old male child. In support of this position, Defendant relies on *State v. Dunston*, 161 N.C. App. 468, 588 S.E.2d 540 (2003). In *Dunston*, the defendant was accused of having anal sex with a twelve-year-old child. *Id.* at 469, 588 S.E.2d at 542. However, the trial court erred by allowing 404(b) testimony from the defendant's wife that the couple regularly had anal sex. *Id.* at 473–74, 588 S.E.2d at 544–45. This Court held that "the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim . . . to be admissible under Rule 404(b)." *Id.* In the present case, Defendant maintains that, because the 404(b) testimony came from adult women, "[n]othing about [the 404(b) testimony] would shed light on why [Defendant] would expose himself to a [male] child." (emphasis added).

We disagree not only with Defendant's conclusion, but we also disagree with his assumption that whether Defendant exposed himself "to" a child is relevant to our analysis. N.C.G.S. § 14-190.9(a1) requires only that Defendant expose himself "in the presence of" someone under sixteen. North Carolina's appellate Courts consistently have interpreted the phrase "in the presence of" in N.C.G.S. § 14-190.9 by its plain meaning. In order to convict a defendant of indecent exposure in public, the exposure need only be in the *presence* of another person; it need not be seen by, let alone directed at, another person. *See State v. Fly*, 348 N.C. 556, 561, 501 S.E.2d 656, 659 (1998) ("[The statute] does not require that private parts be exposed to [a person] before the crime is committed, but rather that they be exposed '*in the presence of*' [another person]."); *State v. Fusco*, 136 N.C. App. 268, 270, 523 S.E.2d 741, 742 (1999) ("Indecent exposure involves exposing one's self 'in the presence

of' [another] person . . . . The victim need not actually see what is being exposed." (citation omitted)).[2]

In the present case, Defendant acknowledges in his own brief that he exposed himself to Ms. Hardin outside of a business near the courthouse in downtown Fayetteville, that he had his hand on his penis when he did so, and that he "shook" his penis at her. That this particular public exposure also happened to take place in the *presence* of a child is not dispositive of the other similarities between this event and those described in the 404(b) testimony. Therefore, *Dunston* is distinguishable from the present case, and we are unpersuaded by Defendant's argument.

Defendant attempts to further distinguish the 404(b) testimony from his exposure to Ms. Hardin by noting that Ms. Hardin expressly described Defendant's conduct as "masturbating," while the 404(b) witnesses did not. However, nothing in our caselaw indicates that the previous acts described in 404(b) testimony must be completely identical to the acts charged in order to be admissible; there need only be "some unusual facts present in both" the past and present instances of conduct to make them sufficiently similar. *See Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110. As already discussed, there are numerous unique similarities between Defendant's conduct described in the 404(b) testimony and in Ms. Hardin's account, which we find satisfies the similarity prong of Rule 404(b). Defendant's distinction, to the extent that there is one, is not dispositive of these similarities. Therefore, Defendant's argument is without merit.

Defendant further contends that the 404(b) testimony nonetheless was unduly prejudicial and should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to a defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Whether to exclude evidence under Rule 403 is a matter of

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2. Although the present case involves Defendant's conviction of felony indecent exposure under N.C.G.S. § 14-190.9(a1), *Fly* and *Fusco* interpreted an older version of North Carolina's misdemeanor indecent exposure statute, N.C.G.S. § 14-190.9(a). Before 2005, in order to convict for misdemeanor indecent exposure under N.C.G.S. § 14-190.9(a), the State had to prove not only that a defendant's exposure occurred in public and in the presence of another person, but it also had to prove that this exposure occurred in the presence of a member "of the opposite sex." *See* 2005 N.C. Sess. Laws ch. 226, § 1. As such, the analyses in *Fly* and *Fusco* are still applicable in the present case, at least to the extent they inform this Court how to interpret the phrase "in the presence of" as it applies to Defendant exposing himself "in the presence of" a member of a particular class of people, presently a child under the age of sixteen.

discretion of the trial court and that decision will be reversed "only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Lakey*, 183 N.C. App. 652, 654, 645 S.E.2d 159, 160–61 (2007) (citation and quotation marks omitted). Moreover, we generally will not overturn a trial court's decision to admit evidence under Rule 403 where "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [the] defendant and was careful to give a proper limiting instruction to the jury." *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation and quotation marks omitted).

In the present case, the trial court held *voir dire* examinations of the State's 404(b) witnesses, and it even excluded a possible third 404(b) witness because she could not state in open court that Defendant was the same man who had exposed himself to her in the past. The trial court found that the 404(b) testimony was admissible to show "some evidence of intent, plan, or absence of mistake in this case" because Defendant "has shown a pattern of exposing himself to [adult] females in the courthouse area" in downtown Fayetteville. Moreover, the trial court expressly instructed the jury that it could only consider the 404(b) evidence for these limited purposes. As such, our review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to Defendant by allowing the 404(b) testimony and that it gave a proper limiting instruction to the jury in response. At the very least, in light of our above analysis, and in spite of Defendant's contention that the introduction of the 404(b) testimony "allowed the State to change the focus of the case from the credibility of Ms. Hardin's account of the incident to the character of [Defendant]," we find that the trial court's decision to not exclude the 404(b) testimony under Rule 403 was not manifestly unsupported by reason.

No error.

Judges STEPHENS and DIETZ concur.

BENJAMIN SUPPLEE AND MEBRITT THOMAS, PLAINTIFFS
v.
MILLER-MOTTE BUSINESS COLLEGE, INC. AND DELTA CAREER EDUCATION CORPORATION, DEFENDANTS

No. COA14-670

Filed 3 February 2015

1. Contracts—school enrollment agreement—failure to perform background check

In an action by a student alleging breach of contract by a technical college, the trial court did not err by denying the school's motion for directed verdict and judgment notwithstanding the verdict. The school failed to abide by its enrollment agreement and conduct a background check before the student's admission, and as a result the student enrolled but was not permitted to complete his program when his past criminal charges were discovered.

2. Evidence—contract claim—income before and after breach

In an action by a student alleging breach of contract by a technical college, the trial court did not abuse its discretion by admitting evidence of plaintiff's income before and after his enrollment in the college. This evidence was relevant to determination of his consequential damages.

3. Pleadings—summary judgment—affidavits materially altering prior testimony

In an action by a student alleging breach of contract by a technical college, the trial court did not abuse its discretion by striking portions of plaintiff's affidavit. The struck portions contained conclusory statements that materially altered plaintiff's prior deposition testimony. Even assuming that the trial court abused its discretion, plaintiff failed to show prejudice.

4. Fraud—lack of intent to carry out promise

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's fraud claim. Plaintiff failed to present any evidence that at the time of the contract formation defendants had no intention of carrying out their promise.

5. Unfair Trade Practices—simple breach of contract

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's unfair trade practices claim. Plaintiff failed to present any evidence or fraud or inequitable assertion of power. Simple breach of contract, without more, does not amount to an unfair or deceptive trade practice.

6. Negligence—"negligent admission" claim not recognized

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's negligence claim. The Court of Appeals declined to recognize a claim for "negligent admission" to an educational program.

7. Fraud—duty arising solely from contract

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's negligent misrepresentation claim. Defendants' duty to conduct a criminal background check arose from their contract with plaintiff, not by operation of law independent of the contract.

8. Attorneys—sanctions—statements to news outlet

The trial court abused its discretion by granting a motion for sanctions against plaintiffs' attorney based on statements he made to a local news station after the first plaintiff's trial and before the second plaintiff's trial on related claims. The attorney did not violate Rules of Professional Conduct 3.3 and 3.6. His statements regarding the first plaintiff's claims and damages were matters of public record. Nothing in the record supported the trial court's finding that defendants settled with the second plaintiff as a result of the attorney's statements. Finally, the attorney did not contradict an earlier statement he made to the trial court.

Appeal by defendants from order entered 20 December 2013 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Cross-appeal by plaintiff Benjamin Supplee from order entered 31 July 2013 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Cross-appeal by Kyle J. Nutt from order entered 27 January 2014 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 22 October 2014.

Shipman & Wright, LLP, by Kyle J. Nutt, for plaintiff-appellee and cross-appellants.

Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for defendant-appellants and cross-appellee.

McCULLOUGH, Judge.

Defendants Miller-Motte Business College, Inc. and Delta Career Education appeal the order of the trial court denying their motions for directed verdict and judgment notwithstanding the verdict; Plaintiff Benjamin Supplee cross-appeals from the order of the trial court granting defendants' summary judgment motion, in part; Plaintiff Benjamin Supplee's attorney, Mr. Kyle Nutt, appeals the trial court's order granting defendants' motion for sanctions. Based on the reasons stated herein, we affirm in part and reverse in part.

I. Background

On 21 August 2012, plaintiffs Benjamin Supplee ("Supplee") and Mebritt Thomas ("Thomas") filed a complaint against defendants Miller-Motte Business College, Inc. ("MMC") and Delta Career Education Corporation ("DCEC"). Plaintiffs alleged the following claims: fraud/fraud in the inducement; unfair and deceptive trade practices; negligent misrepresentation; breach of contract by MMC; and negligence.

On 29 May 2013, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

On 31 July 2013, the trial court entered an order, granting defendants' motion for summary judgment in part, and denying it in part. The trial court found that there were no genuine issues of material fact on plaintiffs' claims for fraud, unfair and deceptive trade practices, negligence, and negligent misrepresentation. Defendants' motion for summary judgment on plaintiffs' breach of contract claim was denied.

Plaintiffs' trials were separated with Supplee's trial occurring first, at the 28 October 2013 civil session of New Hanover County Superior Court, Judge W. Allen Cobb, Jr. presiding.[1]

The evidence at Supplee's trial indicated the following: Sometime after October 2009, Supplee met with MMC's dean of education, Mike

1. Because plaintiff Benjamin Supplee is the only plaintiff who is a party to the appeal before us, we will focus on the record evidence relevant to Supplee's appeal.

Smith ("Smith") and expressed interest in the surgical technology ("surg tech") program at MMC's Wilmington, North Carolina campus. Supplee inquired about the requirements of the surg tech program and job prospects in the field after graduation. The surg tech program was a two year program that consisted of an eighteen month class component, followed by a six month clinical component. Smith gave Supplee MMC's college catalog. Thereafter, Supplee met with Amy Brothers ("Brothers"), an admissions representative for MMC. Supplee testified that although Brothers was aware that he wanted to apply to the surg tech program, Brothers encouraged him to apply to the health information technology ("HIT") program. Brothers told Supplee that he could transfer to the surg tech program if he did not like the HIT program.

During their meeting, Brothers handed Supplee a document entitled "Career Information Profile." The document asked whether Supplee had "ever been convicted of a crime." Supplee marked "no" after asking Brothers whether "a DUI count[s] because I knew it was on my record, I knew I had some issues in the past and she was like, no, you're fine."

On 10 December 2009, Supplee received an acceptance letter from the campus director of MMC and a congratulatory letter of acceptance from the career services director at MMC. On 15 December 2009, Supplee and Brothers signed an enrollment agreement for an associate degree in the HIT program. The agreement stated that Supplee's enrollment was "subject to all terms and conditions set forth in the Catalog" of MMC. The student catalog, under the heading "PROGRAM REQUIREMENTS" and "Background Checks," provided as follows:

> Students applying for admission will be required to have a criminal history check. While a criminal conviction is not a per se bar to admission, **[MMC] will review any applicant who has been convicted of a crime in order to determine his or her fitness for admission**, and will take into consideration the following factors: the nature and gravity of the criminal conviction, the time that has passed since the conviction and/or completion of the criminal sentence, and the nature of the academic program for which the applicant has applied.

(emphasis added).

In January 2010, Supplee began his courses at MMC. On 4 April 2010, after the end of the first quarter, Supplee transferred into the surg tech program. To complete the transfer, Supplee signed an enrollment agreement on 14 April 2010, almost identical to the HIT enrollment agreement,

that incorporated the terms and conditions of the catalog and stated that MMC would review a student's criminal background for admission purposes. Defendants backdated Supplee's start date in the surg tech program to 20 January 2010.

On 12 October 2010, during Supplee's first surg tech program specific class, he was given a document by defendants entitled "Background Check Statement of Disclosure" which provided as follows:

> Background checks will be provided as part of the curriculum, will be held in strictest confidence and specific information will not be released to the clinical site unless specifically requested by the clinical site administrator. . . . As a student in the Surgical Technology Program, I am aware that clinical sites in which I complete my clinical rotations may require proof of a criminal background check prior to my acceptance at the clinical site.

Supplee and Cynthia Woolford ("Woolford"), the program director of surgical technology at MMC, signed this document. Woolford testified that she reviewed the "Background Check Statement of Disclosure" with the whole class, including Supplee.

On or about 12 October 2010, Woolford provided Supplee with the "Surgical Technology Program Student Policy Manual." Under the subsection entitled "Admission," the surg tech manual stated that "[t]he college will perform a criminal background check upon admission to the program." Further, it stated that

> An applicant may be denied admission to the [surg tech] program for any of the following reasons: . . . b. Conduct not in accordance with the standards of a Surgical Technologist: . . . ii. Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the individual is unfit or incompetent to practice surgical technology or that the individual has deceived or defrauded the public. . . . e. Due to JCAHO [Joint Commission on Accreditation of Health Organizations] requirements for Hospital & Operating Rooms, Students with a felony criminal record, larceny, or drug-related background found on the criminal background check will not be admitted to the clinical sites.

Supplee testified that he had not been advised by defendants' representatives that a criminal background check had not been conducted, but believed they had already conducted one.

At trial, Woolford testified that based on MMC's written policy, criminal background checks are "supposed to be conducted of new applicants" during the admissions process. Ned Snyder, the campus director for MMC in Wilmington and the regional vice president for MMC in North Carolina, South Carolina, and Virginia testified that MMC had the same policy, regardless of whether the applicant was applying to the HIT or the surg tech program. In addition, regardless of whether the applicant answered "no" to the question of "have you ever been convicted of crime?" on the career information profile, MMC was supposed to run a criminal background check. Woolford testified that, "if a student during admission had a criminal charge that would automatically disqualify them from clinical sites," the purpose of the criminal background check made during admission was to screen out any applicants who would not be able to complete the program. Once a student was admitted, thirty days prior to being placed at a clinical site, MMC was supposed to conduct another criminal check in order to obtain the most recent results. Woolford testified that MMC had a "responsibility to determine the type of criminal backgrounds that will prohibit students from attending [clinical] externships." However, Woolford admitted that defendants did not conduct a criminal background check on Supplee during his admissions process. Woolford also testified that Supplee did not have a criminal background check conducted prior to the time he started the surg tech program.

Around May of 2011, Supplee's class was scheduled to go to an orientation at two clinical externship sites. Woolford testified that thirty days prior to May 2011, Woolford ordered the background check of Supplee. Prior to May 2011, Woolford was not aware of any criminal background check being conducted on Supplee. A contact at a clinical externship site informed MMC that four students, including Supplee, were not permitted to attend the orientation based on the results of their criminal background checks. Supplee's criminal background check revealed the following: two felony charges of breaking and entering and larceny which were dismissed in 2008; two convictions of driving while intoxicated which occurred in 2004 and 2008, one of which resulted in a probation violation.

Supplee testified that around 15 May 2011, he was pulled out of class by Woolford and told by Smith, that the criminal background check sent to the clinical site was rejected. Defendants "pointed to two dismissed felony charges and said that's why I was not being allowed to attend the orientation site so therefore I couldn't participate in the clinical portion. I couldn't – I couldn't finish." Supplee testified that "[Woolford] looked at

my background and everything else that I had on there. DUIs, traffic misdemeanors she said was okay, that that wasn't why I was being denied." Defendants presented Supplee with two options: Supplee could transfer into any other program at MMC at no charge or Supplee could get his felony charges expunged and reapply to the surg tech program to work towards completion. At Woolford's suggestion, Supplee elected to get the two felony charges of breaking and entering and larceny expunged. Supplee was successful in getting the charges expunged and reapplied to MMC in December of 2011. When Supplee attempted to reenroll, defendants informed him that their admissions policy regarding criminal background checks had changed, requiring a "clean record."

On 10 January 2012, DCEC sent Supplee a "Notice of Pre-Adverse Action" which stated the following:

> During the application process for the SURGICAL TECHNOLOGY program at [DCEC], you authorized a review of your background and qualifications for admission. This background check revealed criminal convictions that would almost certainly preclude participation in externship or clinical experience position placements that may be required to successfully complete the program you have applied. Based on this background check, [DCEC] rejects your application.

On 7 November 2013, a jury returned a verdict in favor of Supplee. The jury found that defendants entered into a contract with Supplee, that defendants breached the contract by non-performance, and that Supplee was entitled to recover from the defendants in the amount of $53,481.00. Costs in the amount of $2,298.30 were also taxed against defendants.

On 14 November 2013, defendants filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial. On 20 December 2013, the trial court denied both motions.

On 14 November 2013, defendants filed a motion for sanctions and/or appropriate relief. Defendants' motion stated that upon the motion of plaintiffs, the trials of Supplee and Thomas were separated; Supplee's trial occurring during the 28 October 2013 civil session and Thomas' trial scheduled for the week of 18 November 2013. Defendants provided that on or about 3 November 2013, a local news station called WECT, posted a story on its website disclosing that Supplee had prevailed on his breach of contract claim in the amount of $53,481.00 and that the damages were based upon "wasted tuition and lost income opportunities[.]" Defendants claimed that the alleged basis for the damages of "wasted

tuition and lost income opportunities" was not a matter of public record. The news story stated that plaintiffs' attorney, Mr. Kyle Nutt ("Mr. Nutt") of Shipman & Wright, LLP, made the following statement:

> the school was contractually obligated to screen their applicants' criminal backgrounds to make sure all potential students could eventually graduate from healthcare degree programs were certain offenses the school was aware of could potentially prevent students from completing required coursework at hospitals.

Mr. Nutt was also attributed to representing that "the school offered Supplee $25,000 at the start of trial to end the matter, but then removed the offer midway through trial." Defendants argue that the statements attributed to Mr. Nutt were not found in the jury's verdict sheet and were not a matter of public record. Furthermore, Mr. Nutt was attributed to stating that "his firm is representing another student going to trial over similar claims this month" and defendants contended that this statement was made with actual knowledge that Thomas' claims were scheduled to occur just two weeks after the article was published. Based on the foregoing, defendants moved the court to levy sanctions against plaintiff and/or Mr. Nutt and to grant appropriate relief based on their violation of Rule 3.6 of the North Carolina Rules of Professional Conduct and "their public dissemination of information that would not be admitted as evidence at Ms. Thomas' trial and which creates a substantial risk of prejudicing an impartial trial."

On 27 January 2014, the trial court entered an order on defendants' motion for sanctions and/or appropriate relief by concluding that Mr. Nutt's comments created a substantial risk of prejudicing the Thomas jury and that Mr. Nutt's extrajudicial statements were in violation of Rule 3.6(a) and/or 3.3 of the North Carolina Rules of Professional Conduct. Mr. Nutt was sanctioned in the amount of $1,000.00 and defendants were awarded $6,395.50 in attorneys' fees and $20.00 in costs.

Attorneys for plaintiffs, including Mr. Nutt, filed a motion for reconsideration, arguing that defendants waived claims referenced in their motion for sanctions and/or appropriate relief, that vital First Amendment considerations required a liberal construction of the "safe harbor" provisions contained in Rule 3.6(b) of the North Carolina Rules of Professional Conduct, and that under such a construction, Mr. Nutt's statements were protected disclosures as a matter of law.

On 11 February 2014, the trial court entered an order denying plaintiffs' motion for reconsideration.

On 16 January 2014 defendants filed notice of appeal; on 21 January 2014, Supplee filed notice of appeal; and, on 3 February 2014, Mr. Nutt filed notice of appeal.

II. Discussion

A. Defendants' Appeal

Defendants raise two issues on appeal. First, defendants argue that the trial court erred by denying their motions for directed verdict and judgment notwithstanding the verdict ("JNOV"). Next, defendants argue that the trial court erred by permitting the jury to consider speculative evidence of Supplee's lost profits and income. We address each of these arguments in turn.

i. Directed Verdict and Judgment Notwithstanding the Verdict

[1] Defendants contend that the trial court erred by denying their motions for a directed verdict and JNOV where Supplee failed to present sufficient evidence of a breach of contract claim. We reject defendants' arguments and conclude there was sufficient evidence of breach of contract by defendants in order to submit the issue to the jury.

> When considering the denial of a directed verdict or JNOV, the standard of review is the same. The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.

Green v. Freeman, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (citations and quotation marks omitted). Whether defendants were entitled to a directed verdict or JNOV is a question of law and questions of law are reviewed *de novo*. *Id.* at 141, 749 S.E.2d at 267.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Branch v. High Rock Lake Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (citation omitted). Here, the parties stipulated that Supplee and defendants entered into a contract. Therefore, the issue before the jury was whether there was a breach of the terms of the contract.

Defendants rely on the holdings of *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) and *Ryan v. Univ. of N.C. Hospitals*, 128 N.C.

App. 300, 494 S.E.2d 789 (1998), and contend that Supplee's breach of contract claim based on the failure of defendants to conduct a criminal background check to determine if he was fit for admission into the surg tech program is not a recognized cause of action.

In *Ross*, a student accepted an athletic scholarship to attend Creighton University and play on its varsity basketball team. *Ross*, 957 F.2d at 411. Creighton was an "academically superior university" while the student came from an "academically disadvantaged background" and was "at an academic level far below that of the average Creighton student." *Id.* The student attended Creighton from 1978 until 1982, maintained a D average, and obtained 96 out of the 128 credits needed to graduate. When he left Creighton, the student had the overall language skills of a fourth grader and the reading skills of a seventh grader. *Id.* at 412. The student filed a complaint against Creighton, alleging that Creighton was aware of the student's academic limitations at admission and in order "to induce him to attend and play basketball, Creighton assured [the student] that he would receive sufficient tutoring so that he 'would receive a meaningful education while at CREIGHTON.' " *Id.* at 411. The student further alleged that he took courses that did not count towards a university degree at the advice of Creighton's Athletic Department, that the department employed a secretary to read, prepare, and type his assignments, and failed to provide him with sufficient and competent tutoring that it had promised. *Id.* at 412. The student asserted claims of breach of contract and negligence. The student argued three separate theories of how Creighton was negligent: "educational malpractice" for failing to provide him with a meaningful education and preparing him for employment after college; negligently inflicting emotional distress by enrolling him in a stressful university environment when he was not prepared and by failing to provide remedial programs to assist him; and, "negligent admission" which would allow recovery when an institution admits and then does not adequately assist an unprepared student. *Id.* The district court dismissed all of the student's claims under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim.

The student appealed and the United States Court of Appeals for the 7th Circuit held that the

> basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract. . . . It is quite clear, however, that Illinois would not

> recognize all aspects of a university-student relationship as subject to remedy through a contract action.

Id. at 416 (citations and quotation marks omitted). The *Ross* court explained that a breach of contract claim attacking the general quality of an education would be precluded. *Id.*

In order to state a claim for breach of contract, the court in *Ross* held that a plaintiff "must point to an identifiable contractual promise that the defendant failed to honor." *Id.* at 417.

> In these cases, the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.

Id. The *Ross* court read the student's complaint to

> allege more than a failure of the University to provide him with an education of a certain quality. Rather, he alleges that the University knew that he was not qualified academically to participate in its curriculum. Nevertheless, it made a specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him. Finally, he alleges that the University breached its promise by reneging on its commitment to provide those services and, consequently, effectively cutting him off from *any* participation in and benefit from the University's academic program.

Id. Because the student's breach of contract claim would be an inquiry into whether Creighton "had provided any real access to its academic curriculum at all", the *Ross* court reversed the decision of the trial court and stated that "we believe that the district court can adjudicate [the student's] specific and narrow claim that he was barred from *any* participation in and benefit from [Creighton's] academic program without second-guessing the professional judgment of the University faculty on academic matters." *Id.*

In *Ryan*, the plaintiff was a resident who was "matched" with the University of North Carolina Family Practice Program ("University") under the terms of the National Residency Program based on their

respective preferences. The plaintiff and the University "entered into a one-year written contract that was renewable, upon the University's approval, each of the three years of the residency program." *Ryan*, 128 N.C. App. at 301, 494 S.E.2d at 790. The plaintiff's residency began on 1 July 1990 and sometime during the plaintiff's second year, problems arose and the University planned to terminate the residency. *Id.* The plaintiff used the internal appeal procedures and executed a contract with the University at the beginning of his third year which stated "in part that plaintiff knew he might graduate as much as six months later than the normal program." *Id.* The plaintiff graduated three months later than normal and it was undisputed that the plaintiff graduated from an accredited residency program. The plaintiff then initiated an action against the University for breach of contract, educational malpractice, intentional and negligent infliction of emotional distress, civil conspiracy, tortious interference with prospective business relationship, and self-defamation. *Id.* The trial court granted the University's motion to dismiss all claims and the plaintiff only appealed the dismissal of his breach of contract claim against the University. *Id.*

Relying on the holding in *Ross* that in order to state a claim for breach of contract, the student "must point to an identifiable contractual promise that the University failed to honor," our Court in *Ryan* held that although the plaintiff made several allegations in support of his breach of contract claim against the University, only one alleged a specific aspect of the contract that would not involve an "inquiry into the nuances of educational processes and theories." *Id.* at 302, 494 S.E.2d at 791. The plaintiff had alleged that the University breached the "Essentials of Accredited Residencies" by failing to provide a one month rotation in gynecology. Our Court held that the plaintiff had alleged facts sufficient to support his claim for breach of contract based on the University's failure to provide that one month rotation and reversed the trial court's order. *Id*. at 303, 494 S.E.2d at 791.

Defendants argue that the present case is distinguishable from *Ross* and *Ryan* because while *Ross* and *Ryan* permit a narrow breach of contract claim where a university promises certain educational services *after* enrollment, Supplee's complaint does not allege that defendants failed to provide a specific educational service. Rather, defendants assert that Supplee's argument is a negligent admission case which has already been rejected by *Ross*. We disagree with this characterization.

Based on *Ross*, Supplee's relationship with defendants was contractual in nature. Supplee signed two separate enrollment agreements on 15 December 2009 and 14 April 2010 that incorporated the terms and

conditions set forth in the MMC student catalog. The student catalog explicitly stated that students applying for admission would be "required to have a criminal history check" and that MMC "will review any applicant who has been convicted of a crime in order to determine his or her fitness for admission[.]" Therefore, the student catalog and the aforementioned term became a part of the contract between defendants and Supplee. *See Ross*, 967 F.2d at 416.

Supplee's claim for breach of contract pointed to this "identifiable contractual promise that the [defendants] failed to honor." *Ryan*, 128 N.C. App. at 302, 494 S.E.2d at 791. Supplee specifically alleged in his complaint that defendants had "failed to order, failed to review, or ignored results from the criminal background checks authorized by [Supplee] as part of the admission process." At trial, defendants conceded that although based on defendants' written policy, criminal background checks were "supposed to be conducted of new applicants" during the admissions process, defendants failed to conduct a criminal background check of Supplee during his admissions process in late 2009. Defendants also admitted that Supplee did not have a criminal background check conducted prior to the time he started the surg tech program in early 2010. Had defendants properly conducted a criminal background check of Supplee at admission in 2009, the results would have revealed his two felony charges of breaking and entering and larceny which were dismissed in 2008 and his two convictions of driving while intoxicated which occurred in 2004 and 2008. Defendants' failure to conduct a criminal background check prior to admitting Supplee was a specific aspect of the contract between defendant and Supplee that would not involve an "inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise." *Ross*, 957 F.2d at 417.

Further, defendants argue that even if a contractual duty existed, MMC could not be said to have committed a material breach of contract. Defendants assert that because Supplee initially applied to the HIT program and an enrollee's criminal background is not an "issue, concern or consideration" to complete the HIT program, even assuming *arguendo* that a contractual duty existed, a material breach could not have been committed. We reject this argument.

It is well established that "[i]n order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citation omitted).

"The question of whether a breach of contract is material is ordinarily a question for a jury." *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 302, 672 S.E.2d 691, 695 (2009).

In the case before us, evidence at trial demonstrated that defendants were aware in October 2009 that Supplee intended to pursue a degree in the surg tech program and were aware that criminal background checks were necessary for the completion of the surg tech program. Supplee testified that based on Brother's encouragement to enroll in the HIT program first and her assurance that Supplee could transfer from the HIT program into the surg tech program, Supplee initially enrolled in the HIT program. Supplee also testified that he would not have enrolled in the HIT program were it not for Brother's assurance that he would be able to transfer into the surg tech program. Once Supplee transferred into the surg tech program on 4 April 2010, defendants backdated his start date in the surg tech program to 20 January 2010. This evidence demonstrates that defendants' failure to conduct a criminal check prior to admission into either the HIT or surg tech program substantially defeated the purpose of the agreement or was a substantial failure to perform.

Viewing the foregoing evidence in the light most favorable to Supplee, there was sufficient evidence of each element of breach of contract to submit the issue to the jury. As such, we hold that the trial court did not err by denying defendants' motions for directed verdict and JNOV.

ii. Damages

[2] In their next argument, defendants contend that the trial court erred by admitting evidence of Supplee's landscaping business and the income he earned as a car salesman. Defendants argue that this evidence of lost profits and income was speculative and request a new trial on the issue of damages. We find defendants' arguments unconvincing.

> Admission of evidence is addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown. Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Cameron v. Merisel Props., 187 N.C. App. 40, 51, 652 S.E.2d 660, 668 (2007) (citations and quotation marks omitted).

In the present case, Supplee testified that prior to enrolling at MMC, he worked as a full-time car salesman from August 2002 until October 2009 when he was laid off. After he was laid off, Supplee received unemployment compensation until the beginning of 2011. When he started school at MMC in 2010, Supplee began working as a school janitor. In 2011, after he was no longer enrolled at MMC, Supplee worked as an occasional waiter and landscaper. Supplee submitted records reflecting his taxed Social Security earnings and taxed Medicare earnings from 1994 until 2009. Supplee also presented his 2010 tax return and testified that he earned $727.00 in wages, salaries, tips, et cetera and received $16,231.00 in unemployment compensation during the period of time he was enrolled at MMC. For the year 2011, Supplee received $13,644.00 from unemployment compensation. After leaving MMC, Supplee testified that in 2011 he worked for a landscaping company by the name of Flora Landscape and earned $631.35 and also worked for Eddie Romanelli's and earned $2,048.00. Supplee further testified that he began a landscaping business in 2012 and submitted ledgers for the years 2012 through 2013 and testified as to his income in 2012 and 2013.

First, relying on *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 466 S.E.2d 324 (1996), defendants argue that evidence about Supplee's landscaping business was inadmissible because Supplee did not have an established history of profits; Supplee contended that the profits he earned after he left MMC would have been duplicated in previous years; and, Supplee made no effort to obtain sales figures and other financial data from similar landscaping businesses in the Wilmington area. Specifically, defendants contend that this evidence was too speculative.

In *McNamara*, the plaintiff leased a space to house a retail custom jewelry store at a mall owned by the defendant. *Id.* at 402, 466 S.E.2d at 326. The parties executed a five year lease and the plaintiff commenced his operations in August 1991. *Id.* at 403, 466 S.E.2d at 326-27. In January or February 1992, the defendant leased a space adjacent to the plaintiff's store to an aerobics studio and a dispute arose in regards to noise emanating from the aerobics studio. *Id.* at 403, 466 S.E.2d at 327. The plaintiff stopped paying rent after April 1992 and abandoned its leased space in December 1992. *Id.* The plaintiff sued the defendant for several claims including breach of contract. *Id.* at 403-404, 466 S.E.2d at 327. The trial court granted the defendant's motion to dismiss all claims, excluding the breach of contract claim and a jury returned a verdict in favor of the plaintiff in the amount of $110,000.00. *Id.* at 404, 466 S.E.2d at 327. On appeal, the defendant contested a denial of a requested peremptory

instruction on damages, argued that its motions for directed verdict and judgment notwithstanding the verdict should have been granted because the plaintiff did not meet his burden of proof with respect to damages, and, in the alternative, sought a new trial on the issue of damages. *Id.* at 407, 466 S.E.2d at 329. At trial, the plaintiff had confined his proof of damages solely to the issue of lost future profits and our Court provided the following:

> Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach. To recover lost profits, the claimant must prove such losses with "reasonable certainty." Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts.

Id. at 407-408, 466 S.E.2d at 329 (citations and quotation marks omitted). Our Court found that the plaintiff did not have an established history of profits and that his evidence of lost profits consisted solely on the testimony of Dr. Craig Galbraith, a professor of management at the University of North Carolina at Wilmington. *Id.* at 408, 466 S.E.2d at 330. Agreeing with the defendants, our Court held that Dr. Galbraith's "calculations were not based upon standards that allowed the jury to determine the amount of plaintiff's lost profits with reasonable certainty." *Id.* at 409, 466 S.E.2d at 330. First, our Court found that Dr. Galbraith's estimation of the plaintiff's lost profits were based on the unsupported assumption that from January 1992 until the remaining term of the five year lease, the plaintiff's sales would have risen in a linear fashion to the point where they matched the average sales of independent national jewelers. *Id.* Rather, he relied exclusively on data from independent national jewelers without ascertaining whether these jewelers bore any similarity to plaintiff's business." *Id.* Based on the foregoing, our Court held that Dr. Galbraith's reliance on aforementioned data "rendered his calculations too conjectural to support an award of lost profits" and remanded to the trial court for a new trial on the issue of damages. *Id.* at 409-12, 466 S.E.2d at 330-32.

We find the circumstances in *McNamara* to be readily distinguishable from the facts of the present case. The *McNamara* court dealt with lost future profits, which "are difficult for a new business to calculate and prove." *Id.* at 408, 446 S.E.2d at 330 (citation omitted). In *McNamara*, the evidence to support the lost future profits of the plaintiff were held to be too conjectural for the aforementioned reasons. In the case *sub judice*, evidence regarding Supplee's landscaping business was based on

actual income earned by Supplee during the years 2012 and 2013. Most importantly, the evidence regarding Supplee's landscaping business was not used to calculate future lost profits, but was relevant to the jury's determination of whether Supplee was entitled to recover consequential damages from the defendants for breach of contract. As the trial court instructed, the jury could find that Supplee had suffered consequential damages which included Supplee's investment of his personal time as defined by his lost opportunity to earn income during his time of enrollment. Supplee testified that had he not been accepted and enrolled in MMC, he would have continued working. Therefore, evidence of the history of income he earned after his period of enrollment was relevant in the determination of consequential damages. Accordingly, we reject defendants' arguments that the trial court abused its discretion in admitting this evidence.

Second, relying on *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987), defendants argue that the trial court erred by admitting speculative evidence of Supplee's past income as a car salesman when Supplee failed to produce any evidence of any job offers he received while enrolled at MMC. Defendants also assert that this evidence was inadmissible because Supplee admitted he was laid off from a dealership in 2009 and did not voluntarily leave his employment to enroll in MMC; Supplee admitted that his income was declining at the time of his termination; Supplee testified that there was "no telling what [he] would have done" had he not enrolled in MMC; and, Supplee testified that after he was terminated as a car salesman, he was not returning to an automotive sales position.

In *Olivetti*, the plaintiff, a manufacturer of word processors, appealed the trial court's determination that the defendant, a dealer, was damaged by the plaintiff's misrepresentations. *Id.* at 544, 356 S.E.2d at 584. The trial court found that had it not been for the plaintiff's fraud, the defendant would have become a dealer for another manufacturer of a word processor. *Id.* The North Carolina Supreme Court held that the trial court correctly concluded that the plaintiff made material representations to the defendant, upon which the defendant reasonably relied. *Id.* at 549, 356 S.E.2d at 587. However, the Supreme Court held that "proof of damages must be made with reasonable certainty" and that "in order for [the defendant] to show that it was deprived of an opportunity to make profits, it must first show that there was in fact such an opportunity." *Id.* at 546, 356 S.E.2d at 585-86. Because there was no competent evidence in the record to support the finding made by the trial court that the defendant had such an opportunity to make profits,

the trial court's award of damages to the defendant was vacated. *Id.* at 549, 356 S.E.2d at 587.

After careful review, we find defendants' reliance on *Olivetti* misplaced. In *Olivetti*, the issue on appeal was whether there was competent evidence to support the trial court's finding that the defendant dealer would have become a dealer for another manufacturer had it not been for the plaintiff's misrepresentations. Here, the issue before our Court is whether evidence of Supplee's income as a car salesman is admissible. While the defendant in *Olivetti* sought lost future profits, Supplee's evidence of his income as a car salesman, like the evidence of Supplee's landscaping business, was relevant to the jury's determination of whether Supplee was entitled to recover consequential damages from defendants for breach of contract. Evidence of the history of Supplee's actual income earned prior to enrolling at MMC was probative in the determination of lost opportunity to earn income during his time of enrollment. As such, we reject defendants' argument that the challenged evidence was speculative and hold that the trial court did not abuse its discretion in its admission.

B. Plaintiff Supplee's Appeal

Supplee raises two issues on appeal. Whether the trial court erred by (i) striking portions of his 4 June 2013 affidavit and (ii) granting defendants' motion for summary judgment, in part.

i. Striking Supplee's Affidavit

[3] Supplee argues that the trial court erred by striking portions of his 4 June 2013 affidavit. We disagree.

"Our Court reviews the trial court's ruling on the admissibility of affidavits for an abuse of discretion." *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 592, 697 S.E.2d 338, 340 (2010).

It is well established that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting his prior sworn testimony. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estates, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978). Our Court has held that where an affidavit contains additions and changes that are "conclusory statements or recharacterizations more favorable to plaintiffs [that] materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment[,]" the trial court should properly exclude these portions of the affidavits. *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 362, 716 S.E.2d 29, 33 (2011). "[I]f a party who has been examined at

length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 362-63, 716 S.E.2d at 33. Furthermore, "the appellant must show not only that the trial court abused its discretion in striking an affidavit, but also that prejudice resulted from that error." *Barringer v. Forsyth County*, 197 N.C. App. 238, 246, 677 S.E.2d 465, 472 (2009) (citation and quotation marks omitted).

In the case before us, Supplee was deposed on 14 May 2013. On 29 May 2013, defendants filed a motion for summary judgment. Thereafter, on 5 June 2013, Supplee filed an affidavit. On 6 June 2013, defendants filed a motion to strike Supplee's affidavit in which they argued that paragraphs four through seven, thirteen, and fifteen of Supplee's affidavit "either materially alter[ed] his deposition testimony or flatly contradict[ed] his prior sworn testimony." On 31 July 2013, the trial court entered an order striking paragraphs four through seven, thirteen, and fifteen "because they materially differ from Plaintiff Supplee's prior, sworn testimony and/or directly conflict with Plaintiff Supplee's prior, sworn testimony."

Paragraphs four through seven of Supplee's affidavit stated the following:

> 4. As part of the enrollment process, I was informed by representatives of [MMC] that a check of my criminal background would be performed.
>
> 5. As part of the enrollment process, [MMC] representatives also informed me that my acceptance into the school and any program of study I entered would be based upon the results of my criminal background check.
>
> 6. I was informed by [MMC] representatives that, in the event a conviction was found on my record during the enrollment process, [MMC] would determine whether or not I was fit for admission.
>
> 7. I agreed to submit to the criminal background check process required by [MMC] as part of the enrollment process to determine my eligibility for the school and any program of study I applied for.

During Supplee's 14 May 2013 deposition, Supplee testified that he revealed all the actions, conversations, and statements made by MMC

employees to the best of his recollection. He described his meetings with MMC's dean of education, Brothers, and Woolford and revealed the information that was discussed during those meetings. At no point during his deposition does Supplee testify that he was informed by MMC representatives that a criminal background check would be performed, that acceptance into a program would depend on the results of that criminal background check, that MMC would determine whether he was fit for admission based on the results of the criminal background check, or that he agreed to submit to the results of the criminal background check as described in paragraphs four through seven of his affidavit. We view paragraphs four through seven of Supplee's affidavit as additions that are comprised of conclusory statements or recharacterizations that are favorable to Supplee and that materially alter his prior deposition testimony. Based on the foregoing, we do not find that the trial court abused its discretion in striking these portions of Supplee's affidavit. Nonetheless, because the substance of paragraphs four through seven are independently corroborated by MMC's "Background Checks" provision included in the student catalog, which provided that students would be required to submit to a criminal history check and that MMC would review any applicant and determine their fitness for admission, we find even assuming *arguendo* that the trial court abused its discretion in striking paragraphs four through seven, Supplee has failed to show any resulting prejudice.

Paragraphs thirteen and fifteen of Supplee's affidavit provided as follows:

> 13. Prior to my dismissal from [MMC], I was never made aware by [MMC] that if I was denied access to one clinical externship facility, I would not be permitted to apply for admission to any other clinical externship facility.
>
> . . . .
>
> 15. Prior to my dismissal from [MMC], I was not aware that being denied access to a single clinical externship facility would immediately prohibit me from graduating from the Surgical Technology Program.

A review of plaintiff's deposition testimony demonstrates that he was aware that based on the results of a criminal background check, there "could be an issue . . . with the clinical sites in general[.]" However, Supplee's deposition testimony fails to indicate that he was aware that being denied to a single clinical externship facility would prohibit him

from applying for admission to another clinical externship facility or would prohibit him from graduating from the surg tech program. Thus, paragraphs thirteen and fifteen of Supplee's affidavit do not contradict or materially conflict with his prior deposition testimony; nor do they contain additions and changes that are conclusory statements or recharacterizations more favorable to Supplee that materially alter his deposition testimony. Yet, even if we were to find that the trial court abused its discretion in striking paragraphs thirteen and fifteen of Supplee's affidavit, we hold that this error was not prejudicial as the substance of the paragraphs were contained within paragraph seventeen, which was not struck by the trial court:

> 17. Had I known that the policies of a single third-party clinical site could render my investments, financial and otherwise, in a [surg tech program] degree to be of no value, I would not have enrolled in that program.

Based on the foregoing, we reject Supplee's arguments and affirm the order of the trial court, striking portions of Supplee's affidavit.

ii. Summary Judgment

In his next argument, Supplee contends that the trial court erred by granting defendants' motion for summary judgment as to Supplee's claims of fraud, unfair and deceptive trade practices (UDTP), negligent misrepresentation, and negligence.

> [W]e review the trial court's order de novo to ascertain whether summary judgment was properly entered. Summary 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.

Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 87, 747 S.E.2d 220, 226 (2013) (citation and quotation marks omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (citation omitted).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing

> through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Folmar v. Kesiah, __ N.C. App. __, __, 760 S.E.2d 365, 367 (2014) (citation omitted).

a. Fraud

[4] "[T]he essential elements of actionable fraud are: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citation omitted). "An unfulfilled promise is not actionable fraud, however, unless the promisor had no intention of carrying it out at the time of the promise, since this is misrepresentation of a material fact." *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 338, 713 S.E.2d 495, 503 (2011) (citation omitted).

In the present case, there are no genuine issues of material fact regarding Supplee's fraud claim because Supplee failed to present any evidence that defendants had the intent to deceive. Ned Snyder, the campus director of MMC at Wilmington, testified in a deposition that it was MMC's practice to run a criminal background check at admissions and at the clinical experience. Woolford also testified that based on MMC's written policy, criminal background checks were "supposed to be conducted of new applicants" during the admissions process. Despite defendants' policy, evidence demonstrated that defendants failed to conduct a criminal background check on Supplee prior to admissions. However, Supplee failed to present specific evidence that at the time of contract formation between Supplee and defendants, defendants had no intention of carrying out its unfulfilled promise; an essential element for a successful fraud claim. Consequently, we hold that the trial court did not err by granting defendants' motion for summary judgment as to Supplee's fraud claim.

b. UDTP

[5] "In order to prevail under [N.C. Gen. Stat. § 75-1.1(a)] plaintiffs must prove: (1) defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, (3) that said act proximately caused actual injury to the plaintiff." *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). "[W]hether an action is unfair or deceptive is dependent upon the facts of each

case and its impact on the marketplace." *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998) (citations and quotation marks omitted).

> If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. "Unfairness" is a broader concept than and includes the concept of "deception." A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Mitchell v. Linville, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) (citations omitted). Furthermore, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 289, 590 S.E.2d 313, 316-17 (2004) (citation and quotation marks omitted).

Our case law establishes that "[s]imple breach of contract . . . do[es] not qualify as unfair or deceptive acts, but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies." *Norman*, 131 N.C. App. at 177, 507 S.E.2d at 273. Breach of contract accompanied by fraud or deception, on the other hand, constitutes an unfair or deceptive trade practice. *Unifour Constr. Servs. v. Bellsouth Telcoms.*, 163 N.C. App. 657, 666, 594 S.E.2d 802, 808 (2004).

In support of his UDTP claim, Supplee first argues on appeal that defendants "knowingly made false representations of material fact concerning their intent to perform background checks" and "knowingly omitted material information about the discretion of a single clinical site to unilaterally reject a student for any reason and prohibit the student from finishing the program." As previously discussed, we held that Supplee could not establish a valid claim for fraud based on Supplee's failure to produce evidence that defendants intended to deceive Supplee at the time of contract formation. A review of the record does not reveal any evidence that defendants knowingly made the alleged false representations or knowingly omitted material about a clinical sites' discretion. Necessarily, Supplee's UDTP claim under the theory of breach of contract accompanied by fraud or deception must fail as Supplee has failed to demonstrate how defendants' breach of contract was characterized by egregious or aggravating circumstances.

Second, Supplee argues that defendants engaged in an unfair practice or act when it took intentional actions amounting to an inequitable

assertion of power. Supplee contends that defendants accomplished this by immediately dismissing him from the surg tech program once a single clinical internship site rejected him. We disagree. In Supplee's own deposition, Supplee testifies as to how defendants suggested he get his criminal record expunged and then reapply to the surg tech program. Supplee further testified that defendants offered an option of transferring into another MMC curriculum at no cost to Supplee. These facts do not display an inequitable assertion of power and do not display a practice that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Rather, the case before us involves a breach of contract based on an identifiable contractual promise that defendants failed to honor. "There is nothing so oppressive or overreaching about defendant[s'] behavior in breaching the contract that would transform the case into one for an unfair trade practice." *Coble v. Richardson Corp. of Greensboro*, 71 N.C. App. 511, 520, 322 S.E.2d 817, 824 (1984). Accordingly, we affirm the trial court's granting of summary judgment in favor of defendants on Supplee's UDTP claim.

c. Negligence

[6] Supplee argues that the trial court erred by granting summary judgment in favor of defendants as to his negligence claim because defendants had a duty to conduct a criminal background check in order to determine his eligibility for admission into and completion of the surg tech program.

In order to state a claim for negligence, a plaintiff must show "(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). In *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), the North Carolina Supreme Court held that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* at 81, 240 S.E.2d at 350. However, the *Ports Authority* Court recognized four general categories under which a breach of contract may constitute a tort action:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other

than the property which was the subject of the contract, or was a personal injury to the promisee.

(3) The injury, proximately caused by the promisor's negligent, or willful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.

(4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Id. at 82, 240 S.E.2d at 350-51 (citations omitted).

We hold that none of the four general exceptions set forth in *Ports Authority* apply to the facts at hand. Rather, this negligence cause of action is analogous to the claim brought forward by the plaintiff in *Ross*. *See Ross*, 957 F.2d at 415 (the plaintiff alleged that a university owed him a duty "to recruit and enroll only those students reasonably qualified and able to academically perform" at the university). As held in *Ross*, we also hold that recognizing Supplee's cause of action, a "negligent admission" claim, would present difficult "problem[s] to a court attempting to define a workable duty of care." *Id.* Addressing Supplee's "negligent admission" claim would require subjective assessments as to the requirements for admission into the surg tech program, requirements for completion of the surg tech program, requirements of the clinical sites, and the results of Supplee's criminal background check. Because "[r]uling on this issue would . . . require an inquiry into the nuances of educational processes and theories," we reject his claim and affirm summary judgment in favor of defendants on this issue. *Id.* at 417.

d. Negligent Misrepresentation

[7] Lastly, Supplee argues that the trial court erred by granting summary judgment in favor of defendants on the issue of negligent misrepresentation. We do not agree.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Howard v. County of Durham*, __ N.C. App. __, __, 748 S.E.2d 1, 7 (2013) (citation omitted).

> Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort. Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty.

Hardin v. York Memorial Park, __ N.C. App. __, __, 730 S.E.2d 768, 775-76 (2012) (citations and quotation marks omitted).

The allegations in Supplee's complaint and the evidence before the trial court demonstrate that Supplee's claim is that defendants failed to conduct a criminal background check prior to admissions and Supplee's damages were caused by the aforementioned failure. The duty that defendants had to conduct a criminal background check arose under the terms of the contract between the parties and not by operation of law independent of the contract. As such, the breach of that contractual duty cannot provide the basis for an independent claim of negligent misrepresentation. Therefore, we hold that the trial court did not err by granting summary judgment in favor of defendants on Supplee's claim for negligent misrepresentation.

C. Mr. Nutt's Appeal

[8] On appeal, Mr. Kyle Nutt argues that the trial court erred by granting defendants' motion for sanctions. We agree.

"[A] Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *In re Small*, 201 N.C. App. 390, 394, 689 S.E.2d 482, 485 (2009) (citation omitted). We review our court's inherent authority to impose sanctions for an abuse of discretion. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 663, 554 S.E.2d 356, 361 (2001). "In reviewing a trial court's findings of fact, our review is limited to whether there is competent evidence in the record to support the findings." *In re Key*, 182 N.C. App. 714, 717, 643 S.E.2d 452, 455 (2007) (citation omitted).

Rule 3.6 of the North Carolina Rules of Professional Conduct provides as follows:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) the information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto[.]

N.C. Revised R. Prof'l. Conduct Rule 3.6(a) and (b). The comment section to Rule 3.6 states that a "relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive." N.C. Revised R. Prof'l. Conduct Rule 3.6 cmt.

North Carolina Rules of Professional Conduct Rule 3.3, entitled "Candor Toward the Tribunal," provides that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" N.C. Revised R. Prof'l. Conduct Rule 3.3(a)(1).

On 27 January 2014, the trial court entered an order on defendants' motion for sanctions and/or appropriate relief. The trial court made the following pertinent findings of fact:

> 7. . . . Plaintiffs moved pursuant to Rule 42 for an order granting each Plaintiff a separate trial.
>
> 8. In that motion, [Mr. Nutt] represented, among other things, that: (1) the respective Plaintiffs had "vastly different" criminal records; (2) the charges that "led to each Plaintiffs' dismissal were entirely different"; (3) the Plaintiffs' damages "were different in amount, time

period, and nature"; (4) there were "significant factual differences" between the Plaintiffs' respective breach of contract claims; (5) Supplee "has decided to appeal the Court's Summary Judgment Order"; (6) Thomas, "due to the greatly different factual difference in her case and desire to reach a final adjudication in a more timely manner, has expressed her intent to proceed directly to trial"; and (7) it would be "prejudicial and inconvenient for Plaintiff Thomas to be forced to wait for the outcome of the appeal of Plaintiff Supplee's distinctly separate case." . . . .

. . . .

11. Mr. Nutt [] moved to have Supplee's claim tried first, despite representing to this Court that Thomas desired to have her claim adjudicated in a more timely manner. The Honorable Phyllis M. Gorham . . . permitted Supplee's trial to proceed before Thomas' trial.

12. Supplee's breach of contract claim came on for trial on October 28, 2013, before the undersigned Superior Court Judge. Thomas' trial was scheduled for November 18, 2013, which was also to be heard by the undersigned[.]

13. The jury returned a verdict in favor of Supplee on November 1, 2013, in the amount of $53,481. . . .

14. The jury's verdict sheet did not identify the basis for the award (i.e., whether damages were awarded based on evidence of tuition paid, lost wages, or some combination thereof).

15. On or about November 3, 2013, WECT posted a story on its website disclosing that Mr. Supplee had prevailed on his breach of contract claim in the amount of $53,481, and that the damages were based upon "wasted tuition and lost income opportunities[.]" . . . .

16. The alleged basis for the damages, "wasted tuition and lost income opportunities[,]" is not a matter of public record.

17. Mr. Nutt acknowledged to this Court that he supplied the information to WECT for the article.

18. Mr. Nutt was reported in the article as stating that "the school was contractually obligated to screen their applicants' criminal backgrounds to make sure all potential students could eventually graduate from healthcare degree programs w[h]ere certain offenses the school was aware of could potentially prevent students from completing required coursework at hospitals."

19. The specific statements attributed to Mr. Nutt by WECT were not found on the jury's verdict sheet.

20. Mr. Nutt also informed WECT that "the school offered Supplee $25,000 at the start of trial to end the matter, but then removed the offer midway through trial."

21. The settlement amount and withdrawal of the offer was an inadmissible settlement communication, and was likewise not a matter of public record.

22. In the WECT article, Mr. Nutt stated that "his firm is representing another student going to trial over similar claims this month."

. . . .

24. Mr. Nutt represented to WECT that Thomas' case was "similar" to Mr. Supplee's claims, while Mr. Nutt represented and has maintained before this Court that the two Plaintiffs present divergent and distinct fact patterns that necessitated two trials.

. . . .

29. Mr. Nutt's comments created a substantial risk of prejudicing the Thomas jury, and were in violation of Rule 3.6(a) of the North Carolina Rules of Professional Conduct.

30. Partially as a result of Mr. Nutt's comments to the news media, Defendants settled Thomas' case and avoided a trial, did not pursue their counterclaim against Thomas[.]

Based on the foregoing, the trial court concluded that Mr. Nutt had violated Rule 3.6 of the North Carolina Rules of Professional Conduct "by making extrajudicial statements to the news media" and that

Mr. Nutt "knew or reasonably should have known that the extrajudicial statements he made would be disseminated by means of public communication and would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The trial court also concluded that Mr. Nutt either violated Rule 3.6 or Rule 3.3, or both, when he either misrepresented the difference in the plaintiffs' claims or knew or should have known that their cases were not "similar."

First, Mr. Nutt argues that his statements made to the media, excluding his statement concerning the settlement offer made to Supplee, were protected by the "safe harbor" provisions of Rule 3.6(b). Here, the trial court found in findings of fact numbers fifteen through nineteen that Mr. Nutt's extrajudicial comments included stating the basis of the damages awarded by the jury and stating that the defendants were contractually obligated to screen their applicants' criminal backgrounds to ensure all potential students could successfully complete healthcare degree programs. The trial court found that these statements were not a matter of public record. After thoughtful review, we find that the jury's award of damages and the amount of damages were clearly a matter of public record. Mr. Nutt's extrajudicial statement stating that the basis of damages was "wasted tuition and lost income opportunities" qualifies under Rule 3.6(b), as it pertained to Supplee's claim. Supplee's claim against defendants were specifically for damages based on expenses spent to enroll and participate in classes at MMC and for "forsaken income-earning opportunities." These claims, contained in Supplee's 21 August 2012 complaint, were matters of public record. Mr. Nutt's statement that defendants were "contractually obligated to screen their applicants' criminal backgrounds" also involves the claim involved in the present case, and therefore, are among the subjects a lawyer may state extrajudicially. Thus, we hold that the trial court abused its discretion by finding that the aforementioned statements were sanctionable under Rule 3.6.

We now address the trial court's finding of fact number twenty through twenty-one regarding Mr. Nutt's extrajudicial statement that defendants made Supplee a $25,000 settlement offer at the start of the trial, which was later removed midway through the trial. The trial court found that this statement was an inadmissible settlement communication and not a matter of public record. Rule 3.6 requires that a lawyer "who is participating or has participated in the investigation or litigation of a matter" may not make an extrajudicial statement that he knows "will have a substantial likelihood of materially prejudicing an adjudicative proceeding *in the matter*." N.C. Revised R. Prof'l Conduct Rule 3.6(a). (emphasis added). Here, the trial court found that Mr. Nutt's statements

were made on 3 November 2013, two days after a jury returned a verdict in favor of Supplee. Therefore, we conclude that Mr. Nutt's extrajudicial statement could not have had a substantially likelihood of materially prejudicing Supplee's proceeding as it had already concluded and find that the trial court abused its discretion in finding that this statement violated Rule 3.6.

Next, Mr. Nutt argues that the trial court erred by entering finding of fact number thirty and we agree. Finding of fact number thirty provided that partially based on Mr. Nutt's extrajudicial statements, defendants settled in Thomas' case and avoided a trial. We find nothing in the record to support this finding. Mr. Nutt merely stated in his statements to the media that "his firm was representing another student going to trial over similar claims this month" and did not identify Thomas by name. Additional information about Thomas' claims would have been a matter of public record.

Lastly, Mr. Nutt asserts that the trial court erred by finding that his extrajudicial statements violated Rule 3.3 of the North Carolina Rules of Professional Conduct. Here, the trial court based its finding of a violation of Rule 3.3 on the fact that while Mr. Nutt represented to the trial court that Supplee's and Thomas' cases "present[ed] divergent and distinct fact patterns that necessitated two trials[,]" Mr. Nutt represented to the media that Thomas' case was "similar" to Supplee's claims. We conclude that these two representations are not contradictory and do not constitute a "false statement" under Rule 3.3. It is clear from the record that Supplee and Thomas' 21 August 2012 joint complaint alleged the same legal claims against defendants and that after the 31 July 2013 summary judgment order, the only claim at issue in both Supplee and Thomas' trials was breach of contract. Mr. Nutt's representations to the media that Supplee and Thomas had similar claims and Mr. Nutt's representations to the trial court that Supplee and Thomas's cases had "divergent and distinct fact patterns" are not mutually exclusive. Stating that two cases have similar claims as well as "divergent and distinct fact patterns" does not represent a lack of candor toward the tribunal in violation of Rule 3.3.

Based on the foregoing, we hold that the trial court abused its discretion by holding that Mr. Nutt either violated Rule 3.6 or Rule 3.3, or both, and reverse the trial court's 27 January 2014 order on defendants' motion for sanctions.

III. Conclusion

We affirm the 20 December 2013 order of the trial court denying defendants' motions for directed verdict and judgment notwithstanding the verdict and hold that the trial court did not abuse its discretion by admitting evidence of Supplee's landscaping business and income earned as a car salesman. We hold that the trial court did not abuse its discretion by striking portions of Supplee's affidavit and affirm the 31 July 2013 order of the trial court granting defendants' motion for summary judgment, in part. We reverse the 27 January 2014 order on defendants' motion for sanctions.

Affirmed in part; reversed in part.

Judges CALABRIA and STEELMAN concur.

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WACHOVIA BANK, N.A., PLAINTIFF
v.
EDNA S. COLEMAN A/K/A EDNA COLEMAN, ET AL., DEFENDANTS

No. COA14-683

Filed 3 February 2015

1. Appeal and Error—issue not raised below—choice of statute of limitations

The applicable statute of limitations for a reformation claim arising from a foreclosure was the three-year statute of limitations for fraud or mistake, which both parties relied on at trial, rather than the ten-year statute of limitations for sealed instruments which plaintiff raised for the first time on appeal. The Court of Appeals declined to exercise its discretion to suspend the Appellate Rules.

2. Statutes of Limitation and Repose—accrual—due diligence—double checking deed of trust description—question for jury

In a claim for reformation of a deed of trust, summary judgment was not appropriate on defendant's due diligence statute of limitations defense where the statute of limitations for fraud or mistake applied. This statute of limitations is triggered when the plaintiff discovered or should have discovered the mistake in the exercise of due diligence. Whether a plaintiff exercised due diligence is ordinarily a question for the jury.

3. Laches—reformation of deed of trust—delay in discovering mistake—reasonableness an issue of fact

In an action for reformation of a deed of trust arising from a foreclosure, defendants' laches defense raised issues of fact that could not be resolved at summary judgment. The evidence plaintiff presented was sufficient to create a genuine issue of material fact concerning whether its delay in discovering the mistake was reasonable.

4. Estates—non-claim statute—reformation of deed of trust not barred

A claim for reforming a deed of trusting arising from a foreclosure was not barred by the non-claim statute, N.C.G.S. § 28A-19-3(a) (2013). The non-claim statute does not preclude actions that seek to effectuate and enforce a deed of trust.

5. Reformation of Instruments—due diligence—not required

Reformation is available where a legal instrument does not express the true intentions of the parties due to mutual mistake or the mistake of the draftsman. Although defendants argued that summary judgment was appropriate on the merits because plaintiff did not use reasonable diligence in drafting the deed of trust, there is no reasonable diligence requirement in an action for reformation based on mutual mistake. Since defendants' statute of limitations and laches defenses raise issues of fact that cannot be resolved at summary judgment, the trial court's entry of summary judgment was reversed and the case remanded.

Appeal by plaintiff from order entered 20 February 2014 by Judge A. Robinson Hassell in Davidson County Superior Court. Heard in the Court of Appeals 20 October 2014.

Womble Carlyle Sandridge & Rice, LLP, by Kenneth B. Oettinger, Jr., Chad Ewing, and Lee Davis Williams, for plaintiff-appellant.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for defendant-appellee.

DIETZ, Judge.

In 2007, Robert and Edna Coleman refinanced their home mortgage through Wells Fargo Bank, N.A. (then Wachovia Bank). The Colemans' home is situated on two lots adjacent to another two empty, undeveloped

lots. The deed of trust prepared by Wachovia listed the correct street address for the Coleman home, but mistakenly referenced the book and page number and tax parcel ID of the adjacent, undeveloped lots.

In 2010, Wells Fargo attempted to foreclose on the property and discovered, for the first time, the mistaken references in the deed of trust. Wells Fargo sought reformation of the instrument on the ground of mutual mistake. Defendants Edna Coleman and the Estate of Ronald Coleman (who passed away) moved for summary judgment, arguing that had Wells Fargo acted with reasonable diligence, it would have immediately discovered the error. Defendants also argued that the reformation claim is barred by the statute of limitations, the equitable doctrine of laches, and the non-claim statute. The trial court granted Defendants' motion for summary judgment.

We reverse and remand this case for further proceedings. A claim for reformation does not require proof that the party seeking reformation acted with reasonable diligence. Indeed, even if the mistake was the result of negligence or neglect, a trial court still has the authority to reform the instrument if there is clear, cogent, and convincing evidence that the mutual mistake prevents the instrument from embodying the parties' actual, original agreement. Likewise, this action is one to enforce a deed of trust, with the reformation claim a necessary part of that enforcement effort. Thus, the non-claim statute, which bars certain untimely claims against a decedent's estate, does not apply.

Finally, with respect to the statute of limitations and laches defenses, there are genuine issues of material fact that preclude entry of summary judgment. Both defenses turn on when Wells Fargo should have discovered the mistake in the exercise of reasonable or due diligence. There is competing evidence on this issue and it must be resolved by a jury. Accordingly, we reverse the trial court's entry of summary judgment and remand for further proceedings.

Facts and Procedural History

Defendants Edna S. Coleman and the Estate of Ronald G. Coleman own lots 42, 43, 44, and 45 in the Rockland Shores Estates subdivision in Davidson County, North Carolina. Although the lots are neighboring, they are of considerably different value. Mr. Coleman acquired lots 42 and 43, which are commonly known as 167 Lakeview Drive, Linwood, North Carolina, on 3 March 1987. This property is improved with a single-family home and had a tax value of $95,000 at the time the complaint was filed in this action. Mr. Coleman and his wife acquired lots 44 and 45 on 24 September 1996. This unimproved property is located adjacent

to the developed property and had a tax value of $11,900 at the time the complaint was filed.

On 19 January 2007, Mr. Coleman borrowed money from Wells Fargo's predecessor in interest, Wachovia Bank, N.A., in the principal amount of $138,567.00. A promissory note was completed that same day, secured by a deed of trust executed by both Mr. and Mrs. Coleman. The deed of trust, prepared by Wachovia and recorded in the Davidson County Registry on 8 February 2007, identified the property as:

> All that real property situated in the County of Davidson, State of North Carolina:
>
> Being the same property conveyed to the Grantor by Deed recorded in Book 1007, Page 1013, Davidson County Registry, to which deed reference is hereby made for a more particular description of this property.
>
> Property Address: 167 Lakeview Drive
>
> Parcel ID: 06-027-A-000-0044

The property address in the deed of trust identifies the developed property on lots 42 and 43, but the book and page description and the parcel ID identify the unimproved property on lots 44 and 45.

About a month before the deed of trust was executed, Wachovia obtained an appraisal of the developed property in connection with its loan to Mr. Coleman. That appraisal estimated the property's value at $215,000 as of 15 December 2006. The report specifically identified lot 42 and recites "Deed Book: 5700 Page: 664" as the legal description of the property being appraised. Although the Davidson County Register of Deeds does not have a book 5700, the deed at book 570, page 664 refers to lots 42 and 43, the developed property on which the Colemans built their home. Wachovia did not obtain an appraisal of the adjacent, undeveloped property.

Defendants applied approximately $131,699.27 of the loan to pay off their existing mortgage on the developed property. Sadly, Mr. Coleman died on 28 October 2008. Mrs. Coleman notified Wachovia shortly after her husband's death. In addition, as administratrix of the Ronald G. Coleman Estate, Mrs. Coleman provided notice to creditors through publication in a local newspaper on four dates throughout January and February 2009.

Wells Fargo acquired the loan at issue in this case on or about 20 March 2010, when it obtained substantially all of Wachovia's assets by

way of merger. After the Coleman Estate defaulted on its payment obligations under the terms of the note, Wells Fargo initiated foreclosure proceedings in Davidson County on 8 December 2010. Defendants contested the foreclosure proceedings on the ground that the deed of trust contained the legal description of the unimproved property, rather than the developed property upon which Wells Fargo sought to foreclose.

Wells Fargo voluntarily dismissed the foreclosure proceedings and instituted this action seeking reformation of the deed of trust and judicial foreclosure of the developed property. In the alternative, Wells Fargo sought a declaratory judgment or equitable lien and judicial foreclosure of the undeveloped property described in the deed of trust.

Both parties moved for summary judgment. At the hearing, the parties agreed that there were no contested issues of material fact and that their respective arguments were based on "basically the same information." Defendants argued that Wells Fargo was barred from relief by the statute of limitations, laches, lack of reasonable diligence, and the nonclaim statute.

Without specifying the grounds on which it based its judgment, the superior court entered an order granting Defendants' motion for summary judgment and dismissing Wells Fargo's claims with prejudice. Wells Fargo timely appealed.

Analysis

Summary judgment is appropriate 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) (2013). In ruling on a motion for summary judgment, the trial court has no authority to resolve factual issues and must deny the motion if there is any genuine issue of material fact. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Id.* (internal quotation marks omitted). An issue of fact is genuine where supported by substantial evidence, and "is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). This Court reviews appeals from summary judgment *de novo*. *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

I. Timeliness of Wells Fargo's Claims

A. Statute of Limitations

[1] Defendants argue that Wells Fargo's reformation claim is barred by the statute of limitations. To address this argument, we must first determine which statute of limitations to apply in this appeal. In the trial court, both parties relied entirely on the three-year statute of limitations "[f]or relief on the ground of fraud or mistake" under N.C. Gen. Stat. § 1-52(9) (2013). On appeal, Wells Fargo argues for the first time that the ten-year statute of limitations applicable to sealed instruments, N.C. Gen. Stat. § 1-47(2), is the proper limitations statute for this action.

Wells Fargo concedes that this argument was not raised below, but asks this Court in its discretion to suspend the Appellate Rules and permit the company to raise the argument for the first time on appeal. We decline to do so and find this argument waived on appeal.[1] *See* N.C. R. App. P. 10 (2013); *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal."). We therefore apply the three-year statute of limitations in N.C. Gen. Stat. § 1-52(9).

[2] An order granting summary judgment "based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). For a claim based on fraud or mistake subject to section 1-52(9), "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9). A plaintiff "discovers" the mistake—and therefore triggers the running of the three-year limitations period—when he actually learns of its existence or should have discovered the mistake in the exercise of due diligence. *See Hyde v. Taylo*r, 70 N.C. App. 523, 528, 320 S.E.2d 904, 908 (1984).

Our case law is clear that the question of whether a plaintiff has exercised due diligence is ordinarily one for the jury. *See*, *e.g.*, *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. "This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649

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1. Our finding of waiver on appeal does not bar the trial court from addressing this issue on remand.

S.E.2d at 386. Thus, where there is a dispute of material fact concerning when the plaintiff should have discovered the mistake in the exercise of due diligence, summary judgment is inappropriate, and the case must be submitted to a jury. *See Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001).

Defendants argue that Wells Fargo should have discovered the mistake in the deed of trust at the time it was executed and recorded, more than three years prior to the filing of this action. They argue that Wells Fargo, in the exercise of due diligence, should have cross-referenced the legal description in the loan documents with the description contained in the Davidson County Registry. Although the deed of trust listed the correct street address of the developed property, the book and page number and parcel ID number referenced the undeveloped property. Defendants also contend that Wells Fargo should have discovered discrepancies between the information in the deed of trust and the same information in the appraisal report (which contained the correct book and page number for the developed property, albeit with an apparent typo). Defendants maintain that, had Wells Fargo done any of this follow-up diligence, it would have discovered the mistake. Thus, Defendants assert that they have shown as a matter of law that Wells Fargo failed to exercise due diligence. We disagree.

Our Supreme Court, applying N.C. Gen. Stat. § 1-52(9), has held that "the mere registration of a deed, containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations." *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951). Instead, "there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud."[2] *Id.*

In other words, the mere fact that there were indications of fraud or mistake on the face of the document does not trigger the statute of limitations as a matter of law. Instead, the running of the limitations period turns on the factual determination of when, in the exercise of due diligence, the party reasonably should have been expected to follow up and ultimately discover the mistake. This is a factual determination that ordinarily must be resolved by a jury. *See id.* at 118, 63 S.E.2d at 209.

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2. Section 1-52(9) applies equally to both fraud and mutual mistake.

This Court confirmed the *Vail* holding in *Huss*, where we reversed the trial court's grant of summary judgment in a reformation case based on the statute of limitations. 31 N.C. App. at 467-68, 230 S.E.2d at 163. In *Huss*, a litigant petitioned for a partition sale of real property allegedly owned by her and her ex-husband as tenants in common. *Id.* at 465, 230 S.E.2d at 161. The ex-husband sought reformation, arguing that the inclusion of his wife's name on the deed was the result of a mutual mistake, and that he had specifically requested assurances from the grantors of the property that it would be recorded solely in his name. *Id.* The husband conceded that he did not even read the deed. Nevertheless, this Court held that "[w]hether failure to read a deed will bar relief depends on the facts and circumstances in each case" and that it was for the jury to determine what constituted the exercise of due diligence on those particular facts. *Id.* at 468, 230 S.E.2d at 163.

Under *Vail* and *Huss*, summary judgment is inappropriate in this case. The deed of trust listed the correct street address of the developed property. Although the legal description was not accurate, that mistake would have been discovered only if Wells Fargo had double-checked the accuracy of the book and page description and the parcel ID, which would have disclosed the mistaken references to the adjacent, undeveloped property. Wells Fargo maintains that, given the accurate property address, its failure to immediately double-check the legal description and discover the mistake was not unreasonable. Under *Vail* and *Huss*, whether this type of double-checking would be necessary "in the exercise of due diligence," and at what point it should have taken place, are factual determinations that cannot be resolved at summary judgment. Accordingly, we hold that summary judgment was not appropriate based on Defendants' statute of limitations defense.

B. Laches

[3] Defendants next argue that summary judgment was appropriate because Wells Fargo's claims are barred by the equitable doctrine of laches. As with Defendants' statute of limitations defense, we hold that their laches defense raises issues of fact that cannot be resolved at summary judgment.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton*, 211 N.C. App. at 88-89, 712 S.E.2d at 230 (internal quotation marks omitted). "Delay which will constitute laches depends upon the facts and circumstances of each case. When

the action is not barred by the statute, equity will not bar relief except upon special facts demanding extraordinary relief." *Huss*, 31 N.C. App. at 469, 230 S.E.2d at 163.

Laches is an affirmative defense which must be pleaded, and the burden of proof is on the party asserting the defense. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). To succeed on the defense of laches, the defendant must show that the delay "resulted in some change in the condition of the property or the relation of the parties." *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001). "[T]he mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it." *Taylor*, 290 N.C. at 622-23, 227 S.E.2d at 584-85.

Here, Defendants failed to show that they are entitled to summary judgment on the issue of laches. On the question of whether the delay was reasonable, Wells Fargo forecast evidence explaining its delay in seeking reformation, including the fact that the street address on the deed of trust correctly referenced the developed property. It was only the book and page numbers and the parcel ID that allegedly were mistaken, and those mistakes were not apparent on the face of the document. Reasonableness is a quintessential fact issue, *see Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983), and the evidence Wells Fargo presented in this case is sufficient to create a genuine issue of material fact concerning whether its delay in discovering the mistake was reasonable. Accordingly, Defendants' laches defense cannot be resolved at summary judgment.

C. Non-Claim Statute

[4] Defendants next argue that because Wells Fargo failed to present its reformation claim within the statutory window to present claims against a decedent's estate, this cause of action is barred by the non-claim statute, N.C. Gen. Stat. § 28A-19-3(a) (2013). We reject this argument because the non-claim statute does not preclude actions that seek to effectuate and enforce a deed of trust.

Like a statute of limitations, the non-claim statute works to limit the time in which a claimant may bring the suit against a decedent's estate. *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 386-87, 675 S.E.2d 122, 129 (2009). The purpose of the non-claim statute is "to provide faster and less costly procedures for administering estates" by allowing the personal representative to efficiently identify all claims

against the estate and requiring that creditors present their claims within a specified time frame. *Id.* at 387, 675 S.E.2d at 129. However, the statute balances these interests in efficiency against the rights of real property creditors, explicitly providing that "[n]othing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with." N.C. Gen. Stat. § 28A-19-3(g).

This is an action to "enforce . . . [a] deed of trust." Wells Fargo expressly seeks enforcement of the deed of trust at issue in this case, and its claim for reformation of the deed of trust—seeking to correct an alleged mutual mistake preventing enforcement—is a necessary part of the overall enforcement action. Accordingly, we hold that the non-claim statute does not apply and thus cannot support the trial court's entry of summary judgment.

II. Wells Fargo's Claim for Reformation

[5] Finally, we address the merits of Wells Fargo's reformation claim. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997). Where a legal instrument does not express the true intentions of the parties due to mutual mistake or the mistake of the draftsman, reformation is available. *McBride v. Johnson Oil & Tractor Co.*, 52 N.C. App. 513, 515, 279 S.E.2d 117, 119 (1981).

On appeal, Defendants argue that summary judgment was appropriate on the merits based entirely on a single legal argument: that reformation is impermissible because Wells Fargo did not use "reasonable diligence" in drafting the deed of trust. As explained above, there is a fact dispute concerning whether Wells Fargo used reasonable diligence, and thus summary judgment would be inappropriate on this ground. But there is a more fundamental flaw in Defendants' argument: there is no "reasonable diligence" requirement in an action for reformation based on mutual mistake.

A mutual mistake is one that is shared by both parties to the contract, "wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the

written instrument designed to embody such agreement." *Dillard*, 126 N.C. App. at 798, 487 S.E.2d at 159. A party seeking reformation on the ground of mutual mistake must prove that the parties agreed upon a material stipulation to be included in the written instrument, that the stipulation was omitted by the parties' mistake, and that because of the mistake, the written instrument does not express the parties' intention. *See Branch Banking & Trust Co. v. Chicago Title Ins. Co.*, 214 N.C. App. 459, 464, 714 S.E.2d 514, 518 (2011). The party seeking reformation must prove the existence of the mutual mistake by "clear, cogent and convincing evidence." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981); *see also Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977).

Notably, "[n]egligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake." *Dillard*, 126 N.C. App. at 798, 487 S.E.2d at 159 (brackets omitted). In *Dillard*, for example, the defendant provided the wrong street number on his application for a property insurance policy. *Id.* at 797-98, 487 S.E.2d at 158-59. This Court affirmed reformation of the policy to cover the correct property address despite the fact that the policyholder's own neglect caused the mistake. *Id.* at 799, 487 S.E.2d at 159. And in *Huss*, as explained above, a husband claimed that his ex-wife's name was mistakenly included on a deed to his property. *Huss*, 31 N.C. App. at 465, 230 S.E.2d at 161. The husband conceded that the existence of his ex-wife's name was apparent on the face of the deed, and admitted that he did not even read the deed. *Id.* We nevertheless concluded that he had stated a claim for reformation, explaining that "[i]t is not required that the pleader allege facts as to how and why the mutual mistake came about." *Id.* at 467, 230 S.E.2d at 162.

Simply put, a party seeking reformation of a written instrument need not allege or prove that the mutual mistake was a reasonable or neglect-free mistake. Even if the mistake resulted from that party's failure to exercise reasonable diligence, reformation is available if there is clear, cogent, and convincing evidence that the mistake was a mutual one and that it prevents the instrument from embodying the parties' actual, original agreement. *Dillard*, 126 N.C. App. at 798-99, 487 S.E.2d at 159; *see also* 25A Strong's N.C. Index 4th Reformation of Instruments § 1, at 82 (2006).

Here, Wells Fargo presented uncontested evidence that the deed of trust includes the correct property address of the developed property. The appraisal conducted during the loan origination process was performed on the developed property. Defendants applied the vast majority of the loan to pay off their existing mortgage on that developed property.

Finally, and most importantly, Defendants did not forecast any evidence at trial tending to show that the deed of trust was intended to reference the undeveloped, empty lots.

Because Defendants have not forecast any evidence to rebut Wells Fargo's showing of mutual mistake, Wells Fargo is entitled to reformation unless Defendants prevail on one of their defenses. As discussed above, Defendants' statute of limitations and laches defenses raise issues of fact that cannot be resolved at summary judgment. Accordingly, we reverse the trial court's entry of summary judgment and remand this case for further proceedings below.

Conclusion

For the reasons set forth above, there are material issues of fact precluding resolution of this case as a matter of law. Accordingly, we reverse the trial court's entry of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 FEBRUARY 2015)

GUIDING LIGHT MISSIONARY BAPTIST ASS'N, INC. v. MT. ZION BAPTIST CHURCH No. 14-750	Rowan (12CVS270)	Reversed and Remanded in Part, Dismissed in Part
HARTLINE v. HARTLINE No. 14-837	Jackson (12CVS707)	Affirmed
IN RE J.F. No. 14-867	McDowell (10JA72-75)	Affirmed
MACON BANK, INC. v. CORNBLUM No. 14-631	Swain (11CVS225)	Affirmed
OLATOYE v. BURLINGTON COAT FACTORY WAREHOUSE CORP. No. 14-590	Durham (12CVS5611)	Vacated and Remanded in Part, Affirmed in Part
PEEPLES v. PEEPLES No. 14-1026	Rowan (13CVD1202)	Affirmed
STATE v. KING No. 14-996	Onslow (13CRS50792-94)	No Error
STATE v. LEONARD No. 14-182	Rowan (09CRS51935) (10CRS55545)	Affirmed
WILSON v. CONLEYS CREEK LTD. P'SHIP No. 14-823	Jackson (12CVS196)	No Prejudicial Error

ACC CONSTR., INC. v. SUNTRUST MORTG., INC.

[239 N.C. App. 252 (2015)]

ACC CONSTRUCTION, INC., PLAINTIFF
v.
SUNTRUST MORTGAGE, INC., JACKIE MILLER, TRUSTEE OF SUNTRUST MORTGAGE, INC., AND SUBSTITUTE TRUSTEE SERVICES, INC., AS TRUSTEE OF SUNTRUST MORTGAGE, INC., DEFENDANTS

No. COA14-789

Filed 17 February 2015

1. Collateral Estoppel and Res Judicata—debt priorities—prior action—identity of causes of action

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err by dismissing Plaintiff's (ACC) amended complaint based on *res judicata*. The only essential element of *res judicata* in question was whether there was an identity of causes of action. The issue could have been addressed in the first appeal, but ACC failed to prosecute the appeal and it was dismissed. ACC's argument amounts to a collateral attack on the trial court's judgment, which is not allowed. Furthermore, the Court of Appeals declined to allow ACC to rewrite the order in a way that distorts the procedural history of the litigation.

2. Collateral Estoppel and Res Judicata—lack of final judgment—plaintiff could have brought claims

Plaintiff's (ACC) claims in this action would still be barred by *res judicata* even if the doctrine of instantaneous seisin applied, as plaintiff argued. Despite the lack of a final judgment on the merits regarding ACC's rights as a junior lienholder, the procedural history of the first action clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*.

3. Collateral Estoppel and Res Judicata—priorities between debts—claim of new injury—opportunities to protect rights not taken

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, *res judicata* bared plaintiff-ACC's current claims for unjust enrichment and constructive trust despite plaintiff's argument that the claims arose from a new and distinct injury. Even though ACC's original lawsuit was filed before SunTrust initiated foreclosure proceedings

and it could not have then claimed surplus proceeds, SunTrust initiated its foreclosure proceedings one month later, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*.

4. Costs—non-justiciable action—sanctions

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err in imposing sanctions pursuant to N.C.G.S. § 6-21.5 based on its determination that plaintiff-ACC's claims raised no justiciable issues.

5. Pleadings—Rule 11 sanctions—action brought for improper purpose

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err by awarding sanctions under Rule 11 based on its conclusion that ACC brought this action for an improper purpose. The fact that SunTrust did not specifically ask for Rule 11 sanctions based on the improper purpose prong is immaterial and the trial court's imposition of sanctions was sufficiently supported by its extensive findings of fact.

6. Attorneys—fees—amount awarded as sanction—calculation

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err or abuse its discretion in calculating the amount of attorney fees it awarded as sanctions in conjunction with plaintiff-ACC's frivolous lawsuit. Although ACC was correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that defendant-SunTrust's counsel stated he was seeking, the trial court's award was well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill.

7. Appeal and Error—frivolous appeal—sanctions

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, defendant-Suntrust's motion for sanctions against plaintiff-ACC and

its counsel for a frivolous appeal was granted. ACC and its appellate counsel were ordered to pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by SunTrust in the appeal.

Appeal by Plaintiff from orders entered 3 March 2014 by Judge Marvin P. Pope, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 20 November 2014.

Karolyi-Reynolds, PLLC, by James O. Reynolds, for Plaintiff.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV and Katie M. Iams, for Defendants.

STEPHENS, Judge.

This appeal arises from a long-standing dispute between Plaintiff ACC Construction, Inc. ("ACC") and Defendant SunTrust Mortgage, Inc. ("SunTrust") over the respective priorities of ACC's mechanic's claim of lien and SunTrust's deed of trust against a property generally known as Lot 3 of Rebecca's Pond subdivision in Henderson County ("the Property"). The procedural history stretches back over the course of multiple lawsuits to 2009. In the present case, ACC challenges the trial court's decision to grant SunTrust's Rule 12(b)(6) motion to dismiss ACC's claims for unjust enrichment and constructive trust based on *res judicata*, as well as the trial court's award of attorneys' fees to SunTrust as a sanction against ACC for bringing non-justiciable claims for an improper purpose. After careful consideration, we affirm the trial court's decision and grant SunTrust's motion for Rule 34 sanctions against ACC for prosecution of this frivolous appeal.

I. Facts and procedural history

In 2007, Christopher and Susan Wall ("the Walls") obtained a $765,000.00 loan from SunTrust to acquire the Property and build a house on it. The Property was originally owned by GHC Land Development, LLC, which transferred it to NC Land Finders, LLC by deed dated 3 April 2007. NC Land Finders then executed a deed conveying the property to the Walls on 5 April 2007 at a purchase price of $165,000.00. That same day, the Walls executed a deed of trust in favor of SunTrust. The deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were both recorded in the Henderson County Registry on 13 April 2007. However, it was subsequently discovered that although

it had been executed, the deed conveying the Property from GHC to NC Land Finders had not been recorded, thus leaving a record gap in the chain of title. To correct this issue, the GHC deed was recorded in the Henderson County Registry on 16 May 2007. Out of an abundance of caution, the deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were re-recorded on 18 September 2007.

The Walls hired ACC to build a house on the Property. On 12 June 2007, ACC began furnishing labor and materials. ACC completed construction in January 2009, but claimed that it had not been fully paid for the work it performed. On 20 January 2009, ACC filed a claim of lien against the Property in the amount of $296,513.71. Later in 2009, the Walls also defaulted on their debt to SunTrust by failing to make payments as due.

On 6 July 2009, ACC filed a lawsuit ("*ACC I*") in Henderson County Superior Court against the Walls and SunTrust to enforce its claim of lien and also seeking damages for breach of contract and recovery in *quantum meruit*. On 6 August 2009, SunTrust instituted a foreclosure special proceeding pursuant to its deed of trust in Henderson County Superior Court.

On 18 August 2009, ACC amended its complaint in *ACC I* to include a fourth cause of action for "Declaratory Judgment to Quiet Title and Motion for Injunctive Relief." In its amended complaint, ACC contended that its lien had priority over SunTrust's deed of trust, which ACC argued was void due to a defect in the Property's chain of title because at the time of its original execution in April 2007, the deed conveying the Property from GHC to NC Land Finders had not yet been recorded. Thus, ACC asked the court to enjoin the foreclosure, declare that ACC's lien held priority, declare "the rights, interests, and priorities of ACC and SunTrust as creditor[s] of the Walls," and declare "the rights, interests, and priorities of the parties in and to [the Property]."

That same day, in response to SunTrust's initiation of foreclosure proceedings, ACC's President Gene Carswell—who is also a principal member-manager of GHC—executed a verification of a "Petition to Determine Lien Priorities and to Determine Disposition of Funds Upon Foreclosure Sale, and to Enjoin Foreclosure Sale." This petition, which was subsequently filed on 1 September 2009, requested that the court determine the respective lien priorities between ACC and SunTrust and determine how the foreclosure proceeds should be distributed. Here, however, ACC offered a different theory for its lien priority, contending that although SunTrust had a valid lien, it was only up to the

amount of the purchase price because it did not attach to the Property until the 18 September 2007 re-recording, and therefore "SunTrust's lien has priority over ACC's lien to the extent of $165,000.00 which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of $165,000.00." ACC further argued:

> 23. . . . SunTrust is entitled to receive the first $165,000.00 from the foreclosure sale proceeds after costs and taxes. Next, ACC is entitled to receive $179,998.01 from the foreclosure proceeds. Then, SunTrust is entitled to receive the balance of the foreclosure proceeds.
>
> . . . .
>
> 28. ACC needs for this court to determine how the sales proceeds from the foreclosure of [the Property] should be distributed upon completion of the foreclosure sale of [the Property].
>
> 29. ACC needs for this court to order the distribution of $179,998.01 to ACC from the sales proceed[s] of the foreclosure sale of [the Property].

Although ACC set a hearing on its foreclosure petition for 16 September 2009, the record does not indicate what happened at that hearing. In any event, on 30 August 2010, the assistant clerk of Henderson County Superior Court entered an order finding that SunTrust's deed of trust represented a valid debt and permitting SunTrust to proceed with its foreclosure sale of the Property, with a sale date set for 20 September 2010.

On 17 September 2010, ACC filed a separate action against SunTrust and the Walls seeking a preliminary and permanent injunction of the foreclosure sale and specifically asking for the court to determine "the rights of the parties with respect to the Claim of Lien and any proceeds which may arise from the foreclosure of [the Property]." This time, ACC argued that due to the aforementioned recording irregularities, it should be considered the senior lienholder against the Property under the theory that SunTrust did not acquire a valid lien to the Property until 18 September 2007. A hearing on ACC's request for injunctive relief was held on 27 September 2010—after the scheduled foreclosure sale but before the expiration of the upset-bid period—and, after the court denied that request by written order dated 30 September 2010, ACC voluntarily dismissed that action. The court did, however, grant ACC's Rule 60 motion to reinstate its claims from *ACC I*, which had previously

been voluntarily dismissed with prejudice on motion from ACC's former counsel prior to the termination of her representation in the matter.

The foreclosure sale for the Property was held as planned on 20 September 2010, and SunTrust was the winning bidder with a bid of $616,250.00. On 1 October 2010, the foreclosure trustee executed a notarized letter stating that the foreclosure sale proceeds had been distributed and "the original note involved in the above captioned foreclosure has been credited with the sum of $612,569.83 representing the full amount of the proceeds of the sale less allowable costs and fees." The trustee's final report was audited and approved by the Henderson County clerk of court on 12 October 2010. That same day, ACC filed notice of dismissal without prejudice regarding the fourth cause of action in its amended complaint in *ACC I* for "Declaratory Judgment to Quiet Title and Motion for Injunctive Relief."

On 15 August 2011, SunTrust moved for summary judgment in *ACC I*. At the hearing, SunTrust argued that its deed of trust should have priority over the foreclosure proceeds because it was recorded before ACC ever provided any work on the Property, that any irregularities in the chain of title were immaterial because ACC had sufficient notice thereof, and that the subsequent September 2007 re-recording had no impact on lien priorities. For its part, ACC urged that its lien should have first priority because SunTrust's deed of trust was not recorded within the Property's chain of title until September 2007, after ACC's lien had already attached. At one point during the hearing, the trial court[1] inquired:

> THE COURT: What happens if any of this money was used to purchase the real property? Then what doctrine comes into play?
>
> [ACC's counsel]: I don't think there's any doctrine that comes into play in that situation, Your Honor. I'm not aware of any.
>
> THE COURT: What about the doctrine of instantaneous seisin?
>
> [ACC's counsel]: The doctrine of instantaneous seisin would not be applicable here, Your Honor, because it is not a true purchase money deed of trust. . . .

1. The Honorable Gary M. Gavenus, Superior Court Judge, presided over this hearing.

After further discussion, during which ACC continued to deny the applicability of the doctrine of instantaneous seisin while insisting on a stringent application of our State's recording statutes, the trial court directed the parties' attention to this Court's holding in *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347, 635 S.E.2d 301 (2006), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 404 (2007), noting:

> THE COURT: I'll give you this case and you all can go look at it. . . . It's not as confusing as this case. The scenario is very similar. There was a deed and a deed of trust, a purchase money deed of trust, only part of it being a purchase money deed of trust. The lumber company actually provided materials to the property prior to the deed and the deed of trust being recorded, and the [C]ourt held that the deed of trust had priority.

Toward the end of the hearing, the court inquired whether ACC was seeking any surplus proceeds from the foreclosure sale:

> THE COURT: But let me ask you this. As regards to this foreclosure proceeding, does [ACC] seek any alleged surplus at the foreclosure sale?
>
> [ACC's counsel]: I don't think there was any surplus, Your Honor.
>
> [SunTrust's counsel]: Not to my knowledge, Your Honor. I think it was a credit bid for the amount of the loan.
>
> [ACC's counsel]: The bank bid in at the sale the amount that it was owed, so there's no surplus to be had.
>
> [SunTrust's counsel]: Thus the lawsuit.
>
> THE COURT: I understand that.

On 13 September 2011, the trial court entered an order granting summary judgment to SunTrust. In its conclusions of law, the court concluded that:

> 1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
>
> 2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

ACC initiated an appeal of the summary judgment order to this Court. However, that appeal was dismissed by the trial court for failure to

prosecute. ACC then filed a Stipulation of Dismissal as to all claims against the Walls and attempted to file a new notice of appeal, which was ultimately dismissed by this Court in December 2012 prior to reaching the merits.

The present case arises from a complaint ACC filed on 11 October 2013, and amended on 9 December 2013, against SunTrust in Henderson County Superior Court for unjust enrichment and a constructive trust. This time, the theory behind ACC's lawsuit was that under the doctrine of instantaneous seisin, its rights as a junior lienholder had been violated because

> . . . the lien created by [SunTrust's] Deed of Trust is superior to ACC's claim of lien, as a matter of law, but only to the extent that funds were used to purchase real property, and that once SunTrust[] recovered its initial outlay for the Walls' purchase of real property, the remaining funds should have been used to satisfy ACC's junior claim of lien.

Thus, ACC requested that SunTrust "be ordered to convey to ACC funds sufficient to satisfy its claim of lien on [the Property]." SunTrust responded by filing a motion to dismiss and a motion for sanctions, arguing that ACC's claim was frivolous, unwarranted by existing law, and barred by *res judicata*.

During a hearing held on 17 February 2014, SunTrust argued in support of its motions that: (1) ACC had ample opportunity during the course of the prior litigation to raise its claims as a junior lienholder but failed to do so; (2) ACC had previously stated it was not seeking any surplus funds from the foreclosure sale and in fact denied that any surplus existed, and should therefore be estopped from arguing to the contrary; (3) nothing in the 13 September 2011 summary judgment order indicated that the doctrine of instantaneous seisin applied in this case; (4) even assuming *arguendo* that the doctrine did apply and ACC was a junior lienholder with a valid claim for surplus proceeds from the foreclosure sale, it was now barred from recovery because it failed to timely claim those proceeds from the clerk of court, which *West Durham Lumber* held was a mandatory prerequisite for aggrieved junior lienholders; and (5) given this case's factual similarity to *West Durham Lumber*, ACC should have known its attempt to raise these claims in a subsequent lawsuit would be barred by *res judicata*.

For its part, ACC argued that: (1) the doctrine of instantaneous seisin was the only possible rationale for the 13 September 2011 summary judgment order in favor of SunTrust, which meant ACC was entitled to

apply the foreclosure sale surplus proceeds to satisfy its junior lien; (2) ACC suffered a new, distinct injury when the trustee failed to deposit the surplus proceeds with the clerk of court; and (3) ACC was not required to include its claims as an aggrieved junior lienholder in *ACC I*, and therefore *res judicata* did not apply, because its original complaint was filed before SunTrust initiated the foreclosure proceedings that gave rise to its aforementioned injury. Toward the end of the hearing, the trial court expressed concern that ACC's new lawsuit amounted to a collateral attack on the 13 September 2011 order granting summary judgment to SunTrust in *ACC I*:

> And frankly, I was—when I read this, I was really surprised concerning the—the previous rulings in the case. In particular, the [13 September 2011 summary judgment order], where the court found the deed of trust has priority over the claim of lien and foreclosure action wiped out the claim of lien. Because to seek what you are asking for would require as a practical matter that that order be disregarded to give you money after all of this has been said and done in Judge Gavenus's order. Whether you go by theory of estoppel, instantaneous seisin, whatever, it required setting aside that and saying, well, your lien has priority because of unjust enrichment or any other reason. That in effect is setting aside the order which I don't think I have authority to do. So that's what troubled me about the case.

On 3 March 2014, the trial court granted both SunTrust's motion to dismiss and its motion for sanctions in separate written orders. In its order granting SunTrust's motion for sanctions pursuant to North Carolina Rule of Civil Procedure 11 and section 6-21.5 of our General Statutes, the court found as facts and concluded as a matter of law that the 13 September 2011 summary judgment order in *ACC I* was binding and final between the parties and that, in light of that order, ACC's subsequent lawsuit was frivolous, facially implausible, presented no justiciable issues, and was brought "for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." Consequently, the trial court concluded that SunTrust was entitled to an award of sanctions against ACC for $19,045.50 in attorneys' fees. ACC gave written notice of appeal on 12 March 2014. On 12 September 2014, pursuant to Rule 34(a) of our Rules of Appellate Procedure, SunTrust filed a motion with this Court designated "Defendant-Appellee SunTrust Mortgage, Inc.'s Motion for Sanctions" and, by order dated 29 September 2014, that motion was referred to this panel.

II. Analysis

A. Motion to dismiss and res judicata

[1] ACC first argues that the trial court erred in dismissing its amended complaint based on *res judicata*. Specifically, ACC contends that its amended complaint states valid equitable claims available to it as a junior lienholder for surplus proceeds from a foreclosure sale under the doctrine of instantaneous seisin. We disagree.

On a Rule 12(b)(6) motion to dismiss, the question is

> whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) 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. We consider [the] plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim.

Allred v. Capital Area Soccer League, Inc., 194 N.C. App. 280, 282-83, 669 S.E.2d 777, 778-79 (2008) (citations and internal quotation marks omitted). This Court's review of the trial court's granting of a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*. *Id.* at 283, 669 S.E.2d at 779.

In the present case, the trial court's order granting SunTrust's motion for sanctions makes clear that it granted SunTrust's Rule 12(b)(6) motion to dismiss based on *res judicata*. The doctrine of *res judicata* "precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994). In that sense, the doctrine of *res judicata* works in conjunction with other legal and equitable doctrines that preserve the integrity and finality of judgments by prohibiting collateral attacks and estopping litigants from intentionally adopting self-contradictory positions to

gain unfair advantage. *See, e.g.*, *State v. Cortez*, __ N.C. App. __, __, 747 S.E.2d 346, 358 (2013) ("A collateral attack upon a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. North Carolina does not allow collateral attacks on judgments.") (citations, internal quotation marks, and brackets omitted); *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) ("Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. . . . It is to prevent litigants from playing fast and loose with the courts and deliberately changing positions according to the exigencies of the moment. Thus, judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.") (citations, internal quotation marks, and brackets omitted). In order to successfully assert the doctrine of *res judicata*, a litigant must prove three essential elements: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 262.

Here, because SunTrust was previously granted summary judgment against ACC in *ACC I* and that judgment became final when ACC's appeal was dismissed by this Court, the only essential element of *res judicata* in question is whether there is an identity of causes of action. Under *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). "[S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*," *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993), because "the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding." *Fickley v. Greystone Enters., Inc.*, 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]" *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

ACC contends that there is no identity of causes between *ACC I* and the present case for two related reasons. First, ACC argues that because the 13 September 2011 summary judgment order did not address its rights as a junior lienholder, there was never any final judgment on the merits to bar its claims for unjust enrichment and a constructive trust. Second, ACC argues that these claims arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to SunTrust instead of depositing the surplus with the clerk of court —that did not occur until well after ACC filed its original lawsuit. After careful consideration, we are not persuaded by either of ACC's arguments.

We note first that ACC's current lawsuit revolves around a flawed premise—specifically, that the 13 September 2011 summary judgment order was based on the doctrine of instantaneous seisin. ACC argues that the doctrine of instantaneous seisin is the only possible rationale for the court's conclusion that SunTrust's deed of trust has priority over its claim of lien, which was extinguished by the foreclosure of the Property. In support of this argument, ACC cites the trial court's discussion of the doctrine and its reference to this Court's decision in *West Durham Lumber* during the 15 August 2011 hearing.

As the trial court noted during that hearing, the facts in the present case are very similar to those in *West Durham Lumber*. In that case, Central Carolina Bank ("CCB") loaned a homebuilder $560,000.00 to finance the construction of a home, with $112,000.00 of that amount used to purchase the real property. 179 N.C. App. at 349-50, 635 S.E.2d at 302-03. The plaintiff, West Durham Lumber, first furnished materials for the construction of the home before the deed of trust securing the loan was ever recorded. *Id.* at 349, 635 S.E.2d at 302. When the homebuilder eventually defaulted on its payments, CCB initiated foreclosure proceedings and was the winning bidder at the foreclosure sale with a bid of $425,000.00. *Id.* at 350, 635 S.E.2d at 303. After the foreclosure sale, West Durham Lumber sued to enforce its lien claim and have its lien declared senior to CCB's lien, and the trial court ruled in its favor. *Id.* The bank appealed and on review, this Court held even though CCB's deed of trust was recorded after West Durham Lumber's lien attached with its first furnishing of materials, CCB still had first priority in the amount of $112,000.00 for the purchase price of the property based on the doctrine of instantaneous seisin. *Id.* at 354, 635 S.E.2d at 305. Moreover, we held that CCB's foreclosure had wiped out West Durham Lumber's junior lien, and that in order to recover anything West Durham Lumber was required to comply with the procedure mandated by N.C.

Gen. Stat. § 44A-13 to enforce its lien and also file a petition for recovery of surplus proceeds with the clerk of court as required by N.C. Gen. Stat. § 45-21.31. *Id.* at 355, 635 S.E.2d at 306. Because West Durham Lumber did not file any claim for surplus proceeds with the clerk, we held that it failed to perfect its claim and was blocked from recovery. *Id.*

West Durham Lumber then filed a second lawsuit against CCB (which by that time had merged with SunTrust) asserting claims for unjust enrichment and constructive trust under the theory that the bank should never have received all the foreclosure sale proceeds. *See West Durham Lumber Co. v. SunTrust Bank*, __ N.C. App. __, 673 S.E.2d 883 (2009) (unpublished), *available at* 2009 WL 678748 ("*West Durham Lumber II*"). When SunTrust moved for dismissal based on *res judicata*, West Durham Lumber argued that its claims should not be barred because they arose after the first lawsuit was filed and were separate and distinct from its claim for lien priority and enforcement against the real property. *Id.* at *1. The trial court rejected West Durham Lumber's argument and granted SunTrust's motion for dismissal. *Id.* On appeal, this Court affirmed that decision. Because West Durham Lumber should have included a claim for surplus proceeds in the prior litigation but failed to do so, its subsequent lawsuit was barred because "simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*." *Id.* at *2.

ACC's argument in the present case presumes that the doctrine of instantaneous seisin applies here just as it did in *West Durham Lumber*. However, ACC's argument is not supported by the 13 September 2011 summary judgment order, which does not mention the doctrine of instantaneous seisin or provide any indication that the trial court believed it was applicable to the underlying facts in this matter. Instead, the order simply concludes that

> 1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
>
> 2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

While ACC insists that the doctrine of instantaneous seisin is the only possible rationale for finding that SunTrust's deed of trust held priority over its claim of lien, the transcript from the 15 August 2011 hearing demonstrates otherwise. For example, SunTrust argued that its deed of trust should have priority over ACC's lien because it was recorded before ACC ever furnished labor or materials to the Property, and that ACC's lien was therefore extinguished by the foreclosure. SunTrust also

cited our Supreme Court's decision in *City of Durham v. Pollard*, 219 N.C. 750, 14 S.E.2d 818 (1941), which suggests that ACC is not the kind of party that our State's recording statute aims to protect. For its part, ACC denied that the doctrine of instantaneous seisin applied and insisted that its claim of lien held first priority. ACC also explicitly stated that it was not seeking any surplus proceeds from the foreclosure sale. Moreover, at the close of the hearing, the trial court requested that the parties submit briefs regarding whether this Court's holding in *West Durham Lumber* should control the outcome. However, the subsequent summary judgment order is devoid of any reference to either *West Durham Lumber* or the doctrine of instantaneous seisin.

In the present case, ACC argued during the 17 February 2014 hearing that SunTrust had actually accepted that the doctrine applied in this case because it submitted a brief after the 15 August 2011 hearing that included an argument in the alternative to that effect, with the implication being that SunTrust should be estopped from changing positions now to argue that it does not. But by ACC's own logic, it too should be estopped from arguing for the doctrine's application, given its express denial during the 15 August 2011 hearing that it was seeking any surplus proceeds and this Court's long-standing prohibition against self-serving changes of position. *See Price*, 169 N.C. App. at 191, 609 S.E.2d at 452. In any event, ACC could have addressed this issue in its appeal as of right to this Court in *ACC I*, but that appeal was dismissed after ACC failed to prosecute it. Therefore, ACC's argument in the present case that the *ACC I* summary judgment order was based on the doctrine of instantaneous seisin basically amounts to an attempt to collaterally attack the trial court's judgment, which is strictly barred under North Carolina law, *see Cortez*, __ N.C. App. at __, 747 S.E.2d at 358, and we emphatically decline to allow ACC to rewrite the order in a way that distorts the procedural history of this litigation.

[2] Even assuming *arguendo* that the doctrine of instantaneous seisin did apply in the present case, ACC's claims would still be barred by *res judicata*. ACC first contends that *res judicata* is inapplicable because there was never any final judgment on the merits in *ACC I* regarding ACC's rights to claim surplus proceeds as a junior lienholder. This may be true, but it does not mean ACC had no opportunity to include these claims in its prior litigation. In fact, ACC even acknowledges that at various points in the proceedings it actually did assert claims that could have resolved these issues. On the one hand, in its amended complaint in *ACC I*, ACC sought a declaratory judgment to quiet title and determine the parties' lien priorities. ACC likewise asked for a determination

of lien priorities when it filed for an injunction to block SunTrust from foreclosing on the Property. On the other hand, in the petition it filed in response to SunTrust's initiation of foreclosure proceedings, ACC not only requested a determination of lien priorities but also asserted the rights of a junior lienholder under the doctrine of instantaneous seisin, contending "SunTrust's lien has priority over ACC's lien to the extent of $165,000.00 which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of $165,000.00." However, ACC eventually took voluntary dismissals on each of these claims, which ACC now relies on as the lynchpin of its argument that the 13 September 2011 summary judgment order did not constitute a final judgment on the merits regarding its rights to claim surplus proceeds as a junior lienholder. Nevertheless, it is well established that, "[a] party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery," *Rodgers Builders, Inc.*, 76 N.C. App. at 23, 331 S.E.2d at 730, and that therefore under the doctrine of *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556. Thus, despite the lack of a final judgment on the merits regarding ACC's rights as a junior lienholder, the procedural history of *ACC I* clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Therefore, just as we held in *West Durham Lumber II*, ACC's current lawsuit is barred because "simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*." __ N.C. App. at __, 673 S.E.2d 883 at *2.

[3] ACC also argues that *res judicata* does not bar its current claims for unjust enrichment and constructive trust because these arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to SunTrust instead of depositing the surplus with the clerk of court. This Court previously rejected a similar argument by the unsuccessful plaintiffs in *West Durham Lumber II*. ACC admits that both the underlying facts and the theory behind its appeal are nearly identical to those in *West Durham Lumber II*, but it attempts to distinguish its case by focusing on the timing of its original lawsuit. Specifically, ACC emphasizes that, unlike the unsuccessful plaintiffs in the *West Durham Lumber* litigation who sued after the foreclosure sale was completed, ACC's original lawsuit was filed *before* SunTrust initiated foreclosure proceedings, which were not completed until over a year later. Thus, unlike in *West Durham Lumber*, ACC had

no opportunity to claim the surplus proceeds from the clerk of court prior to filing *ACC I*, and was further injured after the foreclosure sale because the trustee gave everything to SunTrust, thereby giving rise to ACC's current equitable claims, for which ACC insists it had no recourse as an aggrieved junior lienholder for pursuing other than this lawsuit, given the statutory limitations on the clerk of court's authority discussed by our Supreme Court in *In re Vogler Realty, Inc.*, 365 N.C. 389, 722 S.E.2d 459 (2012). Finally, ACC contends that its claims should not be barred by *res judicata* because, despite the similarities between this case and *West Durham Lumber II*, the latter should have no binding effect here since it was an unpublished opinion, and because *ACC I* was predicated on a good-faith belief that its lien held first priority and ACC should not have been required to amend its complaint or alter its argument when there is no North Carolina authority that explicitly requires a party to amend the party's complaint after litigation has been ongoing for a period in excess of a year when a new cause of action arises from a separate injury.

ACC may be correct that North Carolina law does not explicitly require a party to amend the party's complaint in order to avoid the effect of *res judicata* on a subsequently arising claim. Nevertheless, that does not necessarily mean that *res judicata* is inapplicable here. We are not persuaded by ACC's attempt to distinguish this case from *West Durham Lumber II*. ACC's argument fails because it ignores the fact that although ACC may not have been able to claim surplus proceeds from the clerk of court when it filed its original lawsuit on 6 July 2009, SunTrust initiated its foreclosure proceedings one month later on 6 August 2009, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. Indeed, the procedural history of *ACC I*—specifically, the amended complaint ACC filed less than two weeks after SunTrust initiated foreclosure proceedings against the Property, as well as the petition it filed the very same day in response to those foreclosure proceedings—demonstrates that ACC clearly contemplated the need to protect its rights as a junior lienholder. What makes this case so similar to *West Durham Lumber II*, regardless of any minor differences in the timing of ACC's original lawsuit, is the fact that ACC failed to take the necessary steps to protect its rights as a junior lienholder. In that sense, given this Court's long-standing recognition that a party must bring forth the party's whole case at one time, ACC's current equitable claims and the issue of when they arose are entirely beside the point. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*. If anything, ACC's failure to exercise basic due diligence is even more egregious in the present case, given that

West Durham Lumber I made clear that junior lienholders must carefully follow the proper procedures in order to recover surplus proceeds, while *West Durham Lumber II* made clear that this Court will not bail out those who fail to do so by suspending the operation of *res judicata* to grant them a second bite at the apple. ACC is correct that as an unpublished opinion, *West Durham Lumber II* does not control the outcome of the present case. But given the extensive attention both parties focused on the *West Durham Lumber* litigation in their arguments to the trial court, ACC certainly had notice that its claims could be similarly barred, especially since there was nothing particularly novel about this Court's *res judicata* analysis in *West Durham Lumber II*. While that case is not binding on our decision here, we reach the same conclusion. ACC cannot circumvent the application of *res judicata* by seeking a different remedy and asserting a new theory for a claim that could and should have been resolved in *ACC I*. Accordingly, we hold that the trial court did not err in granting SunTrust's Rule 12(b)(6) motion to dismiss.

B. Sanctions

ACC also contends that the trial court erred in awarding $19,045.50 in attorneys' fees as sanctions to SunTrust pursuant to N.C. Gen. Stat. § 6-21.5 and North Carolina Rule of Civil Procedure 11. In support of this claim, ACC offers several arguments, all of which are meritless.

1. Sanctions pursuant to N.C. Gen. Stat. § 6-21.5

[4] First, ACC argues that the award of sanctions is unwarranted under N.C. Gen. Stat. § 6-21.5 because its claims were meritorious. We disagree.

Section 6-21.5 allows the trial court to award "reasonable attorney[s'] fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2013). This statute requires the trial court to review "all relevant pleadings and documents to determine whether attorneys' fees should be awarded," evaluate "whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue," and make findings of fact and conclusions of law to support its award. *Lincoln v. Bueche*, 166 N.C. App. 150, 153-54, 601 S.E.2d 237, 241 (2004) (citations and internal quotation marks omitted). As this Court has previously explained,

> [s]urviving a Rule 12(b)(6) motion is not determinative on the issue of justiciability. A justiciable issue is one that

> is real and present as opposed to imagined or fanciful. Complete absence of a justiciable issue suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss.

Id. at 154, 601 S.E.2d at 242 (citations and internal quotation marks omitted). In the present case, ACC contends that because its claims were meritorious, the trial court erred in its conclusion of law that, "[e]ven giving ACC's pleadings the indulgent treatment they receive in ruling on a motion to dismiss, the Court finds that there was a complete absence of a justiciable issue of law raised by ACC in the Complaint and Amended Complaint filed in this case." However, as already discussed in detail, the record simply does not support ACC's argument that its claims were meritorious. Indeed, the trial court's sanctions order provides a thorough summation of the procedural history of both *ACC I* and the present case, with particular emphasis on the facts that ACC knew that the summary judgment order was binding and final law between the parties, and that in light of that summary judgment order ACC's claims were facially implausible. Specifically, the trial court found as facts that:

> 45. ACC knew at the time the Complaint and Amended Complaint were filed in this action that neither contained a justiciable issue.
>
> 46. Even if ACC did not know the Complaint lacked a justiciable issue when it was filed, ACC was clearly aware of that fact upon receiving emails from counsel for SunTrust explaining why the Complaint was frivolous.
>
> 47. ACC persisted in litigating the case well after the point at which ACC was aware (or should reasonably have been aware) that the Complaint and Amended Complaint lacked any claim related to a justiciable issue.

Accordingly, we hold that the trial court did not err in imposing sanctions pursuant to section 6-21.5 based on its determination that ACC's claims raised no justiciable issues.

2. Sanctions pursuant to Rule 11

[5] Next, ACC argues that the trial court erred in awarding sanctions under Rule 11 based on its conclusion that ACC brought this action for an improper purpose. We disagree.

Rule 11 requires that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record[.]" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2013). Our Supreme Court has made clear that,

> [a]ccording to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose. A breach of the certification as to any one of these prongs is a violation of the Rule.

Bryson v. Sullivan, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). When violations of the Rule occur, the trial court "upon motion or upon its own initiative, shall impose . . . an appropriate sanction." N.C. Gen. Stat. § 1A-1, Rule 11(a). The trial court's decision to impose sanctions under Rule 11 is subject to *de novo* review by this Court, which must determine

> (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Regarding sanctions imposed for violations of Rule 11's improper purpose prong, this Court has previously explained that, "an objective standard is used to determine whether a [complaint] has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted). Moreover, an improper purpose may be inferred from "filing successive lawsuits despite the *res judicata* bar of earlier judgments." *Id.*

In the present case, ACC argues that the trial court erred in imposing Rule 11 sanctions because SunTrust did not specifically plead that ACC violated the improper purpose prong and because there are no findings of fact that support the trial court's legal conclusion that, "[i]n light

of the prior Summary Judgment Order, the Court finds that ACC filed the Complaint and the Amended Complaint for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." This argument fails for several reasons. First, the fact that SunTrust did not specifically ask for Rule 11 sanctions based on the improper purpose prong is immaterial, given the Rule's explicit provision that sanctions can be imposed "upon motion or upon [the court's] own initiative." N.C. Gen. Stat. § 1A-1, Rule 11(a). Furthermore, we conclude that the trial court's imposition of sanctions was sufficiently supported by its extensive findings of fact, most significantly its finding that, "[b]ased upon the prior Summary Judgment Order and dismissal of its appeal, ACC knew that this Court's holding that 'The Deed of Trust has priority over the Claim of Lien' was binding and final law between SunTrust and ACC." Indeed, the trial court's rationale for granting SunTrust's motion to dismiss was that ACC's claims were barred by *res judicata*, which is a proper basis for inferring that the present action was brought for an improper purpose. *See Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. Thus, given the extensive history of the litigation before us, which encompasses multiple lawsuits by ACC stretching back to 2009, and the fact that ACC's current lawsuit basically amounts to a collateral attack on the summary judgment order that resolved *ACC I*, we conclude that the trial court did not err in imposing sanctions based on its conclusion that ACC brought this action for an improper purpose.

3. Amount of award

[6] Finally, ACC complains that the amount of the trial court's award of attorneys' fees is excessively punitive. ACC cites no specific legal authority in support of this argument, but instead points to the disparity between the $8,100.00 SunTrust's counsel stated were his costs during the 17 February 2014 hearing and the $19,045.50 the trial court ultimately awarded as attorneys' fees in its sanctions order. This argument lacks merit.

As a general matter, a trial court's award of attorneys' fees must be supported by proper findings considering "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633 (2002). Under both section 6-21.5 and Rule 11, we review a trial court's award of attorneys' fees for abuse of discretion. *See*, *e.g.*, *Turner*, 325 N.C. at 165, 181 S.E.2d at 714; *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010).

In the present case, although ACC is correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that SunTrust's counsel stated he was seeking during the 17 February 2014 hearing, the trial court's award of $19,045.50 is well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill. We therefore conclude that the trial court did not err or abuse its discretion in calculating the amount of sanctions it awarded as attorneys' fees in conjunction with ACC's frivolous lawsuit.

4. SunTrust's Rule 34 Motion

[7] Pursuant to Rule of Appellate Procedure 34, SunTrust moves for the imposition of sanctions against ACC and its counsel for the prosecution of this frivolous appeal. Rule 34(a) permits this Court to impose sanctions on an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[,]" or "the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C.R. App. P. 34(a)(1,2).

In light of the preceding analysis, we conclude that this appeal was frivolous and taken for an improper purpose. Therefore, we agree that sanctions are warranted and order that ACC and its appellate counsel pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by SunTrust on account of this appeal. N.C.R. App. P. 34(b)(2).

Conclusion

For determination of SunTrust's costs and expenses in defending this frivolous appeal, the matter is REMANDED to the trial court. The orders of the trial court granting SunTrust's Rule 12(b)(6) motion to dismiss and motions for sanctions pursuant to Rule 11 and section 6-21.5 are

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

BAKER v. TUCKER

[239 N.C. App. 273 (2015)]

DEREK B. BAKER; BAKER & JAMES, INC.; AND B & J - TINGEN PLACE, LLC
v.
JAMES H. TUCKER, JR.

No. COA14-415

Filed 17 February 2015

Civil Procedure—motion to amend judgment—misapplication of law

In a dispute between business partners, the trial court did not err by granting plaintiff's Motion to Alter or Amend Judgment and Motion for Relief from Judgment. Plaintiffs' motion set forth valid grounds for amending the judgment under Rule of Civil Procedure 59 by alleging that the trial court failed to account for certain facts and, as a result, misapplied the law in its order distributing the assets of the dissolved companies.

Appeal by defendant from judgment entered 26 November 2013 by Judge Douglas B. Sasser in Lee County Superior Court. Heard in the Court of Appeals 25 September 2014.

Bain Buzzard & McRae, LLP, by Edgar R. Bain, for plaintiffs-appellees.

Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Eddie S. Winstead III, for defendant-appellant.

GEER, Judge.

Defendant James H. Tucker, Jr. appeals from an amended judgment entered pursuant to the motion of plaintiffs Derek B. Baker, Baker & James, Inc. ("the Corporation"), and B & J - Tingen Place, LLC ("the LLC") to amend a judgment ordering the judicial dissolution of the Corporation and the LLC of which plaintiff Baker and defendant were the sole owners. Plaintiffs' motion to amend alleged that the trial court failed to account for the Corporation's outstanding liabilities -- in particular, a debt owed to plaintiff Baker -- in calculating the companies' net worth and distributing funds following dissolution. The trial court agreed and amended the judgment to correct the calculation error. On appeal, defendant primarily argues that the trial court erred in amending the judgment because plaintiffs' motion did not set forth any of the grounds listed in Rule 59(a) of the Rules of Civil Procedure, as required

for a valid motion to amend pursuant to Rule 59(e). N.C.R. Civ. P. 59(e). We disagree.

This Court has adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law." *Batlle v. Sabates*, 198 N.C. App. 407, 416, 681 S.E.2d 788, 795 (2009). Here, plaintiffs' motion alleges that the trial court failed to adequately account for certain facts and, as a result, misapplied the law by failing to order a distribution of the Corporation and the LLC's assets in accordance with the parties' interests. The grounds set forth in plaintiffs' motion to amend have been held to be valid pursuant to Rules 59(a)(7), (8), and (9). Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend the judgment pursuant to Rule 59(e) and affirm the amended judgment.

Facts

On 29 March 2012, plaintiffs filed a complaint against defendant alleging that plaintiff Baker and defendant had formed various business entities together, including the Corporation and the LLC, that developed and built residential properties, some of which defendant had sold and wrongfully appropriated the proceeds to himself. Plaintiffs brought claims for damages for the misappropriated funds, unfair and deceptive trade practices, and judicial termination of the Corporation and the LLC.

On 4 June 2012, defendant answered plaintiffs' complaint, moving to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, denying many of the allegations regarding his wrongdoing, and counterclaiming against plaintiff Baker for breach of fiduciary duty and unjust enrichment.

On 24 May 2013, following a bench trial, the trial court entered a judgment in which it judicially dissolved the Corporation and the LLC, ordered that all funds held by the Corporation and the LLC be disbursed to plaintiff Baker, and taxed the costs of the action against defendant. On 4 June 2013, pursuant to Rules 59 and 60 of the Rules of Civil Procedure, plaintiffs filed a "MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR RELIEF FROM JUDGMENT," alleging as follows:

> 1. The Court has erred in its judgment in not providing for the payment of the outstanding liabilities of the companies.

(a) The decretal portion of the judgment does not correspond with the Court's findings of fact. In paragraph 9) C) of the Court's findings of fact, the parties stipulated that Derek Baker paid money to the corporation as a loan in the sum of $85,588.37.

(b) In finding of fact 17) of the Court's judgment, the Court found that the net worth of the companies is $102,157.86. In arriving at this figure in the calculation of net worth, the debt owed Derek Baker is shown as a liability in the sum of $85,588.37, as is the interest on such loan in the sum of $7,739.10, for a total outstanding liability of $93,327.47 due Derek Baker.

(c) The Court has not, in the findings of fact or in the decretal portion of the judgment, provided for the repayment of the indebtedness due Derek Baker. There is no provision anywhere in the judgment for the repayment of the outstanding liability of the companies, which is the debt due Derek Baker. The Court's attention is called to the proposed judgment as prepared and submitted by the Plaintiff.

(d) In the Court's judgment, in order for Plaintiff Derek Baker to be repaid the funds loaned, it would be necessary for the Court to enter judgment against Defendant James H. Tucker, Jr. in favor of Derek Baker in a sum equal to one-half of the outstanding liabilities, to wit, $46,663.73, which would be the amount owed by Defendant Tucker.

(e) An affidavit of Marc Gilfillan, CPA, is attached hereto with regard to the Court's findings and the error in the decretal portion of the judgment.

2. The Court should amend and correct its judgment, based on its own findings of fact, to provide for the payment of the outstanding liabilities of the companies, which would be judgment against Defendant James H. Tucker, Jr. for his one-half of the outstanding liabilities in the sum of $46,663.73.

3. The Court has erred in its judgment in not placing the burden of proof on the Defendant on the issue of the $100,000 salary paid to Plaintiff Baker. The Court states, in finding of fact 15), that the Court cannot find, from a

> preponderance of the evidence, that there was any agreement with regard to the payment of salary to Derek Baker. The Defendants [sic] raised the issue relating to salary in a counterclaim which was filed. The burden of proof relative to whether or not there was an agreement as to salary was on the Defendant. If the Court cannot find, by a preponderance of evidence, anything about the salary, then the Defendant should not receive any credit for the $100,000.00 salary paid to Plaintiff Baker. In the Court's finding of fact, it appears that the Court had not correctly placed the burden of proof on the Defendant with regard to the matter of the salary, and the decretal portion of the judgment should not have given the Defendant any credit with regard to such salary.
>
> 4. If the Court can make no finding with regard to the salary, the Defendant has not carried the burden of proof and would not be entitled to a credit for the salary paid to Plaintiff. If, in the alternative, the Court considers that the Plaintiff received $100,000.00 in salary to which he was not entitled, the Plaintiff is still entitled to recover for one-half of the companies' outstanding liabilities which are owed to him by virtue of loans made to the companies.
>
> WHEREFORE, the Plaintiff respectfully prays that the Court hold a hearing with regard to this matter and proceed to alter or amend the judgment by virtue of the discrepancies between the findings of fact and the decretal portion of the judgment.

In sum, plaintiffs claimed that, based upon the findings of fact, the original order should have required defendant to pay the sum of $46,663.73 to plaintiff Baker.

On 26 November 2013, the trial court filed an amended judgment in response to plaintiffs' motion and again judicially dissolved the Corporation and the LLC, but this time ordered defendant to pay plaintiff Baker $46,663.73. Defendant timely appealed the amended judgment to this Court.

Discussion

On appeal, defendant argues that the trial court erred in entering an amended judgment because plaintiffs' motion did not properly state any

basis for amendment of the judgment under Rule 59 or Rule 60 of the Rules of Civil Procedure. The trial court's amended judgment did not specify whether the court was acting pursuant to Rule 59 or 60.

We first consider whether plaintiffs' motion is valid pursuant to Rule 60. In a similar case in which a party requested that a judgment be amended pursuant to Rule 60, this Court stated:

> Counsel for defendant and the trial court have misconceived the purposes of Rule 60(b)(6), N.C.R. Civ. Proc. Defendant seeks to *amend* the divorce judgment, *not* to be *relieved* of the judgment. N.C.G.S. 1A-1, Rule 59(e), governs amendments to judgments and requires that motions to alter or amend judgments be made within ten days after entry of the judgment. . . .
>
> . . . .
>
> Defendant's motion is to amend the judgment. By the very words of the court's order, "be and the same are hereby amended," the district court attempted to amend the divorce judgment. The motion was not properly made pursuant to Rule 60(b)(6) and the court erred in so considering it.

Coleman v. Arnette, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980).

Here, as in *Coleman*, plaintiffs actually requested that the judgment be "alter[ed] or amend[ed.]" *See id.* The trial court then filed an "AMENDED JUDGMENT" and stated it was "allow[ing]" plaintiffs' motion "to alter or amend[.]" As plaintiffs sought and ultimately were allowed to amend the judgment, their motion was not properly a Rule 60, but rather a Rule 59(e) motion. We, therefore, turn to Rule 59(e).

"[O]ur standard of review under Rule 59(e) is abuse of discretion[.]" *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003). The grounds for a Rule 59(e) motion are found at Rule 59(a). In *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469-70, 645 S.E.2d 105, 108 (2007) (internal citations and quotation marks omitted), this Court explained that

> [t]o qualify as a Rule 59 motion . . . the motion must state the grounds therefor and the grounds stated must be among those listed in Rule 59(a). We note that [w]hile failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion

> and the relief sought must be consistent with the Rules of Civil Procedure.

Rule 59(a) provides that reasons for altering or amending a judgment include:

> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C.R. Civ. P. 59(a).

Defendant, without citing any authority, asserts that because the judgment was entered after a bench trial, "without the benefit of a jury, a number of the grounds set forth in Rule 59(a) do not even apply." Our Courts have not adopted a narrow interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial. Although many of the grounds listed in Rule 59(a) address errors that involve a jury, Rule 59(a) also applies to bench trials. The rule specifically provides that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." *Id.* In the context of a motion

to amend an order pursuant to a bench trial, this Court has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law." *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795.

In *Batlle*, an action for breach of a separation agreement, the defendant moved for sanctions pursuant to Rule 37 of the Rules of Civil Procedure based on the plaintiff's failure to timely respond to discovery requests. 198 N.C. App. at 409, 681 S.E.2d at 791. The trial court granted the defendant's motion and entered an order dismissing the plaintiff's amended complaint with prejudice and ordering the plaintiff to pay attorneys' fees. *Id.* at 411, 681 S.E.2d at 792. The trial court subsequently entered an order denying the plaintiff's Rule 59 motion to amend the order, and the plaintiff appealed both orders to this Court. 198 N.C. App. at 412, 681 S.E.2d at 793.

On appeal, this Court first addressed whether the plaintiff's motion stated a valid basis for obtaining relief under Rule 59(a). The plaintiff's motion cited Rules 59(a)(7) and (9) as grounds for the relief requested. In holding that the motion was valid, this Court reasoned:

> In her motion, Plaintiff essentially challenged the trial court's balancing of the equities, argued that Defendant was not prejudiced by her delay in providing discovery, and claimed that "a lesser sanction would have been appropriate in this matter." At an absolute minimum, this argument would, if valid, provide a recognized basis for challenging the validity of an order dismissing a complaint as a sanction for failing to provide discovery, since trial judges are required to give consideration to lesser sanctions before acting in that fashion. Thus, even if the remainder of Plaintiff's motion constituted nothing more than a mere rearguing of information that had been previously presented to the trial court, her challenge to the sufficiency of the trial court's consideration of lesser sanctions constitutes a valid basis for granting a motion to alter or amend a judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e), under N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9).

Batlle, 198 N.C. App. at 417-18, 681 S.E.2d at 796 (internal citation and footnote omitted). Thus, in concluding that the plaintiff's motion stated valid grounds under Rule 59(a)(7) despite the absence of a jury verdict,

the Court necessarily read Rule 59(a)(7) liberally and construed the trial court's disposition and ruling on the Rule 37 motion for sanctions as the "verdict."

Defendant next argues that plaintiffs' motion cannot be considered a Rule 59(a)(8) motion because plaintiffs failed to show that they objected to the alleged error of law at trial. This Court, however, has also declined to strictly construe Rule 59(a)(8) when applied to an order entered after a bench trial. In *Elrod v. Elrod*, 125 N.C. App. 407, 408, 481 S.E.2d 108, 109 (1997), a custody action, the defendant appealed the denial of her motion to amend an order requiring the defendant to enroll her children in public school. This Court held that the defendant's motion was a proper motion pursuant to Rule 59(a)(8) because it "was based on specifically enumerated errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110. Significantly, the Court did not adopt a strict reading of Rule 59(a)(8), and recognized that "[a]lthough [defendant] had not prior to the filing of the motion entered any objection to the Order, because the motion was timely filed and because the issues raised in the motion relate to matters in the Order (as opposed to errors allegedly occurring during a trial), it is properly considered a Rule 59(e) request to modify the [order] because of errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110.

In this case, the trial court ordered the judicial dissolution of the Corporation and the LLC "pursuant to the provisions of Chapter 55 of the North Carolina General Statutes." Pursuant to N.C. Gen. Stat. § 55-14-33(b) (2013), "[a]fter entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with G.S. 55-14-05 . . . ." N.C. Gen. Stat. § 55-14-05(a)(3) and (4) (2013), in turn, provide that "[d]ischarging or making provision for discharging its liabilities" and "[d]istributing its remaining property among its shareholders according to their interests" are necessary acts to winding up a dissolved corporation's affairs.

In plaintiffs' motion to amend, plaintiffs allege that, despite having made a finding that plaintiff Baker had loaned the Corporation $85,588.37, the trial court failed to account for that liability in calculating how much money each party is owed after dissolution. Thus, by failing to account for the Corporation's liabilities and incorrectly calculating the total net worth of the companies, the trial court acted contrary to N.C. Gen. Stat. § 55-14-05.

In other words, the trial court "misapprehended the relevant facts or . . . misapplied the applicable law" -- grounds that this court has held

to be valid grounds for relief pursuant to Rules 59(a)(7) and (9). *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795. Furthermore, under *Elrod*, the grounds stated in plaintiffs' motion could also be considered a valid ground for amendment pursuant to Rule 59(a)(8), despite the lack of an objection raised at trial, because it concerns an error of law arising for the first time in the order. *See also Batlle*, 198 N.C. App. at 417 n.3, 681 S.E.2d at 796 n.3 (noting that the plaintiff's challenge to the sufficiency of the trial court's consideration of lesser sanctions was an argument that could not have been advanced prior to the entry of the order "since [plaintiff] had no way to know the exact language that the trial court would employ in ruling on Defendant's request for sanctions prior to that time").

Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend pursuant to Rules 59(a)(7), (8), and (9). Defendant has made no argument that the trial court abused its discretion in granting the motion. We, therefore, affirm the trial court's granting of plaintiffs' motion and the amended judgment.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.

BARRY HOYT BODIE
v.
CLAIRE VOEGLER BODIE

No. COA14-629

Filed 17 February 2015

1. Divorce—equitable distribution—remand instructions—findings of fact—recalculation of award

The trial court did not err in an equitable distribution case by failing to strictly follow the mandate from this Court in *Bodie III* by going beyond the remand instructions in its findings of fact. When the Court of Appeals remands an equitable distribution case for specific findings, such as the value of mortgages and tax liabilities, that remand necessarily authorizes the trial court to recalculate other related portions of the award that are impacted by the new findings.

2. Appeal and Error—record on appeal—failure to include transcripts—sufficiency of findings of fact

Although defendant wife challenged several specific findings by the trial court as unsupported by the evidence in an equitable distribution case, the Court of Appeals (COA) could not address defendant's arguments because the record on appeal did not include the transcripts of the proceedings in which the trial court heard the relevant evidence. Even though this was the fourth time this case had come before the COA, nothing in our appellate rules excused litigants from assembling a complete record simply because portions of that record may have been submitted to this Court in previous appeals years earlier.

3. Divorce—equitable distribution—reduction of distributive award on remand

The trial court did not abuse its discretion in an equitable distribution case by reducing defendant wife's $100,000 distributive award to $25,000. The trial court was well within its discretion in reducing the distributive award in light of its new fact findings on remand.

Appeal by defendant from order entered 20 February 2014 by Judge Mack Brittain in Transylvania County District Court. Heard in the Court of Appeals 5 November 2014.

Roberts & Stevens, P.A., by Phillip T. Jackson, for plaintiff-appellee.

Donald H. Barton, P.C., by Donald H. Barton, for defendant-appellant.

DIETZ, Judge.

This is the fourth time this equitable distribution case has come before us on appeal. The last time we heard this case, we remanded with instructions for the trial court to make a number of specific findings and then adjust its distributional decision accordingly.

In this fourth appeal, Defendant argues that the trial court's latest order suffers from *seventeen* separate reversible errors. This brings to mind an observation from the U.S. Court of Appeals for the Sixth Circuit which, faced with a similar situation, observed that "[w]hen a party comes to us with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012).

Here, Defendant's seventeen arguments fall into three general categories. First, Defendant argues that the trial court made various findings outside the scope of the remand, thus violating the mandate rule. Second, Defendant contends that various fact findings are not supported by competent record evidence. Third, Defendant argues that the district court abused its discretion when selecting an appropriate distributive award.

For the reasons set forth below, we reject all seventeen arguments. When this Court remands an equitable distribution case for specific findings, such as the value of mortgages and tax liabilities, that remand necessarily authorizes the trial court to recalculate other related portions of the award that are impacted by the new findings (and, indeed, we specifically authorized the trial court to do so). With regard to whether the trial court's fact findings are supported by competent evidence, we cannot address Defendant's arguments because the record on appeal does not include the transcripts of the proceedings in which the trial court heard the relevant evidence. We are thus constrained to reject these arguments. Finally, the trial court was well within its discretion in reducing the distributive award to Defendant in light of its new fact findings on remand. Accordingly, we reject Defendant's arguments and affirm the trial court.

Facts and Procedural History

Plaintiff Barry Hoyt Bodie and Defendant Claire Voegler Bodie married in April 1996 and separated in July 2005. One month later, Plaintiff commenced an action for child custody and equitable distribution. On 3 August 2009, the trial court entered an order on the equitable distribution claim ordering Plaintiff to pay Defendant a distributive award of $100,000. Plaintiff appealed, but this Court dismissed the appeal as interlocutory because Defendant's alimony claim was still pending. *Bodie v. Bodie*, 208 N.C. App. 281, 702 S.E.2d 556 (2010) (unpublished) (*Bodie I*). In early 2011, after all issues were resolved in the lower court, Plaintiff again appealed to this Court. In an opinion filed 5 June 2012, we remanded to the trial court for additional findings of fact pertaining to the classification and values of specified items and to adjust any conclusions of law and its distributional decision as necessary. *Bodie v. Bodie*, 221 N.C. App. 29, 44, 727 S.E.2d 11, 21 (2012) (*Bodie II)*. The trial court entered a new order on 23 August 2012 and Plaintiff appealed again.

On the third appeal to this Court, we remanded to the trial court to find several specific, additional facts:

(1) the value of the appreciation of the 401(k) account;

(2) whether the funds Plaintiff used to make post-separation payments on marital debts came from marital or separate property;

(3) the value of the 2004 loan; and

(4) the value of the 2005 tax obligation.

Bodie v. Bodie, ___ N.C. App. ___, ___, 746 S.E.2d 22, 2013 WL 3131126, *5 (2013) (unpublished) (*Bodie III*). We also directed the trial court to classify a second mortgage as marital debt and find the value of that mortgage. *Id.* We then instructed the trial court to adjust its distributional decision as necessary in light of these new findings. *Id.*

On 20 February 2014, the trial court entered an order making the additional findings required by our mandate. In light of those findings, the trial court concluded that an "unequal division of the marital estate is equitable" and that the "previously ordered distributional award of $100,000.00 to [Defendant] is not warranted based on the unequal distribution." The trial court then reduced Defendant's distributive award to $25,000. Defendant timely appealed.

Analysis

I. Remand Instructions and the Mandate Rule

[1] Defendant first argues that the trial court erred because it failed to strictly follow the mandate from this Court in *Bodie III* by going beyond the remand instructions in its findings of fact. We disagree.

"[W]hen reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact as long as they are supported by competent evidence. However, the trial court's conclusions of law are reviewed *de novo*." *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation and internal quotation marks omitted). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962).

Defendant argues that, when this Court remanded with instructions to make a series of specific findings of fact, the trial court was limited solely to making those findings, and could not alter other portions of its award. For example, Defendant contends the trial court went beyond the mandate by addressing the net value of a residential house located

at 98 Soquilli Drive because "the value of the Soquilli house and its net date of separation value had been addressed" by this Court in *Bodie II*.

But in *Bodie III*, this Court expressly instructed the trial court to "(1) classify the second mortgage on the Soquilli house as marital debt; (2) find the value of that mortgage, and (3) adjust the distributional decision accordingly." *Bodie III*, ___ N.C. App. at ___, 746 S.E.2d at 22, 2013 WL 3131126, at *5. Those remand instructions necessarily authorize the trial court to adjust any findings that are impacted by the newly determined mortgage value on the Soquilli house. When this Court remands an equitable distribution proceeding with instructions to recalculate the value of a home mortgage, this remand instruction necessarily anticipates that the trial court will, in turn, adjust the net value of the property in light of the new mortgage calculation. That is precisely what the trial court did here.

Similarly, the trial court did not violate the mandate rule by calculating the value of certain distributions from Plaintiff's 401(k) account and calculating the value of interest and penalties incurred to pay the parties' 2005 tax obligation. Again, these calculations were necessary in light of our instruction and the previous findings of the trial court. For example, after determining the value of the parties' 2005 tax liability as this Court's remand instructions required, the trial court necessarily had to determine how that liability was paid and the source of the funds used to pay it in order to arrive at an accurate distributional award. In short, after a careful review of the record, we are unable to identify any actions by the trial court that departed from our remand instructions. Accordingly, we reject Defendant's mandate rule arguments.

II. Review of Particular Fact Findings

[2] Defendant also challenges several specific findings by the trial court as unsupported by the evidence. For example, Defendant challenges the trial court's determination of how much separate property Plaintiff used to pay down marital debt. Defendant makes similar arguments with respect to various other determinations of marital and divisible property values.

We are unable to review these arguments because the record on appeal does not include copies of the transcripts of the proceedings where evidence on these issues was submitted to the trial court. The trial court's order at issue in this appeal states that its findings are based on "the greater weight of the evidence presented during the 30 January 2009, 3 March 2009, 5 May 2009, and 13 July 2009 sessions of Transylvania County District Court." The record on appeal in this case

does not include transcripts of those proceedings, although Plaintiff represents that those transcripts contain more than 800 pages of witness testimony.

The North Carolina Rules of Appellate Procedure state that in appeals from the trial division "review is solely upon the record on appeal, the verbatim transcript of the proceedings, if one is designated, and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2013). We recognize that this is the fourth time this case has come before this Court, but nothing in our appellate rules excuses litigants from assembling a complete record simply because portions of that record may have been submitted to this Court in previous appeals years earlier. As the rules plainly instruct, we must review *this* appeal solely upon the record and verbatim transcripts submitted in *this* appeal.

Here, the record on appeal does not include the evidence and testimony on which the trial court relied to make the findings challenged by Defendant on appeal. "Where the record is silent on a particular point, we presume that the trial court acted correctly." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). Accordingly, we reject Defendant's challenges to the trial court's findings of fact.

III. Distributive Award

[3] Defendant next argues that the trial court abused its discretion by reducing her $100,000 distributive award to $25,000. Defendant contends that this award is not a fair and equitable division of the parties' marital and divisible property.

Our standard of review of an equitable distribution order is abuse of discretion. *Shope v. Pennington*, ___ N.C. App. ___, ___, 753 S.E.2d 688, 690 (2014). "[T]he trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision." *Lawing*, 81 N.C. App. at 162, 344 S.E.2d at 104.

As with our review of the trial court's findings of fact, our review of the trial court's distributive award decision is constrained by the lack of transcripts and other evidence documenting the proceedings below. The trial court stated in its order that, in light of the findings made on remand, "[t]he previously ordered distributional award of $100,000.00 to Wife is not warranted based on the unequal distribution herein stated and the same should be rescinded in favor of a $25,000 distributional award to Wife." On the record before us, there is nothing indicating that the distributive award is "so arbitrary that [it] could not have been the

result of a reasoned decision." *Id.* Accordingly, we reject Defendant's challenge to the trial court's distributive award.

Conclusion

For the reasons set forth above, we reject Defendant's arguments in each of the seventeen issues presented on appeal and affirm the trial court's order.

AFFIRMED.

Judges BRYANT and DILLON concur.

JEFFREY BOWDEN
v.
DWAYNE MAURICE YOUNG, COASTAL PLAINS RESTAURANT, AND
FIRST LIBERTY INSURANCE CORPORATION

No. COA14-819

Filed 17 February 2015

1. Appeal and Error—appealability—subject matter jurisdiction—denial of motion to dismiss—substantial right affected

The denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act is immediately appealable as affecting a substantial right.

2. Workers' Compensation—handling of claim—intentional infliction of emotional distress action—Industrial Commission—exclusive jurisdiction

The trial court's denial of a Rule 12(b)(1) motion to dismiss claims of intentional timing of emotional distress and bad faith by defendant insurer First Liberty handling a Workers' Compensation case was reversed and remanded for entry of an order dismissing plaintiff's claims for lack of subject matter jurisdiction. The exclusive jurisdiction of the Industrial Commission includes not only work-related injuries but also any claims that are "ancillary" to the original compensable injury and these "ancillary" claims include mishandling of plaintiff's workers' compensation claim and causing some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies. Although plaintiff Bowden

is correct that intentional torts generally fall outside the scope of the Workers' Compensation Act, it has been repeatedly held that *all* claims concerning the processing and handling of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not.

Judge DILLON concurs by separate opinion

Appeal by defendant from order entered 21 April 2014 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 3 December 2014.

Anderson Law Firm, by Michael J. Anderson, for plaintiff-appellee.

Wall Templeton & Haldrup, P.A., by William W. Silverman, J. Mark Langdon, & Robin A. Seelbach, for defendant-appellant.

DIETZ, Judge.

Plaintiff Jeffrey Bowden was injured at work. While his workers' compensation claim was pending, he sued First Liberty Insurance Corporation, the insurer handling the claim, for intentional infliction of emotional distress and bad faith. Bowden alleged that First Liberty engaged in a host of intentionally wrongful conduct while handling his claim and that he suffered various emotional injuries as a result.

First Liberty moved to dismiss the claims on the ground that the Industrial Commission had exclusive jurisdiction. The trial court denied the motion and First Liberty appealed.

We reverse. This case is controlled by *Johnson v. First Union Corp.*, 131 N.C. App. 142, 143-44, 504 S.E.2d 808, 809 (1998) and *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212 (2001). In *Johnson* and *Deem*, this Court held that claims arising from an employer's or insurer's processing and handling of a workers' compensation claim—even intentional torts—fall within the exclusive jurisdiction of the Industrial Commission. We agree with First Liberty that the claims asserted in this case are indistinguishable from those we previously held to be within the exclusive jurisdiction of the Industrial Commission in *Johnson* and *Deem*. Accordingly, we reverse the trial court and remand for dismissal of the claims against First Liberty for lack of subject matter jurisdiction.

Facts and Procedural History

Jeffrey Bowden managed a fast food restaurant in Wilson, North Carolina. On 4 July 2013, Defendant Dwayne Maurice Young allegedly assaulted Bowden during an attempted armed robbery at the restaurant. Bowden later filed a workers' compensation claim for various physical and emotional injuries caused by the assault.

First Liberty Insurance Company handled Bowden's claim on behalf of Coastal Plains Restaurant, its insured. Bowden claims that First Liberty engaged in a pattern of improper conduct while processing his claim. He contends that First Liberty communicated with his doctors without his permission and wrongly sought a second opinion from "a professional witness for the defense in claims under the Workers Compensation Act, who opined in exactly the fashion for which he was paid." He also claims that First Liberty treated him belligerently over the phone, denied some of his requests for medical treatment via "form letter," improperly filed paperwork to suspend his compensation, and "insisted that [Bowden] needed to settle his Workers Compensation claim."

Based on this alleged conduct, Bowden sued First Liberty in Wilson County Superior Court while his workers' compensation case was still pending before the Industrial Commission. He alleged claims for bad faith and intentional infliction of emotional distress on the ground that First Liberty purposefully "create[d] an atmosphere of duress intended to force Plaintiff to settle his claim or be made to feel like a fraud or malingerer."

On 14 April 2014, First Liberty moved to dismiss all of Bowden's claims against it pursuant to N.C. R. Civ. P. 12(b)(1) (2013), arguing that the trial court lacked subject matter jurisdiction. The company argued that the Workers' Compensation Act vests exclusive jurisdiction over such claims with the Industrial Commission. The trial court denied this motion, and First Liberty timely appealed.

Analysis

I. Appellate Jurisdiction

[1] We first address our own jurisdiction to hear this appeal. Ordinarily, the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *See*, *e.g.*, *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207 (2009). However, the denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act is immediately appealable as affecting a substantial right. *Burton v. Phoenix*

Fabricators & Erectors, Inc., 362 N.C. 352, 661 S.E.2d 242 (2008); *Estate of Vaughn v. Pike Elec., LLC*, ___ N.C. App. ___, ___, 751 S.E.2d 227, 231 (2013). Accordingly, we have jurisdiction over this appeal.

II. Exclusive Jurisdiction of the Industrial Commission

[2] The sole issue raised by First Liberty on appeal is whether the allegations in Bowden's complaint state any claims that fall outside the exclusive jurisdiction of the North Carolina Industrial Commission. This is a legal question that we review *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

The Workers' Compensation Act provides the exclusive remedy for work-related injuries. *Johnson*, 131 N.C. App. at 145, 504 S.E.2d at 810. The Act is intended "to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Id.* at 144, 504 S.E.2d at 810 (internal quotation marks omitted).

The exclusive jurisdiction of the Industrial Commission includes not only work-related injuries but also any claims that are "ancillary" to the original compensable injury. *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212. These "ancillary" claims include claims that "defendants' mishandling of plaintiff's workers' compensation claim caused some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies." *Riley v. Debaer*, 149 N.C. App. 520, 526, 562 S.E.2d 69, 72, *aff'd per curiam*, 356 N.C. 426, 571 S.E.2d 587 (2002) (dismissing negligent infliction of emotional distress claim against injured worker's rehabilitation specialist for lack of jurisdiction). As this Court has explained, "the Industrial Commission, charged with administration of the Workers' Compensation Act, is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers and health care providers in matters under the Workers' Compensation Act." *N.C. Chiropractic Ass'n, Inc. v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 9, 365 S.E.2d 312, 316 (1988).

Bowden acknowledges these legal principles but contends that, because his claims against First Liberty are intentional torts, they fall within an exception to the exclusive jurisdiction of the Industrial Commission. Bowden is correct that intentional torts generally fall outside the scope of the Workers' Compensation Act. *See Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). But this Court repeatedly has held that *all* claims concerning the *processing* and *handling* of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct

is intentional or not. *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809; *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212.

In *Johnson*, two injured employees claimed that their workers' compensation carrier had fabricated evidence and engaged in other wrongful conduct while handling their claims. *Johnson*, 131 N.C. App. at 143, 504 S.E.2d at 809. The employees sued, "alleging fraud, bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy." *Id.* This Court affirmed dismissal of the claims for lack of jurisdiction, holding that the Workers' Compensation Act "gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including issues such as those raised in the case at bar." *Id.* at 143-44, 504 S.E.2d at 809.

Several years later, in *Deem*, this Court reaffirmed the Johnson holding in even clearer terms. In that case, the employee alleged that his employer intentionally mishandled his workers' compensation claim to force him back to work "at a made up job." *Deem*, 142 N.C. App. at 477, 543 S.E.2d at 212. The employee brought claims for "fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy *arising out of the handling of his workers' compensation claim.*" *Id.* at 475, 543 S.E.2d at 210 (emphasis in original). When the employer argued that those claims were within the exclusive jurisdiction of the Industrial Commission, the injured worker made the *identical* argument that Bowden makes here:

> [P]laintiff at bar argues that it matters not that his claims originally arose out of his compensable injury. Instead, he argues that the "intentional conduct" of defendants fails to come under the exclusivity provisions of the Act because that conduct did not arise out of and in the course of plaintiff's employment relationship.

Id. at 477, 543 S.E.2d at 211. This Court rejected that argument, holding that "plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper." *Id.* at 477, 543 S.E.2d at 212.

We distill from *Johnson* and *Deem* a straightforward rule: all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission, regardless of whether the alleged conduct was intentional or merely negligent.

Here, all of Bowden's factual allegations against First Liberty involve the company's handling of his worker's compensation claim. He alleges that First Liberty wrongly sought a second opinion from "a professional witness for the defense"; that First Liberty denied some of his requests for medical treatment via "form letter"; that First Liberty contacted his doctors without his permission; that First Liberty's representatives were rude and aggressive with him during phone calls; that First Liberty improperly filed paperwork to suspend his compensation; and that First Liberty "insisted that [Bowden] needed to settle his Workers Compensation claim."

After careful review of Bowden's complaint, we conclude that every allegation supporting his tort claims against First Liberty arises out of the company's processing and handling of his workers' compensation claim. Accordingly, those claims fall within the exclusive jurisdiction of the Industrial Commission. As this Court concluded in *Johnson* and *Deem*, the Industrial Commission "is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers" in the handling of workers' compensation claims. *N.C. Chiropractic Ass'n*, 89 N.C. App. at 9, 365 S.E.2d at 316.

CONCLUSION

The allegations against First Liberty Insurance Corporation in Plaintiff's complaint all arise out of First Liberty's processing and handling of Plaintiff's workers' compensation claim. Those claims fall within the exclusive jurisdiction of the Industrial Commission. We reverse the trial court's denial of First Liberty's Rule 12(b)(1) motion and remand this case for entry of an order dismissing Bowden's claims against First Liberty for lack of subject matter jurisdiction.

REVERSED.

Judge BRYANT concurs.

Judge DILLON, concurring by separate opinion.

I concur in the majority's holding. I write separately, however, because I do not agree with the majority's conclusion that "all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission[.]" (Emphasis added.) Rather, I believe an employee can pursue a civil action against his insurer, as he can against his employer, where the insurer " 'intentionally engages in misconduct

knowing it is substantially certain to cause serious injury or death' and that conduct causes injury or death[.]" *Trivette v. Yount*, 366 N.C. 303, 306, 735 S.E.2d 306, 308-09 (2012), (quoting *Woodson v. Rowland*, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991)). Indeed, in *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, a case relied upon in the majority's analysis, the Court appears to recognize a *Woodson* exception to the exclusivity of the Workers' Compensation Act in claims against the insurer. 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212, *disc. review denied*, 354 N.C. 216, 553 S.E.2d 911 (2001). However, in concluding that the claim of the plaintiff in that case did not rise to the level of a *Woodson* claim, the *Deem* Court noted that "it is also well established that the [*Woodson*] exception is extremely narrow[.]" *Id.* at 478, 543 S.E.2d at 212.

In any event, I do not believe that Plaintiff in this case has set forth allegations which, if true, rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Accordingly, I concur in the holding reached by the majority.

BRANCH BANKING AND TRUST COMPANY, Plaintiff
v.
HUI S. SMITH, CHONG SU KIM, JERRY D. SMITH, JOON HEE NAM, MOUNIB AOUN, JIHAD L. LIBBUS, YON SU NAM, and HOSUN KIM, Defendants

No. COA14-554

Filed 17 February 2015

1. Appeal and Error—issue preservation

In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, defendant guarantor preserved his argument that he was not liable for the deficiency under N.C.G.S. § 45-21.36.

2. Pleadings—summary judgment—deficiency judgment defense

In an action by a bank (BB&T) to collect a deficiency on a loan debt following a foreclosure sale, the trial court erred by granting summary judgment in favor of BB&T, which had purchased the property. Defendant raised N.C.G.S. § 45-21.36 as an affirmative defense and forecasted evidence that the property was worth more than the debt.

3. Guaranty—foreclosure—deficiency judgment defense

In an action by a bank (BB&T) to collect a deficiency on a loan debt following a foreclosure sale from which BB&T purchased the property, a guarantor on the loan was entitled to the N.C.G.S. § 45-21.36 defense even though the borrower LLC had been dismissed from the action.

4. Guaranty—mortgage—guaranty agreement

In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, the guarantor did not waive the N.C.G.S. § 45-21.36 defense by the terms of his guaranty agreement.

Appeal by Defendant Mounib Aoun from order entered 30 October 2013 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 5 November 2014.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr. and Michael A. Burger, for Plaintiff-Appellee.

Harris Sarratt & Hodges, LLP, by H. Clay Hodges, for Defendant-Appellant.

DILLON, Judge.

I. Background

In 2008, Plaintiff Branch Banking and Trust Company ("Bank") made a loan ("Loan") to Garrett Enterprise, LLC ("Borrower-LLC")[1] for a real estate project in Durham. The Loan was in the principal amount of $1,675,000.00 and was secured by the Durham real estate ("the Property").

The Bank entered into separate guaranty agreements with the eight individual Defendants ("Guarantors") - including Mounib Aoun ("Appellant") - to guaranty the Loan. The guaranty agreement executed by Appellant limited his liability to $418,750.00, plus interest, costs, and fees.

By 2012, the Loan was in default with over $1.4 million still owing, and the Bank foreclosed on the Property. At the foreclosure sale, the Bank was the sole bidder, purchasing the Property for $800,000.00. After

1. Garrett Enterprise, LLC was previously a Defendant in this suit but on 21 August 2013 the Bank dismissed all claims against it without prejudice.

the net proceeds from the foreclosure sale were applied, a deficiency of approximately $700,000.00 remained on the Loan debt.

Following the foreclosure sale, the Bank commenced this action against the Borrower-LLC and the eight Guarantors to collect the deficiency. Appellant and the other Defendants filed responsive pleadings.

The Bank voluntarily dismissed all claims against the Borrower-LLC and filed a motion for summary judgment against the Guarantors. Following a hearing on the matter, the trial court entered an order granting summary judgment in favor of the Bank against all eight Guarantors. The amount of the judgment entered against Appellant was $502,309.52.

Appellant filed a timely appeal from the order against him. However, none of the other Guarantors noticed an appeal.

II. Analysis

This action involves the application of N.C. Gen. Stat. § 45-21.36 (2013), which makes available a statutory defense or offset to certain loan obligors in actions brought by a lender to recover the deficiency following the foreclosure sale of the collateral. Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale. *See* N.C. Gen. Stat. § 45-21.31(a)(4) (2013). However, this general rule is abrogated by G.S. 45-21.36 in situations where the foreclosing creditor – which in this case is the Bank – ends up purchasing the property at the foreclosure sale. Specifically, G.S. 45-21.36 provides that where the foreclosing creditor purchases the property and subsequently sues to collect the deficiency, certain obligors may "as [a] matter of defense" show that the collateral "was fairly worth the amount of the [entire] debt[,]" a showing which would "defeat . . . any deficiency judgment against [any said obligor]." N.C. Gen. Stat. § 45-21.36. Alternatively, G.S. 45-21.36 provides that the obligor may by way of "offset" show that the creditor's winning foreclosure bid was "substantially less than [the collateral's] true value[,]" a showing which would "offset any deficiency judgment against [any said defendant]." *Id.*[2]

2. By way of illustration, if a lender forecloses on collateral securing a $1 million loan and the lender purchases the collateral at the sale for $600,000, the lender would normally have a valid deficiency claim for $400,000 against the obligors. However, the obligors to which G.S. 45-21.36 applies could "defeat" the claim by way of a "defense" by showing that the collateral was worth at least $1 million (the full loan amount). Alternatively, those obligors could "reduce" their liability by way of an "offset" by showing that the $600,000 bid was "substantially less" than the actual value of the collateral. For example, if the collateral was shown to be worth $850,000 and if $600,000 was determined to be "substantially less" than $850,000, then those obligors' liability for the deficiency would only be $150,000.

On appeal, Appellant argues that summary judgment was inappropriate because there was an issue of fact as to whether he was entitled to the G.S. 45-21.36 offset/defense. For the reasons below, we agree and reverse the summary judgment entered *against Appellant* and remand the matter to the trial court for further proceedings.[3]

A. Appellant Preserved The Issues Raised in this Appeal

[1] Initially, we address the Bank's contention that Appellant waived his right to argue the G.S. 45–21.36 defense/offset because he did not make this argument at the summary judgment hearing. *See* N.C.R. App. P. 10(b)(1) ("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").

The record before us reveals that Appellant pleaded G.S. 45-21.36 as an affirmative defense. At the summary judgment hearing, the transcript shows that Appellant's counsel cited G.S. 45-21.36 as a basis for his position that his client was not liable for the deficiency. Specifically, at the hearing, the Bank's counsel argued that the offset defense was only available to the Borrower-LLC and could not be used by the Guarantors since the Bank had dismissed its claims against the Borrower-LLC. The trial court then asked Appellant's counsel if he agreed with the Bank's argument. In his response, Appellant's counsel did make an argument based on the statute: "[The fact that the Bank dismissed its claims against the Borrower-LLC] does not foreclose, however, the issues that are raised by that statute [G.S. 45-21.36]."

We note that Appellant's counsel conceded that the deficiency amount was established by the amount paid by the Bank at foreclosure. However, this concession does not waive Appellant's argument that G.S. 45-21.36 provides him a defense or offset to his liability for the deficiency.

In sum, Appellant's counsel did raise G.S. 45-21.36 as a defense during the argument; Appellant also raised this ground in his pleading which was before the trial court; and the trial court considered this ground in its questioning of counsel. Accordingly, we overrule this argument and proceed to the merits of Appellant's appeal.

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3. Appellant also argues that summary judgment was inappropriate on the Bank's claims against the *other seven Guarantors on their respective guaranty agreements*, as well. However, since the other Guarantors failed to notice an appeal, we lack jurisdiction to review the summary judgment order as to them. *See*, *e.g.*, *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (holding that "only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions").

B. There Is An Issue of Fact Regarding the Property's Value

[2] At the summary judgment stage, the burden rested with Appellant, the non-moving party, to forecast evidence to create an issue of fact that either (1) the Property was worth more than the amount of the approximately $1.4 million debt or (2) the amount the Bank paid to purchase the Property ($800,000.00) was substantially less than the Property's true value. *See Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008), *cert denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). We believe that Appellant met his burden. For example, an affidavit of one of the Guarantors authenticated an e-mail sent by an officer of the Bank indicating that an appraisal ordered by the Bank five months prior to the foreclosure sale indicated that the Property was worth over $2.1 million[4]. Accordingly, we hold that there was evidence before the trial court which created a genuine issue of material fact as to the value of the Property at the time of the foreclosure sale.

C. Section 45-21.36 Applies to Appellant as a Guarantor Even Though the Borrower-LLC Had Been Dismissed

[3] The Bank argues that Appellant is not entitled to the defense/offset provided by G.S. 45-21.36. The language in the statute provides that the defense/offset is available to "the mortgagor, trustor or other maker of any such obligation whose property has been so purchased [at foreclosure by the creditor]." N.C. Gen. Stat. § 45-21.36. Many decisions from this Court appear to support the position of the Bank that the G.S. 45-21.36 defense/offset is not available to a mere guarantor. *See First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 264, 261 S.E.2d 145, 148 (1979) (holding that "it seems clear that the General Assembly intended to limit protection [afforded by G.S. 45-21.36] to those persons who held a property interest in the mortgaged property, and that such protection was not applicable to other parties liable on the underlying debt"); *see also Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, ___ N.C. App. ___, ___, 742 S.E.2d 201, 204 (2013); *NCNB Nat. Bank of N. Carolina v. O'Neill*, 102 N.C. App. 313, 316, 401 S.E.2d 858, 860 (1991); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 762-63, 394 S.E.2d 294, 296 (1990) (holding that "[t]he protection of [G.S. 45-21.36] is limited . . . to persons who hold a property interest in the

4. We note that the date of the appraisal was several months prior to the date of foreclosure, which is the relevant date for purposes of G.S. 45-21.36. However, the appraisal providing an opinion of value as of a date not too remote from the foreclosure date is some evidence of value as of the relevant date. It is for the jury to determine how much weight to afford the appraisal.

mortgaged property"); *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 579-80, 389 S.E.2d 429, 432 (1990).

We are compelled, however, by our Supreme Court's holding in *Virginia Trust Company v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938) to conclude that Appellant, though merely a guarantor, is entitled to the G.S. 45-21.36 defense/offset, even where the Borrower-LLC has been dismissed from the action.

The loan at issue in *Dunlop* was secured by a borrower's real estate collateral and guaranteed by a separate guarantor. *Id.* at 196-97, 198 S.E. at 645. When the borrower defaulted, the creditor foreclosed on the collateral and cast the winning bid at the foreclosure sale; however, the creditor's bid was less than the amount of the debt, resulting in a deficiency. *Id.* at 197, 198 S.E. at 645. As a result, the creditor brought a deficiency action against the guarantor's estate, but did not name the borrower in the suit. *Id.*

The guarantor's executors, in their answer, pleaded the defense provided under G.S. 45-21.36, alleging that the fair market value of the collateral exceeded the indebtedness. *Id.*

In response, the creditor filed a motion to strike the executors' defense, arguing that the protections of the statute were "unavailable to a guarantor of the debt." *Id.* at 198, 198 S.E. at 645. After the creditor's motion to strike was denied, the creditor immediately appealed the trial court's ruling.

On appeal, our Supreme Court applied the following standard of review:

> On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial. If the defense provided in [section 45-21.36] is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial.

Id. at 198, 198 S.E. at 646 (citations omitted). In other words, the allegations brought by the guarantor's estate could survive the creditor's motion to strike *only if* they were relevant and constituted a valid defense. In its ruling, our Supreme Court held that because the allegations were relevant based "upon the merits[,]" *id.* at 199, 198 S.E. at 646, the guarantor's estate had a right to "present the facts" concerning the statutory defense at trial. *Id.* at 198, 198 S.E. at 646. While explaining its conclusion, our Supreme Court further stated that

> [i]t is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

Id. In so many words, the Court affirmed the guarantor's executors' right to assert the statutory defense, but appropriately declined to comment on whether the guarantor's executors could produce the evidence to support the defense.

The Bank argues that *Dunlop* does not apply because the Supreme Court was not making a "clear and unequivocal" decision regarding whether the statutory defense was available to a guarantor. It is true that in certain cases under the pleading practices of that time our Supreme Court often chose not to rule on the relevancy of a pleaded defense in an interlocutory appeal, but would rather remand the matter so that the relevancy could be determined *after* evidence was offered at the trial court level, as in the case of *Hildebrand v. Telephone Co.*, 216 N.C. 235, 4 S.E.2d 439 (1939), a case cited in the Bank's brief.

However, in *Dunlop*, the Supreme Court – while noting the interlocutory nature of the appeal in that case – *did* make a "clear and unequivocal" ruling on the relevancy of the defense pleaded by the guarantor's executors in that case:

> We are not sure of [the creditor's] right to appeal on this matter [], since the same question could have been raised on objections to the evidence, and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected. **But since the holding [not to strike the guarantor's pleading] is adverse to [the creditor's] contention, and the appeal has precedent, we prefer to decide the matter upon the merits.**
>
> **The judgment denying the [creditor's] motion is AFFIRMED.**

Dunlop, 214 N.C. at 199, 198 S.E. at 647 (citations omitted and emphasis added). In other words, though *Dunlop* contains dicta which might seem equivocal to the modern reader, as it was written in 1938, the holdings are clear: An irrelevant pleading must be struck, and the Supreme Court considered the issue raised by the creditor's appeal and decided on the legal merits that the trial court did not err in denying the creditor's motion

to strike the statutory defense pleaded by the guarantor's executors. We are bound by this holding until our Supreme Court speaks on this issue and renders a holding contrary to that in *Dunlop*, notwithstanding holdings by this Court which may appear to conflict with *Dunlop*.[5]

D. Appellant Did Not Waive the G.S. 45-21.36 Defense/Offset

[4] Finally, the Bank argues that even if the G.S. 45-21.36 defense/offset is available to Appellant, Appellant waived the defense under the terms of his guaranty agreement. Specifically, the Bank cites to language in the guaranty agreement which states that "the undersigned [Appellant] hereby waives the benefits of all provisions of law[.]" However, the Bank omits the rest of the clause which limits the scope of the waiver:

> the undersigned hereby waives the benefits of all provisions of law, including but not limited to the provisions of N.C.G.S., section 26-7, or its successor, for stay or delay of execution or sale of property or other satisfaction of judgment against the undersigned on account of obligation and liability hereunder until judgment be obtained therefor against the [Borrower-LLC] and execution thereon returned unsatisfied, or until it is shown that the [Borrower-LLC] has no property available for the satisfaction of the indebtedness, obligation or liability guaranteed hereby, or until any other proceedings can be had[.]

When read in its entirety, the language makes no mention of a waiver of Appellant's potential G.S. 45-21.36 defense/offset. Rather, it only purports to waive any obligation by the Bank under law to first pursue its remedies against the Borrower-LLC and the collateral before pursuing Appellant. Accordingly, this argument is overruled.

III. Conclusion

In conclusion, we hold that the trial court erred in granting summary judgment against Appellant. We hold that under our Supreme Court's decision in *Dunlop*, *supra*, Appellant is entitled to assert the defense/offset provided under G.S. 45-21.36. Further, we hold that there was sufficient evidence before the trial court at the summary judgment hearing

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5. This issue is currently before our Supreme Court in *High Point Bank & Trust Co. v. Highmark Props., LLC* ___ N.C. App. ___, 750 S.E.2d 886 (2013), *petition for discretionary review allowed*, 367 N.C. 321, 755 S.E.2d 627 (2014).

to create a genuine issue of material fact as to the value of the Property. Accordingly, we reverse the order against Appellant and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

SHELBY J. GRAHAM, Plaintiff

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of November 1, 2005, Morgan Stanley Home Equity Loan Trust 2005-4 Mortgage Pass through Certificates, Series 2005-4, Defendant/Third-Party Plaintiff

v.

BRANCH BANKING AND TRUST COMPANY, Third-Party Defendant

No. COA13-881-2

Filed 17 February 2015

1. Trespass—party asserting claim—not in possession of property at time unauthorized entry first occurred

On rehearing, the Court of Appeals determined that it was not bound by the portion of *Woodring v. Swieter*, 180 N.C. App. 362 (2006), suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry first occurred.

2. Trespass—summary judgment—removal of encroaching structure

The trial court did not err in a trespass case by granting summary judgment in favor of plaintiff and BB&T, and issuing a mandatory injunction requiring defendant to remove the encroaching portions of the pertinent structures. A defendant's wrongful maintenance of an encroaching structure is itself a trespass each day it so remains and constitutes a distinct wrong. The forecast of evidence showed that all of the elements of a trespass claim were satisfied.

Appeal by defendant from order entered 19 March 2013 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Originally heard in the Court of Appeals 11 December 2013. Petition for Rehearing allowed 13 August 2014.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for plaintiff-appellee and third-party defendant-appellee.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Christopher C. Finan, for defendant/third-party plaintiff-appellant.

DAVIS, Judge.

Deutsche Bank National Trust Company ("Defendant") appeals from the trial court's order awarding summary judgment in favor of Shelby J. Graham ("Plaintiff") and Branch Banking and Trust Company ("BB&T") on Plaintiff's trespass claim. On 1 July 2014, this Court filed an opinion reversing the trial court's order and remanding for the entry of summary judgment in favor of Defendant. On 4 August 2014, Plaintiff filed a petition for rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We granted Plaintiff's petition for rehearing on 13 August 2014, and after careful review upon rehearing, we conclude that the trial court's order should be affirmed.

Factual Background

Plaintiff and Defendant are the owners of two adjoining parcels of land in the Mayfield Village subdivision ("Mayfield Village") in Guilford County, North Carolina. Plaintiff acquired Lot 1, Section 1 of Mayfield Village ("Lot 1") by general warranty deed on 25 July 1996.[1] Plaintiff did not have Lot 1 surveyed at the time of purchase. Defendant acquired Lot 2, Section 1 of Mayfield Village ("Lot 2") pursuant to a trustee's deed recorded on 28 May 2010. Similarly, Defendant did not have Lot 2 surveyed at the time it acquired the property.

In September of 2010, one of Plaintiff's neighbors approached her and expressed an interest in purchasing Lot 2 from Defendant. Plaintiff's neighbor asked her if she was aware "that there was a property line dispute between [Lot 1] and [Lot 2]." Plaintiff replied that she did not know of any such dispute.

In early 2011, another individual, Danny Frazier ("Mr. Frazier"), approached Plaintiff, expressed an interest in acquiring Lot 2, and inquired about a property line dispute. At some point, Mr. Frazier had the property surveyed, and the survey — which he provided to Plaintiff

1. The deed listed Shelby G. Coffer — Plaintiff's married name — as the grantee. Plaintiff is no longer married, and in 2001, Plaintiff executed and recorded a deed conveying Lot 1 to Shelby J. Graham.

— indicated that portions of the house and septic system on Lot 2 encroached on Lot 1.

Plaintiff's title insurance company then contacted Boswell Surveyors, Inc. to prepare a survey of the property ("the Boswell survey"). The Boswell survey likewise indicated that the house and septic system on Lot 2 — which were constructed in 1994 — are "in fact partially located on Lot 2 Mayfield Village and partially encroach[] over onto Lot 1."

On 8 March 2012, Plaintiff's attorney sent a letter to Defendant demanding that the encroaching structures be immediately removed from Lot 1. The letter stated that if Defendant did not respond within seven days, a civil action would be filed.

Twelve days later, Plaintiff filed a complaint against Defendant in Guilford County Superior Court alleging that the encroaching structures were an "ongoing and continuing trespass" on her property. On 23 May 2012, Defendant filed an answer, counterclaims for reformation of its deed and to quiet title, and a third-party complaint against BB&T, the holder of the deed of trust encumbering Plaintiff's property. Defendant filed an amended answer on 18 July 2012, adding a counterclaim for adverse possession. Defendant voluntarily dismissed its counterclaim for adverse possession on 31 October 2012.

On 13 February 2013, Plaintiff and BB&T filed a joint motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Following a hearing, the trial court entered an order on 19 March 2013 granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's trespass claim and ordering Defendant to remove the encroaching structures. Defendant appealed to this Court.

Analysis

[1] In our prior opinion in this case, we held that summary judgment in favor of Plaintiff and BB&T was improper because Plaintiff was not in possession of the property when the trespass initially occurred and, therefore, had failed to establish the first element of a claim for trespass. In so holding, we relied on this Court's decision in *Woodring v. Swieter*, 180 N.C. App. 362, 637 S.E.2d 269 (2006). Upon reconsideration, however, we conclude that the portion of *Woodring* we relied upon in our opinion is inconsistent with prior decisions of North Carolina's appellate courts regarding the law of continuing trespass to real property.

"[A] claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized

entry by defendant; and (3) damage to plaintiff." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (citation and quotation marks omitted). In *Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984), this Court addressed the law of continuing trespass to real property. In *Bishop*, the defendants constructed their new house in such a manner that a portion of the home encroached upon the plaintiffs' property. *Id.* at 380, 311 S.E.2d at 299. The plaintiffs brought a trespass claim seeking the removal of the encroaching portion of the house, and the defendants asserted the three-year statute of limitations as an affirmative defense. *Id.* at 384, 311 S.E.2d at 301. We held that the plaintiffs' action seeking removal of the encroachment "would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription." *Id.* We reasoned that a defendant's wrongful maintenance of a structure encroaching upon the plaintiff's property "is a separate and independent trespass each day it so remains" such that the three-year statute of limitations applicable to trespass claims begins to run every day the encroaching structure remains on the plaintiff's land. *Id.*

While the present case does not present a statute of limitations issue, we construe the precedential effect of *Bishop* as encompassing the issue presented here. Implicit in the holding of *Bishop* is the principle that the first element of a trespass claim may be satisfied even where — as here — the landowner asserting the claim did not own the property at the time the original trespass was committed as long as she was in possession of her land while the trespass was ongoing. Accordingly, subsequent landowners who, like Plaintiff, purchase the subject property after the encroaching structure has already been built may still meet the first element of a trespass claim given that the maintenance of the encroaching structure is itself a trespass that continues each day the encroachment exists. *See Adams Creek Assocs. v. Davis*, ___ N.C. App. ___, ___, 746 S.E.2d 1, 9, *disc. review denied*, 367 N.C. 234, 748 S.E.2d 322 (2013) (determining that plaintiffs stated valid claim for trespass even though defendants' encroaching structures were built before plaintiffs acquired possession of property at issue).

Such an interpretation is also consistent with caselaw from our Supreme Court. In *Caveness v. Charlotte, Raleigh & S. R.R. Co.*, 172 N.C. 305, 90 S.E. 244 (1916), the Supreme Court discussed the circumstances under which the right to recover on a trespass theory passes to a subsequent landowner. The Court explained that

> [a] subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case for a continuing trespass, and in the latter for a fresh injury.

Id. at 309, 90 S.E. at 246 (citation and quotation marks omitted).

We note that this analysis is similarly in harmony with generally accepted principles of the law of trespass. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 83 (5th ed. 1984) ("[W]here the defendant erects a structure . . . upon the land of the plaintiff, the invasion is continued by a failure to remove it. In such a case, there is a continuing wrong so long as the offending object remains. A purchaser of the land may recover for the continuing trespass, and a transferee of the defendant's interest in the chattel or structure may be liable."); *see also* 75 Am.Jur.2d *Trespass* § 29 (2007) ("[I]f a possessory interest in land has been transferred after the actor placed something on the land that constitutes a continuing trespass, a transferee of the land may maintain an action for continuing the trespass there."); 87 C.J.S. *Trespass* § 26 (2010) ("If a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass."). Indeed, as Plaintiff notes in her petition for rehearing, a contrary holding would allow for a private taking of the portion of the landowner's property upon which the encroachment sits — a result that the jurisprudence of our State does not permit.

Here, the trespass at issue is one that continues to affect Plaintiff's possession of her property and is clearly continuing in nature. *See Young v. Lica*, 156 N.C. App. 301, 305-06, 576 S.E.2d 421, 424 (2003) ("An essential right inuring the ownership of real property is the ability to exclude others from the property. When one builds upon another's land without permission or right, a continuing trespass is committed."). Therefore, because it is undisputed that Plaintiff was in possession of her property while the encroaching structures remained on her land, she has satisfied the first element of a trespass claim.

In reaching a contrary result in our prior opinion in this case, we relied on this Court's decision in *Woodring*. In *Woodring*, the defendants constructed an underground water pipeline that encroached upon the neighboring property. *Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. Gary and Henry Woodring, who each at varying times owned the

neighboring property, filed a complaint against the defendants alleging various claims, including a claim for trespass. *Id.* The trial court granted summary judgment in favor of the defendants on the trespass claim, and we affirmed the trial court's ruling. *Id.* at 364, 637 S.E.2d at 273.

In reaching our conclusion that summary judgment in the defendants' favor was proper, we first noted that Henry Woodring did not have standing to bring a trespass claim because he had conveyed all of his interest in the property to Gary Woodring prior to the filing of their complaint. *Id.* at 367, 637 S.E.2d at 275. We then concluded that Gary Woodring was also unable to prevail on his trespass claim against the defendants, stating the following:

> The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. Plaintiff Gary Woodring obtained no legally recognized interest [in the land] until Henry deeded his interest in the two acre parcel to Gary in November 1998, approximately six years after the installation of the waterline — the date when the original trespass was committed. As a result, plaintiff failed to satisfy the first element of a claim for trespass, and, accordingly, summary judgment in favor of defendants was proper.

Id. at 376, 637 S.E.2d at 280-81 (citations, quotation marks, and emphasis omitted).

It is well established that as a general rule we are bound by the prior decisions of this Court. *See In re 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."). However, it is also well settled that "where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 701 (2014) (citation and quotation marks omitted).

On rehearing, we determine that we are not bound by the portion of the *Woodring* decision suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry *first* occurred. Such a proposition is inconsistent with both our earlier opinion in *Bishop* and our Supreme Court's discussion of the law of continuing trespass

in *Caveness*. Therefore, we conclude that *Woodring* does not control the outcome of the present case. *See Respess*, ___ N.C. App. at ___, 754 S.E.2d at 702.

[2] Defendant next contends that summary judgment was improper because Plaintiff cannot establish the second element of her trespass claim in that she failed to show that *Defendant* committed an unauthorized entry onto her property. Specifically, Defendant argues that it did not personally construct either of the encroaching structures, was not in possession of the property when the structures were first built, and is "a mere successor in title" to the party who committed the original unauthorized entry onto Plaintiff's property.

However, as our Court explained in *Bishop*, a defendant's wrongful maintenance of an encroaching structure is itself a "trespass each day it so remains" and constitutes a distinct wrong. *Bishop*, 66 N.C. App. at 384, 311 S.E.2d at 301. Thus, because it is undisputed that Defendant failed to remove the encroaching structures from Plaintiff's property, the second element of Plaintiff's trespass claim is likewise established. *See* Restatement (Second) of Torts § 161(2) (1965) ("A trespass may be committed by the *continued presence* on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." (emphasis added)). Accordingly, Defendant's argument on this issue is overruled.

Because the forecast of the evidence in this case showed that all of the elements of a trespass claim were satisfied, the trial court's order granting summary judgment in favor of Plaintiff and BB&T and issuing a mandatory injunction requiring Defendant to remove the encroaching portions of the structures was proper. *See Williams v. S. & S. Rentals, Inc.*, 82 N.C. App. 378, 383, 346 S.E.2d 665, 669 (1986) ("[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment.").

Conclusion

For the reasons stated above, we affirm the trial court's 19 March 2013 order granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's claim for trespass.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

IN RE FORECLOSURE OF FOSTER

[239 N.C. App. 308 (2015)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RALPH M. FOSTER AND SHYVONNE L.STEED-FOSTER DATED FEBRUARY 26, 2010 AND RECORDED IN BOOK 6428 AT PAGE 134 IN THE DURHAM COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA14-108

Filed 17 February 2015

Mortgages and Deeds of Trust—foreclosure—motions for injunction and sanctions

Judge Fox properly denied respondents' motion to reconsider an order dismissing their appeal by Judge Gessner in an action arising from a foreclosure. Although the foreclosure ended when Judge Collins dismissed Wells Fargo's appeal to superior court from the clerk's dismissal of the foreclosure, and appeal from that order was not timely, respondents had remaining a motion for a permanent injunction against foreclosure and a motion for sanctions. The superior court did not have subject matter jurisdiction over respondents' motion for a permanent injunction in this proceeding; the proper way to invoke equitable jurisdiction to enjoin a foreclosure sale is by bring an action pursuant to N.C.G.S. § 45-21.34. As to sanctions, Judge Collins' order dismissing the foreclosure did not prevent respondents from calendaring the motion, so that the record that ultimately came before Judge Fox contained no order dismissing or denying respondents' motion for sanctions, leaving no order to reconsider.

Appeal by respondents from order entered 8 August 2013 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 7 May 2014.

Womble, Carlyle, Sandridge & Rice, LLP, by Christopher W. Jones, for petitioner-appellee.

Ralph M. Foster and Shyvonne L. Steed-Foster, pro se, respondents-appellants.

GEER, Judge.

Wells Fargo Bank, NA initiated foreclosure proceedings against respondents Ralph M. Foster and Shyvonne L. Steed-Foster. The clerk of superior court denied the foreclosure petition, and the superior court

dismissed Wells Fargo's appeal of the clerk's order. The court did not, however, rule on respondents' motions for sanctions and permanent injunctive relief for fraud on the court. Respondents appealed the dismissal order to this Court, but they never served a proposed record on appeal. The superior court granted Wells Fargo's motion to dismiss respondents' appeal. Respondents moved for relief under Rule 60 of the Rules of Civil Procedure from the order dismissing their appeal and for reconsideration of their motions for sanctions and permanent injunctive relief. The superior court denied the Rule 60 motion, and we affirm.

Facts

On 26 February 2010, respondents executed a promissory note in the amount of $340,506.00 secured by a deed of trust on their real property. On 31 July 2012, the substitute trustee initiated a foreclosure proceeding at the request of Wells Fargo by filing a "NOTICE OF HEARING ON FORECLOSURE OF DEED OF TRUST." On 2 January 2013, after a hearing, the clerk of superior court entered an order dismissing the petition. Wells Fargo filed written notice of appeal from the clerk's order on 7 January 2013.

On 22 January 2013, respondents filed a motion entitled "MORTGAGORS [sic] MOTION FOR SANCTIONS AND FOR DENIAL OF FORECLOSURE WITH PREJUDICE AND/OR FOR PERMANENT INJUNCTIVE RELIEF FOR FRAUD UPON THE COURT AND MORGAGORS [sic] BY WELLS FARGO BANK, NA." The motion alleged that Wells Fargo had committed fraud upon the court by producing at the 2 January 2013 hearing a copy of the promissory note that had been altered by the addition of Wells Fargo as an endorsee. Attached to respondents' motion were the affidavits of Shyvonne and Ralph Foster, a copy of the promissory note sent to respondents in response to a July 2012 qualified written request, and a copy of the promissory note submitted by Wells Fargo at the 2 January 2013 hearing.

On 28 January 2013, counsel for Wells Fargo was not present when the case was called before Judge George B. Collins, but appeared later that afternoon and moved for a continuance. On 1 February 2013, Judge Collins entered an order denying Wells Fargo's motion for continuance and dismissing Wells Fargo's appeal "without prejudice." Judge Collins did not hear respondents' motion for sanctions or permanent injunction, and the order did not mention those motions. Respondents filed a written notice of appeal to this Court on 11 February 2013 from the 1 February 2013 order.

On 2 April 2013, after the time had expired for service of a proposed record on appeal, respondents filed a motion for extension of their time to serve the proposed record on appeal. The motion stated:

> There remain issues to be resolved in this case regarding mortgagors [sic] motion for sanctions for fraud upon the court and for permanent injunction. If Mortgagors are successful in obtaining the requested relief then no appeal is necessary. On the other hand, if relief is denied, mortgagors would seek to amend the notice of appeal to include such order and make appropriate additions to their proposed record to avoid a piece meal appeal.

The motion stated that it "was timely filed, however it was inadvertently file [sic] in a related proceeding instead of this proceeding." The motion was originally filed on 14 March 2013 in 12 CVS 6015.

On 25 April 2013, Wells Fargo moved to dismiss respondents' appeal pursuant to Rules 11 and 25 of the Rules of Appellate Procedure. At the hearing on 13 May 2013, Judge Paul G. Gessner rendered a ruling granting Wells Fargo's motion to dismiss, denying respondents' motion for an extension, and denying respondents' motion for sanctions. On 31 May 2013, Judge Gessner entered a written order dismissing respondents' appeal, but the order did not include any ruling on respondents' motion for sanctions.

On 23 May 2013, after Judge Gessner rendered his ruling but before entry of the 31 May 2013 written order, respondents filed a "MOTION TO VACATE ORDER DISMISSING APPEAL AND MOTION TO VACATE, AMEND AND/OR FOR RECONSIDERATION OF THE DENIAL OF RESPONDENTS' MOTION FOR SANCTIONS AND PERMANENT INJUNCTIVE RELIEF" pursuant to Rules 59 and 60 of the Rules of Civil Procedure. This motion was heard on 29 July 2013 by Judge Carl R. Fox, and on 8 August 2013, Judge Fox entered an order denying the motion. Respondents timely appealed to this Court.

Discussion

Respondents argue that Judge Fox erred in denying their motion for Rule 60(b) relief from Judge Gessner's 31 May 2013 order dismissing respondents' appeal of Judge Collins' order. The standard of review of a trial court's ruling on a Rule 60(b) motion is well settled:

> [A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its

> discretion. [A] trial judge's extensive power to afford relief [under Rule 60(b)] is accompanied by a corresponding discretion to deny it, and the only question for our determination . . . is whether the court abused its discretion in denying defendant's motion. A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

McKyer v. McKyer, 182 N.C. App. 456, 459, 642 S.E.2d 527, 529-30 (2007) (internal citations and quotation marks omitted).

Judge Collins' 1 February 2013 order dismissed Wells Fargo's appeal of the clerk's dismissal of the foreclosure proceeding. Although the order dismissed the appeal "without prejudice," Wells Fargo is barred from appealing the clerk's order by N.C. Gen. Stat. § 45-21.16(d1) (2013) (clerk's order in foreclosure proceeding "may be appealed to the judge of the district or superior court having jurisdiction *at any time within 10 days after said act*" (emphasis added)). Therefore, the 2 January 2013 clerk's order dismissing the foreclosure petition stands, and the 1 February 2013 order effectively ended the foreclosure proceeding.

It is well settled that "[o]nly a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1–271 (1983)), *superseded on other grounds by* N.C. Gen. Stat. § 35A-1102. "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Id.* Here, the 1 February 2013 order did not injuriously affect respondents -- on the contrary, it ended the foreclosure of respondents' property. Nevertheless, respondents contend that their appeal of the order should not have been dismissed because respondents' motions for permanent injunctive relief and sanctions remained pending in the trial court.

Regarding respondents' motion for permanent injunctive relief, this Court has held that "[a]t a foreclosure hearing pursuant to N.C. Gen. Stat. § 45–21.16, '[t]he Clerk of Superior Court is limited to making the four findings of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*.' " *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009) (quoting *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978)). " 'The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34.' " *Id.* at 296, 681 S.E.2d at 458 (quoting *In re Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429).

Thus, "[o]n a *de novo* appeal to the Superior Court in a section 45-21.16 foreclosure proceeding, the trial court must 'declin[e] to address [any party's] argument for equitable relief, as such an action would . . . exceed[] the superior court's permissible scope of review[.]' " *Id.* (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999)). Accordingly, we hold that Judge Collins properly declined to rule on respondents' motion for permanent injunctive relief, as the superior court did not have subject matter jurisdiction to grant that relief in this proceeding.

Thus, the only motion pending after the dismissal of the foreclosure proceeding was respondents' motion for sanctions. This Court has held that "neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions." *Dodd v. Steele*, 114 N.C. App. 632, 634, 442 S.E.2d 363, 365 (1994). Consequently, the 1 February 2013 order dismissing the foreclosure proceeding, and respondents' filing an appeal of that order did not prohibit respondents from calendaring their motion for sanctions with the trial court. Respondents, therefore, were not aggrieved by the 1 February 2013 order.

"Where a party is not aggrieved by the judicial order entered, . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam). We therefore hold that Judge Fox properly denied respondents' motion to vacate the order dismissing respondents' appeal. Because of our holding, we need not address the parties' arguments regarding respondents' failure to serve a proposed record on appeal in violation of Rule 11 of the Rules of Appellate Procedure.

Respondents next argue that Judge Fox erred by failing to reconsider respondents' motions for permanent injunctive relief and sanctions. Regarding permanent injunctive relief, as previously discussed, the trial court did not have authority to grant such relief in a foreclosure proceeding pursuant N.C. Gen. Stat. § 45-21.16(d1).

With respect to respondents' motion for sanctions, the record before Judge Fox contained no order dismissing or denying respondents' motion for sanctions. Regardless whether Judge Gessner orally made any ruling on the motion for sanctions, the order actually entered only dismissed respondents' appeal -- it did not address the motion for sanctions. Therefore, no order existed to be reconsidered, and Judge Fox properly denied respondents' Rule 60 motion.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN RE ALLESSANDRINI

[239 N.C. App. 313 (2015)]

IN THE MATTER OF RAYMOND KYLE ALESSANDRINI, CUSTODIAN UNDER NC UNIFORM TRANSFERS TO MINORS ACT

No. COA14-850

Filed 17 February 2015

Fiduciary Relationship—custodian of account—Uniform Transfers to Minors Act—accounting of expenses

The trial court did not err by denying petitioners' motion for summary judgment and by granting summary judgment for respondent father in an action seeking an accounting by the father as custodian of accounts he established for his children under the Uniform Transfers to Minors Act. The uncontroverted evidence showed respondent paid reasonable expenses for the benefit of the minors out of his personal funds and reimbursed himself from the custodial accounts.

Appeal by Petitioners from order entered 7 April 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 7 January 2015.

Raymond Kyle Alessandrini, pro se, for respondent.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.L.L.C., by John F. Scarbrough, for petitioners.

TYSON, Judge.

Michell Alessandrini, Ainsley Alesandrini and Vince Allesandrini ("petitioners") appeal from an order which denied their motion for summary judgment and granted summary judgment in favor of Raymond Alessandrini ("respondent"). We affirm.

I. Background

In the 1990's, respondent's father established accounts for the benefit of respondent's three children pursuant to the Uniform Transfers to Minors Act ("UTMA"). Respondent Raymond Alessandrini, their father, was named as the custodian. The bulk of the custodial funds are deposited in two Edward Jones accounts, one for the benefit of Ainsley, and the other for the benefit of Vince.

On 11 February 2011, the children's mother, petitioner Michell Alessandrini, filed a special proceeding on behalf of the children and

petitioned the Rowan County Clerk of the Superior Court for an accounting. Petitioners alleged respondent had refused to produce the financial records of the accounts, refused to release funds to pay for expenses of the children, and improperly withdrew custodial funds. Petitioners filed an amended petition on 24 August 2012 to require respondent to fully account, immediately pay for certain expenses of the children, reimburse the accounts for any misappropriated funds, and to pay petitioners' attorney's fees and costs.

The matter was heard before the Clerk of the Rowan County Superior Court on 4 October 2012. The Clerk ordered respondent to file an accounting of funds. Respondent filed the accounting on 4 January 2013. The accounting showed that respondent withdrew $5,000.00 from the Edward Jones custodial account for the benefit of Ainsley by check dated 1 September 2009. He withdrew $22,749.97 from the Edward Jones custodial account for the benefit of Vince by check dated 22 July 2010.

Following respondent's filing, the Clerk of the Rowan County Superior Court recused himself from further participation due to an unrelated conflict of interest. Pursuant to a joint motion of the parties under N.C. Gen. Stat. § 7A-104(b), the superior court entered an order and removed the special proceeding to the superior court. On 28 February 2014, petitioners filed a motion for summary judgment for the relief requested in the 24 August 2012 amended petition. On 27 March 2014, respondent filed a cross motion for summary judgment.

The parties' motions for summary judgment were heard on 7 April 2014. The court found no genuine issue of material fact existed, denied petitioners' motion for summary judgment, and granted summary judgment in favor of respondent. Petitioners appeal.

II. Summary Judgment

Petitioners' sole argument on appeal asserts the trial court erred in denying their motion for summary judgment and by granting summary judgment for respondent. Petitioners argue genuine issues of material fact existed of whether respondent breached his fiduciary duty by paying himself $5,000.00 from Ainsley's custodial account and $22,749.97 from Vince's custodial account. We disagree.

A. Standard of Review

Summary judgment is proper 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) (2013).

> An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on 'undisputed aspects of the opposing evidential forecast,' where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004)(citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. UTMA

Chapter 33A of our General Statutes, entitled "North Carolina Uniform Transfers to Minors Act," governs UTMA accounts in this State. N.C. Gen. Stat. § 33A-12(a) sets forth the fiduciary duties of a custodian concerning custodial property. The statute provides the custodian shall: "(1) Take control of custodial property; (2) Register or record title to custodial property if appropriate; and (3) Collect, hold, manage, invest, and reinvest custodial property." N.C. Gen. Stat. § 33A-12(a) (2013). "In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries." N.C. Gen. Stat. § 33A-12(b) (2013).

The Act requires the custodian to keep the custodial property separate and distinct from all other property, so that it can be clearly

identified as custodial property of the minor. N.C. Gen. Stat. § 33A-12(d) (2013). The custodian is required to "keep records of all transactions with respect to custodial property." N.C. Gen. Stat. § 33A-12(e) (2013).

C. Use of Custodial Property

N.C. Gen. Stat. § 33A-14, entitled "Use of Custodial Property," states:

> (a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

N.C. Gen. Stat. § 33A-14(a) (2013). Use of custodial funds is in addition to, not in substitution for, the parental obligation to support the minor. N.C. Gen. Stat. § 33A-14(c) (2013).

In support of his motion for summary judgment, respondent's affidavit states that at or near the time of the $5,000.00 withdrawal from Ainsley's account, she had incurred college tuition expenses of $5,315.75, and the $5,000.00 withdrawal contributed to her tuition.

Respondent's affidavit further states that at or near the time of the withdrawal of $22,749.97, Vince had incurred expenses related to travel abroad totaling $8,593.32. Vince also incurred expenses for his computer in the amount of $1,709.23, and expenses related to his vehicle in the amount of $6,454.53. The remainder of respondent's accounting for Vince's UTMA account shows purchases from drug stores and clothing stores and orthodontic expenses.

Petitioner presented no evidence and does not argue the expenditures incurred and set forth in respondent's affidavit and accounting were not paid for the benefit of the children, nor do they argue that respondent did not pay the expenses out of pocket. Petitioners do not argue that respondent used the custodial funds to reimburse himself for expenses paid within the normal support obligations of parenthood. N.C. Gen. Stat. § 33A-14(c) (2013). Instead, petitioners argue that respondent's reimbursement for these expenses he had paid out of pocket was a per se breach of his fiduciary duty.

Petitioners correctly note this Court has not interpreted the Uniform Transfers to Minors Act in this specific context: whether it is permissible

for a custodian to pay expenses of the minor out of his pocket and later reimburse himself from the custodial funds.

Although our Uniform Trust Code does not apply to Chapter 33A for custodial accounts, we find its provisions, as well as case law involving trusts, to be persuasive to resolve issues regarding custodial accounts under the UTMA. *See Belk v. Belk*, 221 N.C. App. 1, 728 S.E.2d 356 (2012) (applying trust law principles in determining appropriate remedy when a custodian misappropriates UTMA account funds).

In the context of a trustee, our Supreme Court adhered as follows:

> The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (citing Restatement of the Law of Trusts, section 187; *Carter v. Young*, 193 N.C. 678, 137 S.E. 875 (1927)). We apply this reasoning to a custodian under the Uniform Transfers to Minors Act.

The uncontested evidence shows that respondent paid expenses for the benefit of Ainsley and Vince from personal funds, and later reimbursed himself from their UTMA accounts. No evidence tends to show respondent reimbursed more than he expended or incurred expenses or took funds unrelated to the benefit of the children. Nothing on the record tends to show respondent acted with a dishonest purpose or a lack of reasonable judgment in managing and dispersing the funds in the UTMA accounts.

In opposing respondent's claim that the withdrawals were reimbursements for out-of-pocket expenses he paid for the benefit of the minors, petitioners note respondent paid two of Ainsley's college tuition payments after withdrawing $5,000.00 from the account. Those tuition payments were made near the time of the withdrawal.

Ainsley was enrolled in college and the record shows tuition payments were due periodically. While respondent may have refrained from paying himself from Ainsley's account prior to paying the tuition, the evidence before the trial court fails to show respondent acted dishonestly or unreasonably as custodian in managing and dispersing the

funds in the UTMA accounts, or otherwise breached his fiduciary duty. Petitioners' arguments are overruled. The order of the trial court denying petitioners' motion for summary judgment and granting summary judgment in favor of respondent is affirmed.

III. Conclusion

The superior court correctly held no genuine issue of material fact exists, and properly granted summary judgment in favor of respondent and denied petitioners' motion for summary judgment. The uncontroverted evidence showed respondent paid reasonable expenses for the benefit of the minors out of his personal funds and reimbursed himself from the custodial accounts. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and DAVIS concur.

IN THE MATTER OF H.D., K.R.

No. COA14-589

Filed 17 February 2015

1. Child Abuse, Dependency, and Neglect—change of permanent plan to adoption—order ceasing reunification orders included

In a child neglect and dependency proceeding, the Court of Appeals heard respondent's appeal from an order changing a permanent plan to adoption, which respondent addressed as an order ceasing reunification efforts, even though the order did not explicitly cease reunification efforts or require DSS to file a motion terminating parental rights. As a practical matter, the order ceased reunification efforts.

2. Appeal and Error—notice of appeal—termination of parental rights—order ceasing reunification order—not designated

In a child neglect and dependency proceeding, the Court of Appeals denied DSS's motion to dismiss the appeal and respondent's petition for a writ of certiorari where DSS contended that respondent had not designated the order ceasing reunification in her notice of appeal. Respondent's parental rights were terminated

in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was identified as an issue in the record on appeal.

3. Child Abuse, Dependency, and Neglect—continued reunification efforts futile—findings sufficient

The findings in a child neglect and dependency proceeding were sufficient where respondent contended that the court relieved DSS of its duty to seek reunification without first finding that continued efforts would be futile or inconsistent with the children's welfare. The findings, particularly the pending criminal charges, indicated repeated failures at creating an acceptable and safe living environment.

4. Child Abuse, Dependency, and Neglect—adjudication—findings—sufficient

The unchallenged findings were sufficient in a child dependency and neglect proceeding to support the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2).

5. Termination of Parental Rights—best interests of children—likelihood of adoption considered

The trial court did not abuse its discretion in concluding that termination of parental rights was in the best interests of the children when it failed to consider the likelihood that the children would be adopted by their new pre-adoptive caregiver. The enumerated findings demonstrate the trial court did consider the girls' likelihood of adoption.

Appeal by respondent from orders entered on or about 16 November 2012 by Judge F. Warren Hughes and 11 February 2014 by Judge Ted McEntire in District Court, Madison County. Heard in the Court of Appeals 9 December 2014.

Leake & Stokes, by Larry Leake, for petitioner-appellee Madison County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Tobias R. Coleman, for guardian ad litem.

Mark Hayes, for respondent-appellant mother.

STROUD, Judge.

Respondent seeks review of three orders: an order which changed the permanent plan for the children to adoption and the adjudication and disposition orders terminating respondent's parental rights to her daughters. Madison County Department of Social Services filed a motion to dismiss respondent's appeal from the order adopting a permanent plan of adoption, and respondent then filed a petition for a writ of certiorari requesting this Court to hear her appeal on the contested order. For the following reasons, we deny Madison County Department of Social Services's motion to dismiss and respondent's petition for certiorari and affirm the three orders.

I. Background

On 6 April 2010, the Madison County Department of Social Services ("DSS") filed juvenile petitions seeking adjudications of neglect and dependency for respondent's two daughters. The petitions alleged that respondent admitted to DSS that she and her husband were drinking alcohol while supervising the children in April of 2010, in violation of a safety plan established in response to prior incidents. DSS alleged that "the family continues to be in constant crisis and the parents are unable to provide for the supervision and care of the juvenile[s] and lack appropriate alternative child care arrangement." On 23 November 2010, the district court entered an order adjudicating the girls dependent juveniles.

Over the next two years, DSS made several attempts to return the girls to the care of respondent but each time eventually had to intervene again. On 12 July 2012, the district court amended the girls' permanent plan of reunification with respondent by adding a concurrent plan of adoption. On or about 16 November 2012, the district court signed an order changing the permanent plan for the girls to adoption. On 11 February 2014, the trial court entered adjudication and disposition orders terminating respondent's parental rights to the children based on her lack of reasonable progress. Respondent appeals.

II. Permanency Planning Order

[1] Respondent purports to appeal from the 16 November 2012 order changing the permanent plan to adoption. Respondent addresses the order changing the permanent plan to adoption as an order ceasing reunification efforts though the order does not explicitly cease reunification efforts or require DSS to file a motion seeking termination of respondent's parental rights. But even without any explicit language directing cessation of reasonable efforts to achieve reunification or requiring

termination of parental rights, as a practical matter the order does cease reunification efforts. Here, the trial court found that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens[,]" and as such the girls "will be unable to go home within six months[;]" "[i]t is proper to change the plan for the girls to one of adoption[;]" and "[v]isits with the Respondent Mother are hereby terminated due to her failure to attend and her non-compliance." In addition to these findings, the court made uncontested findings regarding DSS's several failed attempts to return the girls to respondent's care. "While these findings of fact do not quote the precise language of subsection 7B–507(b) [regarding ceasing reunification efforts], the order embraces the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. N.C.G.S. § 7B–507(b)(1)." *In re L.M.T.*, ___ N.C. ___, ____, 752 S.E.2d 453, 456 (2013) (quotation marks omitted).

A. Appeal of 16 November 2012 Order

[2] Nonetheless, respondent failed to designate the 16 November 2012 order ceasing reunification in her notice of appeal, and due to this failure, DSS moved to dismiss respondent's appeal of the 16 November 2012 order or in the alternative, sought sanctions for the error. Thereafter, respondent petitioned this Court to review the 16 November 2012 order by writ of certiorari. Again we turn to *In re L.M.T.*, which provided:

> Parents may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B–1001(a)(5)(a), which provides that
>
> a. The Court of Appeals shall review an order entered under section 7B–507 to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

> In other words, if a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order.

Id. at ___, 752 S.E.2d at 456 (citation and quotation marks omitted).

Here, respondent's parental rights were terminated in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was "identified as an issue in the record on appeal" in the list of respondent's "Proposed Issues[.]" Id. We therefore deny DSS's motion to dismiss respondent's appeal and respondent's petition for writ of certiorari, and we consider respondent's appeal because "the appeal of the cease reunification order is combined with the appeal of the termination order." *Id.*

B. Respondent's Argument Regarding the 16 November 2012 Order

[3] Respondent contends that "the court relieved DSS of its duty to seek reunification of the family, without first finding that continued efforts would be futile or inconsistent with the children's welfare." (Original in all caps.)

> All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.

In re Weiler, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citations omitted). North Carolina General Statute § 7B-507(b) provides that

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and

> need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011).

We first note that

> [w]hile trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language.

In re L.M.T., ___ N.C. at ___, 752 S.E.2d at 455 (quotation marks omitted). In *In re L.M.T.*, the Court stated by way of "example" that

> the trial court's finding that the environment that the Respondent Mother and her husband have created is injurious indicates that further reunification efforts would be inconsistent with the juveniles' health and safety. Likewise, the trial court's findings of fact related to respondent's drug abuse, participation in domestic violence, deception of the court, and repeated failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile. Moreover, these findings clearly support the trial court's conclusions that return of the juveniles is contrary to the welfare and best interest of the juveniles[.]

Id. at ___, 752 S.E.2d at 456 (citation, quotation marks, ellipses, and brackets omitted).

As we have already stated, the 16 November 2012 order found unchallenged and thus binding that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens" and as such the girls "will be unable to go home within six months[.]" *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal."). These findings, particularly the pending criminal charges, all indicated "repeated

failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile." *Id.* Even without the benefit of hindsight regarding what happened after reunification efforts had ceased, as permitted by *In re L.M.T.*, the findings in the cease reunification order standing alone "*suggest* that reunification efforts would be futile." *Id.* (emphasis added). This argument is overruled.

III. Termination Orders

[4] Respondent challenges (1) the district court's determination under North Carolina General Statute § 7B-1111(a)(2) that she willfully left the girls in foster care for more than twelve months without making reasonable progress to correct the conditions leading to their placements and (2) that it was in the best interests of the girls for her parental rights to be terminated when the trial court did not consider whether they would be adopted by their current caregiver.

> The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. Once a trial court has determined that at least one ground exists for termination, the trial court then decides whether termination of parental rights is in the best interest of the child.

In re S.R.G., 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (citations and quotation marks omitted), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010).

A. Findings of Fact

> [T]o find grounds to terminate a parent's rights under G.S. § 7B–1111(a)(2), the trial court must perform a two part analysis. The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of reasonable

progress may parallel or differ from that which supports the determination of willfulness in leaving the child in placement outside the home.

A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress, we conclude that, under the applicable, amended statute, evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights. Our Supreme Court, in In re Pierce, 356 N.C. 68, 565 S.E.2d 81 (2002), recognized this when it observed:

> During the 2001 session of the General Assembly, the legislature struck the within 12 months limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's reasonable progress or lack thereof.

In re O.C., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (citations, quotation marks, and brackets omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

While respondent-mother challenges particular portions of numerous findings made by the district court, the following findings are unchallenged:

i. The child[ren have] been in the custody of DSS for well over three and one-half years now.

ii. . . . Respondent Mother was given a case plan with tasks to complete that she never completed. Even after some early success on her part that resulted in

placement of the juveniles with her, there was a subsequent disruption that results from additional substantiation by Buncombe County DSS. Respondent Mother's visits were ceased with the juveniles in October 2012 . . . .

iii. During the trial home placement . . . there were repeated problems of getting the juveniles to school on time and the respondent mother failing to take the children to their therapy appointments. Since the trial home placement ended [she] . . . has had [an] additional drug conviction[] for violation of the criminal law, was incarcerated in 2013 as a result of conviction and had inconsistency showing up late for visitation late or not at all until [DSS] . . . was relieved of reunification efforts.

iv. While the children were in the custody of [DSS] . . ., the respondent mother was evicted from her residence, served time in custody for [a] criminal conviction[] and required additional inpatient substance abuse treatment for the continued use of controlled substances . . . . [This] occurred after the respondent mother had received 60 hours of substance abuse treatment as part of her initial case plan that was completed in April 2011. . . .

v. Since the respondent mother's visitations were ceased in October 2012 [she] . . . has written one letter to these juveniles and the children have responded with one letter. . . .

. . . .

viii. The Court finds credible the testimony of Faith Ashe, the social worker who has spent more than two years working on this case who has been able to observe that respondent mother does not have the ability to properly care for these minor children.

Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009), and we conclude that these binding findings support the district court's adjudication under North Carolina General

Statute § 7B-1111(a)(2). *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2013). *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) ("It is clear that respondent has not obtained positive results from her sporadic efforts to improve her situation."). As such, this argument is overruled.

B. Best Interests

Respondent contends that "the court abused its discretion in concluding that termination was in the best interests of the children, when it failed to consider the likelihood that the children would be adopted by their new pre-adoptive caregiver." (Original in all caps.) Once a district court has found grounds for termination of parental rights under North Carolina General Statute § 7B-1111(a), it must then "determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2013).

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id.

North Carolina General Statute § 7B-1110(a) "requires the trial court to consider all six of the listed factors," but does not require "written findings with respect to all six factors; rather, . . . the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 735 (2014) (citations and quotation marks omitted). In this situation, a factor is "relevant" if there is "conflicting evidence concerning" the factor, such that it is "placed in issue by virtue of the evidence presented before the trial court[.]" *Id.* at ___ n.3, 753 S.E.2d at 735 n.3.

The dispositional order makes it clear that the district court considered the likelihood that the girls would be adopted:

> 9. . . . The juveniles had previously been placed in a pre-adoptive home for two years which placement [was] disrupted on the day of the adjudication hearing in January 2014. . . . The children ha[ve] been in [a new] pre-adoptive placement since January 29, 2014. The pre-adoptive placement is suitable to meet the needs of the juveniles and at this time the placement is going well. . . .
>
> 10. . . . The court received evidence that adoption would not happen immediately but was likely to occur . . . [within a] reasonable period of time.
>
> 11. The juveniles are currently 11 years old and 10 years old and at times have displayed negative behaviors. These behaviors contributed to the disruption of the prior pre-adoptive placement but have not resulted in the children requiring a higher level of care rather continued therapy to deal with previous trauma in their lives.
>
> 12. . . . [Therapist Sheila McKeon] expressed the opinion that the girls['] negative behaviors were learned and observed from their biological parents and that the extended length of this case contributed to their regression. The children are described as friendly, social, intelligent and capable of having relationships and connecting with others. The therapist supports adoption of these juveniles and believes the children are very adoptable.
>
> 13. . . . The Guardian ad litem has expressed . . . that there remains a strong likelihood of adoption in the future and that he believes that it's in the best interest of the juveniles that parental rights be terminated.
>
> . . . .
>
> 15. The court considered whether there was any bond with the new adoptive placement and finds credible evidence that the placement while limited in time is going well and that the children are fully capable of bonding with a permanent placement provider.

The enumerated findings demonstrate the trial court did consider the girls' likelihood of adoption. This argument is overruled.

V. Conclusion

For the foregoing reasons, we deny DSS's motion to dismiss respondent's appeal as to the 16 November 2012 order and respondent's petition for certiorari as to the 16 November 2012 order and affirm the 16 November 2012 order and the 11 February 2014 orders.

AFFIRMED.

Judges Dillon and Dietz concur.

IN THE MATTER OF O.J.R., A MINOR CHILD

No. COA14-858

Filed 17 February 2015

Termination of Parental Rights—trial court order—insufficient findings and conclusions

The trial court erred by terminating the parental rights of respondent father. The trial court's order failed to indicate the grounds under which it terminated respondent's parental rights, and it failed to make findings and conclusions that would support any of the statutory grounds under N.C.G.S. § 7B-1111. The Court of Appeals reversed and remanded for further proceedings on the matter.

Appeal by Respondent from order entered 24 March 2014 by Judge Robert J. Stiehl, III, in District Court, Cumberland County. Heard in the Court of Appeals 26 January 2015.

The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for Petitioner-Appellee Mother.

Mary McCullers Reece for Respondent-Appellant Father.

McGEE, Chief Judge.

Because the findings of fact and conclusions of law in support of the trial court's ruling terminating Respondent's parental rights are insufficient for appellate review, we remand for further action.

I. Facts

Petitioner-Appellee Mother ("Petitioner") filed a petition to terminate the parental rights of Respondent-Appellant Father ("Respondent") concerning their child, O.J.R. ("the Child"), on 26 July 2013. Petitioner alleged dependency and willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) & (7), as grounds for termination of Respondent's parental rights. The petition alleged Respondent had no contact with the Child and had provided no support.

The Child was born to Petitioner and Respondent in January 2009. Petitioner and Respondent were unmarried, but had been living together for approximately eight months at the time the Child was born. Petitioner testified that Respondent was in the hospital room with Petitioner when the Child was born, and that Respondent worked and helped support the Child following the birth. Approximately four months after the birth of the Child, Respondent was incarcerated due to probation violations related to several 2007 convictions. Respondent's projected release date from prison was in 2014. Before Respondent returned to prison, he signed over the title of his car to Petitioner to assist in child care expenses. Petitioner sold the car for approximately $3,000.00. Petitioner testified that, after Respondent returned to prison, they talked on the phone and corresponded through letters. Petitioner testified she took the Child to visit Respondent, stating: "I want to say, at the most, three times[.]"

Respondent, with the assistance of a church program, sent the Child a present for Christmas in 2009. Petitioner testified that the Child received a gift from Respondent, sent by Respondent's mother, in 2010. Petitioner testified there were letters and cards from Respondent to the Child that Petitioner had thrown away when she moved residences. Petitioner testified that she intentionally withheld her address from Respondent and his family "[b]ecause I felt, at the time, it was in my child's best interest not to be subject to that."

A guardian *ad litem* was appointed for the Child, and the guardian *ad litem* signed an affidavit on 9 September 2013 concerning interviews she had conducted with Petitioner and Respondent. The guardian *ad litem's* affidavit included the following: Petitioner told the guardian *ad litem* that Respondent "got upset when she did not bring [the Child]" to visit him. Petitioner stated that she "decided the relationship was not going to work and told [Respondent]. [Petitioner] indicated [Respondent] was 'okay with it, but wanted the name of the person she would be dating if it was going to get serious so he would know who was raising his child.' " Petitioner deleted Respondent's mother from her

Facebook account because Petitioner and Respondent's mother were arguing. Petitioner stated that Respondent's mother wanted Petitioner's new address, but Petitioner refused to give it to her, telling Respondent's mother that she could send any correspondence to Petitioner's mother. Respondent told the guardian *ad litem* that Petitioner sent him a letter in late 2009 indicating that Petitioner no longer wanted Respondent in the child's life "because of his lifestyle." Respondent told the guardian *ad litem* that he did not want his parental rights terminated.

Petitioner married another man ("Petitioner's husband") in May 2010, and they had a child together in December 2011. Petitioner sent Respondent a letter in May 2012, included in the record, in which she states that the Child "is doing great in the environment she is in[,]" that Petitioner's husband gives the Child everything she needs, and that Petitioner's husband "would like to adopt [the Child] so he can legally provide [the Child] with everything [the Child] could ever need." Petitioner included in that letter an agreement, handwritten by her, for Respondent to sign agreeing to give consent for Petitioner's husband to adopt the Child. Petitioner then stated: "I will let you know that if you deny the adoption, paperwork will be filed [and] you will be served with child support orders. As of now you are behind about $10,000." There was never any order for child support entered against Respondent, and Petitioner testified that Respondent was never behind in child support. Respondent did not reply to the letter containing the handwritten agreement.

Respondent sent Petitioner a letter in January 2013 and included a birthday card for the Child. In that letter, Respondent stated: "I really want to be a part of [the Child's] life." Respondent indicated his desire that Petitioner would forgive him for his prior failings, and that they could be friends for the Child's sake. He indicated that he had felt shut out of the Child's life, but he believed it had more to do with Petitioner's husband than with Petitioner. Respondent asked Petitioner to respond, and that if she did not want to write him a long response, she could just write back with her phone number and he would call her at his own expense. Petitioner did not respond.

Respondent accepted service of a summons and complaint in this matter on 30 May 2013. Petitioner voluntarily dismissed the original complaint and filed a second complaint on 26 July 2013. Respondent again accepted service. Respondent sent the Child two more cards in 2013, one for Halloween and one for Thanksgiving. Included with the Halloween card was a letter to Petitioner stating: "If you don't mind I would like it if you would write me and let me know how [the Child] is doing." Respondent wanted to know specifics about the Child's

personality and how she was doing in school. Respondent concluded the letter:

> I really want to be part of her life. I wish you would let me do that. If not let me in b/c I'm in here at least keep me informed on how she is plus maybe a few new pics of her would be great. All I'm asking is to please let me be in [the Child's] life. P.S. please let [the Child] get this card. Thank you.

Petitioner is the party who filed the petition for termination of Respondent's parental rights. No county department of social services was ever involved in the Child's life, and there have been no prior accusations or adjudications of neglect, dependency, or abuse. A termination hearing in this matter was begun on 10 September 2013. However, the trial court declared a mistrial at the first termination hearing. The trial court did this after reading the affidavit of the guardian *ad litem* and concluding that Petitioner had been untruthful in her testimony. The matter came on for a second termination hearing on 3 December 2013. Petitioner and Respondent testified at both hearings. Following the 3 December 2013 hearing, the trial court concluded that "grounds exist[ed] to terminate the parental rights of the Respondent father" and that termination of Respondent's parental rights was in the Child's best interests. Respondent appeals.

II. Analysis

In his two arguments on appeal, Respondent contends the trial court's findings of fact describing his lack of contact with the Child were not supported by the evidence, and that the remaining findings of fact did not support termination of his parental rights. We remand for further action by the trial court.

At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1109(f) (2013); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Review in the appellate courts is limited to determining whether clear, cogent, and convincing evidence was presented to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

We are unable to adequately review the termination order because it lacks sufficient findings of fact and conclusions of law. The trial court

must make adequate findings of fact to support every necessary ultimate finding or conclusion of law:

> (e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.
> . . . .
>
> (f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. The rules of evidence in civil cases shall apply.

N.C. Gen. Stat. § 7B-1109(e) and (f) (2013).

Findings of Fact

Respondent alleges that parts of the following findings of fact are not supported by the evidence. We agree in part.

> 4. That the Respondent Father in this case has engaged in no level of communication and effort as the father of this child. Specifically, at trial the Respondent Father attempts to blame the lack of possible address communication with the minor child. Clearly, Respondent Father's family members had open abilities to provide him with points of communication. Indeed, at one point, the Respondent Father's own brother was assigned to a duty station in Kansas in a similar locale to the duty station of the stepfather.
>
> . . . .
>
> 10. The [c]ourt finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means. Further, the [c]ourt has received into evidence three (3) cards, such three cards being lines of communication in writing Respondent Father to Petitioner Mother or from Respondent Father

> to the minor child from Father/Respondent to the Mother/Petitioner, or minor child. Specifically, 2 of the 3 measures of correspondence took place in the October/November 2013 timeframe. Both of those cards, the Respondent Father admits, were written by somebody else within the Department of Corrections and that he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter. The third piece of correspondence, postmarked January 24, 2013, the Respondent Father sent a birthday card to the minor child. In the birthday card, a handwritten letter is contained. In that letter the Respondent Father devotes an extraordinary amount of space discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child. In it he admits that he "had a big part in shutting himself out of [the child's] life," and additionally "I don't think you shut me out."

Initially, the part of finding four stating that Respondent "has engaged in no level of communication and effort as the father of this child" is not supported by the evidence. According to the trial court's own findings of fact, Respondent gave Petitioner his car, which Petitioner sold for approximately $3,000.00. Further, the trial court acknowledged that Respondent sent some cards to the Child. The trial court made dispositional findings that Respondent sent the Child a Christmas gift in 2009, and that there was a "face-to-face" meeting with the Child early in Respondent's incarceration.

In addition, uncontroverted evidence shows that, before Respondent was incarcerated, he was living with Petitioner and the Child; he was working and taking care of the Child; he was in the delivery room when Petitioner gave birth to the Child; after Respondent was incarcerated, he sent additional letters and cards that Petitioner threw away; that Petitioner did not want Respondent to communicate with or have any relationship with the Child; that Petitioner "intentionally withheld" her contact information from Respondent and Respondent's family; and that Respondent participated in both termination hearings and testified concerning his desire to be a part of the Child's life. These facts evince some level of "communication and effort as the father of [the Child]." We are uncertain what the second sentence in finding four is meant to communicate; however, the remainder of finding four is supported by competent evidence.

The first sentence of finding ten is an ultimate finding of fact. Evidence supports that two of the cards Respondent sent to the Child were physically written by another inmate. However, Respondent did not admit that "he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter." Respondent testified that the sentiments in the cards were his, but he had his friend write the cards because his friend had better penmanship.

Concerning the third piece of correspondence — the January 2013 card and letter — it is true that Respondent sent a birthday card to the Child, and a letter to Petitioner. It is also true that, in the card, Respondent is communicating directly to the Child, whereas in the letter Respondent is communicating directly to Petitioner. We do not find support for the trial court's characterization of Respondent as "devot[ing] an extraordinary amount of space to discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child." We do not find it extraordinary that Respondent discussed "more with . . . Petitioner" in a letter to Petitioner. Though Respondent was not attempting to communicate directly with the Child in that letter, and was not asking for information about the Child, the entire letter is devoted to trying to convince Petitioner to allow Respondent back into the Child's life, including requests that he and Petitioner try to improve their relationship for the sake of the Child. Respondent does request specific information about the Child in a subsequent letter.

There is not competent evidence to support the trial court's finding that, in the January 2013 letter, Respondent "admit[ted] that he 'had a big part in shutting himself out of [the Child's] life,' and additionally "I don't think you [Petitioner] shut me out." What Respondent actually stated in that letter was the following: "I don't think you [Petitioner] shut me out[,] I think that 'D' [Petitioner's husband] had the big part in shutting me out of [the Child's] life. Am I right?"

Sufficiency of the Findings and Conclusions

N.C. Gen. Stat. § 7B-1111 provides the exclusive grounds for terminating a parent's parental rights. *In re C.W.*, 182 N.C. App. 214, 218, 641 S.E.2d 725, 728-29 (2007). The trial court may only terminate a parent's parental rights if the petitioner proves at least one ground pursuant to N.C. Gen. Stat. § 7B-1111 by clear, cogent, and convincing evidence, and the trial court enters sufficient findings of fact to support a conclusion of law that at least one of the grounds alleged by the petitioner exists. N.C. Gen. Stat. § 7B-1109(e) and (f); *In re C.W. & J.W.*, 182 N.C. App. at 219, 641 S.E.2d at 729.

In this case, the trial court has failed to properly indicate the grounds pursuant to which it terminated Respondent's parental rights, or to make sufficient findings and conclusions to support any of the potential grounds. We first note that Petitioner's petition to terminate Respondent's parental rights only included two grounds for termination: willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Petitioner did not allege neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as a ground for terminating Respondent's parental rights. In addition, it is not clear from the transcript that Petitioner was arguing neglect at the termination hearing.

However, because Respondent did not argue this issue on appeal, we do not decide whether there were sufficient allegations in the petition to put Respondent on notice that Petitioner might proceed on the ground of neglect as well. *See In re C.W.*, 182 N.C. App. at 228-29, 641 S.E.2d at 735 ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

The termination order does not mention willful abandonment nor dependency. The order does not specifically mention N.C. Gen. Stat. § 7B-1111, though it does intimate in finding of fact ten that it is proceeding pursuant to neglect as defined in N.C. Gen. Stat. § 7B-1111(a)(1). Finding of fact ten states in relevant part:

> The Court finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means.

As written, this finding does not actually state that the trial court is making an ultimate finding of neglect. However, this may simply be an issue of incomplete wording. There are no additional findings of fact referencing neglect.

The only conclusion of law relevant to N.C. Gen. Stat. § 7B-1111 was the following: "That by clear, cogent and convincing evidence grounds exist to terminate the parental rights of the Respondent Father." This

conclusion of law is insufficient to indicate the specific ground or grounds found by the trial court to terminate Respondent's parental rights, and is insufficient for appellate review.

Furthermore, in order to adjudicate based on neglect, Petitioner must prove, and the trial court must find, that the Child is a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15):

> Neglected juvenile. – A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Because there has been no prior adjudication of neglect involving Respondent, and because Respondent is incarcerated and has had no physical contact with the Child since his incarceration, the only potential grounds to prove neglect were either abandonment of the Child, or having failed to provide proper care, supervision, or discipline for the Child. There are no findings or conclusions stating that Respondent had either abandoned the Child or failed to provide proper care, supervision, or discipline. It is possible the trial court was basing termination on abandonment, though it is unclear whether the termination was pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) or (7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). In the present case, the findings do not support a conclusion that Respondent had manifested "a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.*

Further, the order does not conclude that Respondent was neglecting the Child at the time of the hearing.

> [A]n adjudication that a child was neglected on a particular prior day does not bind the trial court with regard to the issues before it at the time of a later termination hearing, i.e., the then existing best interests of the child and fitness of the parent(s) to care for it in light of all evidence of neglect and the probability of a repetition of neglect.

> During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights . . . is present at that time. The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding.

In re Ballard, 311 N.C. 708, 715-16, 319 S.E.2d 227, 232 (1984) (citations omitted). In some instances, neglect can be proven by demonstrating a history of neglect and further proving that the neglect is likely to continue.

> In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child "at the time of the termination proceeding." . . . . Termination may not . . . be based solely on past conditions that no longer exist. Nevertheless, when, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." In those circumstances, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect."

In re L.O.K., *J.K.W.*, *T.L.W.*, *& T.L.W.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citations omitted).

The trial court's findings of fact indicate Respondent was initially more involved in the Child's life, essentially giving Petitioner $3,000.00 for the care of the Child, corresponding with the Child, having a visit with the Child, and giving several gifts to the Child. The trial court then found that Respondent ceased communicating with the Child for several years, but then sent the Child a birthday card and discussed the Child in a letter to Petitioner sent in January 2013. In this letter, which was admitted at trial, Respondent indicates multiple times that he would like to be a part of the Child's life, that he hoped he and Petitioner could be "friends" for the sake of the Child, and that he didn't "see why [he couldn't] start to see [the Child] some." Respondent concluded: "I'm going to end this now. If you don't want to write a letter just send me your # and I will

call you and talk about this. Plus will you please give [the Child] this b-day card for me and tell her who it's from." Respondent then requested that Petitioner "please" write him back, and he let Petitioner know that she would not have to pay for the phone call. Respondent sent this letter to Petitioner before she initiated this action for termination of Respondent's parental rights. Respondent sent a Halloween card to the Child in October 2013 and included a letter to Petitioner, again stating his desire to be in the Child's life, and asking for specific information about the Child; how she was doing in school, how she was getting along with other children, and other information. He also asked for some recent photographs of the Child. Respondent also sent a Thanksgiving card to the Child in November 2013.

The order does not indicate that the trial court, before making its ruling, considered any changes in Respondent's behavior, particularly leading up to the time of the hearing. In addition, the order contains no finding that there was a probability of a repetition of neglect moving forward. *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citation omitted) ("We agree that the parents' fitness to care for their children should be determined as of the time of the hearing. The trial court must consider evidence of changed conditions. However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect.").

We must reverse and remand. We hold that there was no evidence presented at trial that would have supported termination based upon N.C. Gen. Stat. § 7B-1111(a)(6), dependency. If Petitioner wishes to pursue this ground, a new termination hearing is required. If the trial court meant to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), willful abandonment, the trial court needs to provide both sufficient findings of fact and conclusions of law indicating that the trial court is proceeding pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and that Petitioner has proven that Respondent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. *Id.* Because "[t]ermination [based upon N.C. Gen. Stat. § 7B-1111(a)(1), neglect,] may not . . . be based solely on past conditions that no longer exist[,]" *In re L.O.K.*, 174 N.C. App. at 435, 621 S.E.2d at 242, if Petitioner contends that Respondent's parental rights should be terminated based upon neglect, a new termination hearing is required.

Reversed and remanded.

Judges STEELMAN and DAVIS concur.

IN RE V.B.

[239 N.C. App. 340 (2015)]

IN THE MATTER OF V.B.

No. COA14-812

Filed 17 February 2015

Child Abuse, Dependency, and Neglect—sufficiency of findings of fact

The trial court erred by adjudicating the minor daughter of petitioner as dependent and placing her in the custody of Youth and Family Services (YFS). YFS did not make any allegations or present any evidence that petitioner was unable to provide or arrange for the care of his daughter, and the trial court made no findings as to that issue.

Appeal by Respondent-Appellant Father from order entered 22 May 2014 by Judge Rickye McKoy-Mitchell in District Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2015.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate County Attorney Kathleen M. Arundell, for Petitioner-Appellee.

Assistant Appellate Defender Annick Lenoir-Peek for Respondent-Appellant Father.

Steven S. Nelson for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Appellant Father ("Father") appeals from an adjudication and disposition order, which adjudicated his daughter, V.B. ("the Child"), as dependent and placed her in the custody of Petitioner Mecklenburg County Department of Social Services, Youth and Family Services ("YFS"). We reverse the order of the trial court.

I. Background

The Child was born on 8 February 2014. Three days later, on 11 February 2014, before the Child was discharged from the hospital, YFS filed a juvenile petition ("the petition") alleging that the Child was dependent and took the Child into nonsecure custody. The petition alleged that Respondent-Mother ("Mother") was, herself, a minor in the custody of YFS. Mother did not have independent housing, was

unemployed, and was living at Florence Crittenton, a residential program for pregnant girls. Father, also a minor, was served with the petition. The petition named Father as the Child's parent but, with respect to Father, the petition alleged only that his paternity had not been established. Father participated in a paternity test on 18 February 2014 and, six days later, on 24 February 2014, DNA testing confirmed that Father was the Child's biological father.

The trial court conducted a hearing on 1 April 2014 ("the hearing"). At the hearing, YFS submitted Father's paternity results and acknowledged that Father's paternity had been established. YFS declined to present any further evidence or witnesses, and purported to rely entirely on the verified petition to support its contention that the Child was dependent. Mother did not object and stipulated to the factual allegations in the petition. Father, however, did not stipulate to those allegations and contested the petition on the ground that it made no allegations as to his inability to care for the Child. The trial court concluded nonetheless that the Child was a dependent juvenile. The trial court then conducted a dispositional hearing. The trial court entered a corresponding written order on 22 May 2014, in which it adjudicated the Child dependent and ordered that she remain in YFS custody ("the order"). Father appeals.

II. Standard of Review

On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact were supported by clear and convincing evidence, and (2) whether its conclusions of law were supported by the findings. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

III. Analysis

Father challenges the adjudicatory order on the grounds that the order's conclusions of law are unsupported by its findings, and that its findings are not supported by clear and convincing evidence. We agree.

Adjudicatory hearings for dependency are limited to determining only "the existence or nonexistence of any of the conditions alleged in [the] petition." N.C. Gen. Stat. § 7B-802 (2013). The petitioner has the burden of proving by clear and convincing evidence that a child is

dependent. N.C. Gen. Stat. § 7B-805 (2013). In order to do so, pursuant to N.C. Gen. Stat. § 7B-101(9) (2013), in relevant part, the petitioner must prove that "the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007). Moreover, although N.C.G.S. § 7B-101(9) uses the singular word "the [] parent" when defining whether "the [] parent" can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least "a parent" capable of doing so. *See In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 332 (2005) (emphasis added).

Our Juvenile Code mandates that "[t]he adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2013). "[T]he trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support [its] conclusions of law.' " *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation omitted). The findings "must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation and internal quotation marks omitted).

In the present case, the petition named Father as the Child's father and then alleged that (1) Mother was a minor who was unable to provide for the Child's care or supervision, (2) paternity had not been established, (3) there were "no known placements currently available for" the Child, and (4) the Child was "dependent" as defined by N.C.G.S. § 7B-101(9). In the adjudication order, the trial court made the following findings of fact:

> 2. YFS submitted the verified petition . . . as its showing of evidence as it relates to the juvenile and offered the [P]etitioner for cross-examination.
>
> The parties did not object.
>
> The parties did not cross-examine the [P]etitioner.
>
> The [c]ourt receives the verified petition into evidence. The verified petition forms the basis for the [c]ourt's finding of fact.

> 3. [] [F]ather contested the allegations of the petition and a hearing was held.
>
> . . . .
>
> 5. The [c]ourt further finds a factual basis for the submitted verified petition, and further finds that the facts have been proven by clear and convincing evidence.[1]

Finding of fact 10 in the adjudication order, in part, found that "[e]verything alleged in the petition still stands today with the exception of paternity being established at this time."[2]

We conclude that the findings of fact in the adjudication order are insufficient to sustain an adjudication of dependency. Notwithstanding that finding of fact 10 – that paternity had been established – directly contradicts one of the core allegations in the petition, the trial court's findings of fact do not fully address (1) whether either parent was capable of providing care and supervision for the Child; or (2) whether either parent had an appropriate alternative child care arrangement for the Child. Thus, the trial court failed to "find the ultimate facts essential to support [its] conclusions of law." *See In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853.

Father further contends that, even if we were to remand and instruct the trial court to make proper findings as to the unsupported allegations in the petition, the trial court still could not adjudicate the Child as dependent. Specifically, Father argues the Child could not be adjudicated dependent because the trial court found that paternity had been established, and the petition did not allege, and there were no findings made, that he could not provide or arrange for the care and supervision of the Child. Conversely, YFS contends that Father's paternity should have been "irrelevant" to the trial court's adjudication of the Child as dependent because, at best, Father's paternity was established after YFS filed the petition and, therefore, Father was not a "parent" recognized by the North Carolina Juvenile Code at the time of the hearing and was not a "proper party" in the present case.[3] We agree with Father.

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1. These findings are "check the box" style findings.

2. The remainder of finding of fact 10 contains a summary of the arguments presented at the hearing, which do not constitute findings of fact. *See In re O.W.*, 164 N.C. App. 702-03, 596 S.E.2d at 854 (holding that findings of fact were not appropriate where they merely recited what an individual stated).

3. The term "parent" is not defined in the North Carolina Juvenile Code. *See* N.C. Gen. Stat. § 7B-101 (2013).

YFS is correct to point out that post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect, or dependency. *See In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006). This is because the purpose of an adjudicatory hearing is to determine only "the existence or nonexistence of any of the conditions alleged in a petition." *See* N.C.G.S § 7B-802. However, this rule is not absolute. For instance, in *In re A.S.R.*, 216 N.C. App. 182, 716 S.E.2d 440, slip op. at 11 (2011) (unpublished), this Court allowed a post-petition psychological evaluation to be considered during a neglect adjudication hearing because, "[d]ue to the fact that mental illness is generally not a discrete event or one-time occurrence, . . . the psychological assessment was relevant to respondent's ability to care for her child, regardless of when it occurred."

Similarly, paternity is not a "discrete event or one-time occurrence." It is a fixed and ongoing circumstance, even more so than mental illness. In the present case, Father's paternity was extremely relevant to whether the Child had a parent who could provide or arrange for her care and supervision.

Moreover, YFS submitted Father's paternity results to the trial court and even acknowledged at the hearing that paternity had been established. The trial court made a finding that paternity had been established accordingly. Father does not challenge this finding on appeal. While YFS does challenge this finding in its brief, YFS did not preserve this issue by objecting during the hearing, nor has it brought a cross-appeal from the trial court's order for us to review. Therefore, the finding that paternity has been established is binding on this Court. *See* N.C. R. App. P. 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal[.]"); N.C. R. App. P. 10(a)(1) ("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."); N.C. R. App. P. 28(a) ("Issues not [properly] presented and discussed in a party's brief are deemed abandoned.").

In light of this finding, the trial court erred by adjudicating the Child dependent because YFS made no allegations, and presented no evidence, that Father was unable to provide or arrange for the care and supervision of the Child, and the trial court made no findings to that effect. Because we find that the trial court erred in its adjudication of the

Child as dependent, we need not review Father's additional arguments regarding the trial court's dispositional order.

Reversed.

Judges STEELMAN and DAVIS concur.

EVERETTE E. KIRBY AND WIFE, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, AS EXECUTOR OF THE ESTATE OF FRANCES HENDRIX; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON AND WIFE, PHYLLIS H. NELSON; AND REPUBLIC PROPERTIES, LLC, A NORTH CAROLINA COMPANY (GROUP 1 PLAINTIFFS), PLAINTIFFS

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA14-184

Filed 17 February 2015

1. Appeal and Error—interlocutory orders—substantial right—just compensation—inverse condemnation

Because the Court of Appeals has previously held that an order granting partial summary judgment on the issue of North Carolina Department of Transportation's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right, it considered the merits of the issues on appeal.

2. Eminent Domain—inverse condemnation—takings—ripeness

The trial court erred by determining that plaintiffs' claims for inverse condemnation were not yet ripe because plaintiffs' respective properties had not yet been taken. The takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in 1997 and 2008, respectively. The case was remanded to the trial court to consider evidence concerning the extent of the damage suffered by each plaintiff as a result of the respective takings and concerning the amount of compensation due to each plaintiff.

Appeal by Plaintiffs and Cross-Appeal by Defendant from orders entered 8 January 2013 and 20 June 2013 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 12 August 2014.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, and Kenneth C. Otis, III, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury and Assistant Attorney General John F. Oates, Jr., for Defendant.

McGEE, Chief Judge.

Everette E. and Martha Kirby ("Mr. and Mrs. Kirby"), Harris Triad Homes, Inc. ("Harris Triad"), Michael Hendrix, as Executor of the Estate of Frances Hendrix ("the Hendrix Estate"), Darren Engelkemier ("Mr. Engelkemier"), Ian Hutagalung ("Mr. Hutagalung"), Sylvia Maendl ("Ms. Maendl"), Steven David Stept ("Mr. Stept"), James W. and Phyllis H. Nelson ("Mr. and Mrs. Nelson"), and Republic Properties, LLC ("Republic") (collectively "Plaintiffs") appeal from: (1) the trial court's 8 January 2013 order granting Defendant North Carolina Department of Transportation's ("NCDOT") motions to dismiss Plaintiffs' claims alleging violations of the Constitutions of the United States and of the State of North Carolina; and (2) the trial court's 20 June 2013 order granting NCDOT's summary judgment motion on (a) Plaintiffs' inverse condemnation claims under N.C. Gen. Stat. § 136-111, and (b) Plaintiffs' — excluding Harris Triad's — claims seeking declaratory judgments. NCDOT cross-appeals from the same orders. For the reasons stated, we reverse the orders of the trial court and remand this matter for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

This case concerns, in broad terms, challenges to the constitutionality and propriety of legislation related to the proposed development of a thirty-four-mile highway that would loop around the northern part of the City of Winston–Salem ("the Northern Beltway" or "the Northern Beltway Project") in Forsyth County, North Carolina. Plaintiffs Mr. and Mrs. Kirby, the Hendrix Estate, Mr. Engelkemier, Mr. Hutagalung, Ms. Maendl, Mr. Stept, and Republic own real property located in the section of the Northern Beltway that would extend from U.S. Highway 52 to U.S. Highway 311 in eastern Forsyth County ("the Eastern Loop"). Plaintiffs Harris Triad and Mr. and Mrs. Nelson own real property located in the section of the Northern Beltway that would extend from U.S. Highway 158 to U.S. Highway 52 in western Forsyth County ("the Western Loop").

Before Plaintiffs filed their respective complaints with the trial court, our Court considered a separate case brought by several plaintiffs who owned real property in both sections of the proposed Northern Beltway Project, and who alleged almost identical claims against NCDOT as those alleged by Plaintiffs in the present case. *See Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth I)*, 220 N.C. App. 419, 420, 423–24, 725 S.E.2d 651, 653, 655 (2012), *aff'd in part*, *vacated in part*, *and remanded*, 367 N.C. 333, 757 S.E.2d 466 (2014). Because the challenged legislation and general factual background of the present case are the same as those underlying this Court's and our Supreme Court's respective decisions in the *Beroth* case — which we will discuss in further detail later in this opinion — we rely on those decisions to recount the relevant background of the case now before us.

In *Beroth I*, this Court stated: "In 1989, our General Assembly established the North Carolina Highway Trust Fund to finance the construction of 'urban loops' around designated urban areas." *Id.* at 420 n.1, 725 S.E.2d at 653 n.1. "The Northern Beltway Project has been in the works for more than two decades," *id.*, and "[t]he area encompassed by the Northern Beltway Project was and remains designated for development." *Id.* Pursuant to the Transportation Corridor Official Map Act ("the Map Act"), *see* N.C. Gen. Stat. §§ 136-44.50 to -44.54 (2013), NCDOT "recorded corridor maps with the Forsyth County Register of Deeds on 6 October 1997 and 26 November 2008 identifying transportation corridors for the construction of . . . the Northern Beltway." *Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth II*), 367 N.C. 333, 334, 757 S.E.2d 466, 468 (2014).

Pursuant to the Map Act, after a transportation corridor official map is filed with the register of deeds and other notice provisions are met, *see* N.C. Gen. Stat. §§ 136-44.50(a1), 136-44.51(a) (2013), "the Map Act imposes certain statutory restrictions on landowners within the corridor." *Beroth I*, 220 N.C. App. at 421, 725 S.E.2d at 654. Specifically, N.C. Gen. Stat. § 136-44.51(a) provides that "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision . . . be granted with respect to property within the transportation corridor." N.C. Gen. Stat. § 136-44.51(a).

The Map Act provides three potential avenues of relief from the statutory restrictions imposed upon affected property located within a transportation corridor. First, as we said in *Beroth I*, the Map Act provides a maximum three-year limit on the building permit issuance restrictions set forth in N.C. Gen. Stat. § 136-44.51(a). *See id.* § 136-44.51(b). If an

application for a building permit is still being reviewed three years after the date of the original submittal to the appropriate local jurisdiction, the entity responsible for adopting the transportation corridor official map affecting the issuance of building permits or subdivision plat approval "shall issue approval for an otherwise eligible request or initiate acquisition proceedings on the affected properties," *id.*, or "an applicant within the corridor may treat the real property as unencumbered and free of any restriction on sale, transfer, or use established by [the Map Act]." *Id.*

Second, in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.52, the Map Act allows property owners within the transportation corridor to petition for a variance from the Map Act's restrictions, which may be granted upon a showing that, as a result of the Map Act's restrictions, "no reasonable return may be earned from the land," N.C. Gen. Stat. § 136-44.52(d)(1) (2013), and such requirements "result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52(d)(2).

Finally, the Map Act provides that, once a transportation corridor official map is filed, a property owner "has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship [('the Hardship Program')]." N.C. Gen. Stat. § 136-44.53(a) (2013). Upon such petition, the entity that initiated the transportation corridor official map "may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner." *Id.* The Map Act further provides that this same entity is tasked with the responsibility of "develop[ing] and adopt[ing] appropriate policies and procedures to govern the advanced acquisition of right-of-way and . . . assur[ing] that the advanced acquisition is in the best overall public interest." *Id.* § 136-44.53(b).

According to an affidavit by NCDOT's Right-of-Way Branch Manager, Virgil Ray Pridemore, Jr. ("Mr. Pridemore") — who is responsible for the implementation of right-of-way policies and administration of all phases of NCDOT acquisition work in the NCDOT Raleigh central office — he makes his decisions with respect to the Hardship Program applications by relying on "the criteria and regulations in the NCDOT Right[]of[]Way Manual, the [Code of Federal Regulations], and input and recommendations from various NCDOT staff members from the preconstruction and roadway design branches, NCDOT Advance Acquisition Review Committee members, and representatives from [the Federal Highway Administration]." The Map Act further provides that "[a]ny decision"

made with respect to a Hardship Program petition "shall be final and binding." *Id.* § 136-44.53(a).

Between October 2011 and April 2012, Plaintiffs separately filed complaints against NCDOT alleging that NCDOT's actions "placed a cloud upon title" to Plaintiffs' respective properties, rendered Plaintiffs' properties "unmarketable at fair market value, economically undevelopable, and depressed Plaintiff[s'] property values." Plaintiffs' complaints also alleged that NCDOT treated similarly situated property owners differently by "depriving Plaintiff[s] of the value of their Properties, . . . substantially interfering with the Plaintiff[s'] elemental and constitutional rights growing out of the ownership of the Properties, and . . . restricting the Plaintiff[s'] capacity to freely sell their Properties." Plaintiffs further alleged that the administrative remedies offered by NCDOT were "inadequate and unconstitutional," and, thus, "futile" and not subject to exhaustion. Finally, Plaintiffs alleged that the Hardship Program was "unequal in its treatment of similarly situated persons in the Northern Beltway in that physically unhealthy or financially distressed owners are considered for acquisition yet healthy and financially stable owners are not."

Plaintiffs' complaints set forth the following claims for relief: a taking through inverse condemnation pursuant to N.C. Gen. Stat. § 136-111; a taking in violation of the Fifth Amendment of the United States Constitution, as applied to NCDOT through the Fourteenth Amendment; a violation of the Equal Protection Clause of the Fourteenth Amendment; a taking in violation of Article I, Section 19 (the "Law of the Land" Clause) of the North Carolina Constitution; and a declaration that the Map Act and, specifically, the Map Act's Hardship Program are unconstitutional and "invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners." NCDOT answered and moved to dismiss each of Plaintiffs' respective complaints with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (b)(2), and (b)(6), asserting various affirmative defenses, including sovereign immunity, statutes of limitation and repose, failure to exhaust administrative remedies, and lack of standing and ripeness.

Given "the identical nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues" of the parties in the present action and in a series of companion cases that were or were soon-to-be filed, counsel for Plaintiffs and NCDOT filed a joint motion pursuant to Rule 2.1 of North Carolina's General Rules of Practice for the Superior and District

Courts Supplemental to the Rules of Civil Procedure on 27 July 2012. In this joint motion, the parties requested that the trial court recommend to the Chief Justice of our State's Supreme Court that these cases be designated as "exceptional." In an order entered 31 July 2012, the Chief Justice granted the parties' joint motion pursuant to Rule 2.1. For case management purposes, in a subsequent order entered 8 January 2013, the trial court ordered that these exceptional cases be split into three groups. Plaintiffs in the present case were designated by the trial court as "Group 1" Plaintiffs and are the only plaintiffs who are parties to this appeal.

The trial court heard NCDOT's motions to dismiss the complaints of Group 1, Group 2, and Group 3 Plaintiffs, and entered an order on 8 January 2013 disposing of the motions concerning all three groups as follows:

> 1. Defendant's motions to dismiss with prejudice are DENIED regarding the claims for inverse condemnation, under N.C. Gen. Stat. § 136-111; . . . and claims seeking Declaratory Judgments as to the constitutionality of the Hardship Program and the "Map Act," statutes N.C. Gen. Stat. §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53.
>
> 2. Defendant's motions to dismiss with prejudice are GRANTED regarding all remaining claims, including a taking under N.C. Const. art. I, § 19, Law of the Land; a taking under the Fifth Amendment of the United States Constitution, as applied to Defendant through the Fourteenth Amendment; and claims for Equal Protection violations under the Fourteenth Amendment of the United States Constitution.

Group 1 Plaintiffs — who are Plaintiffs in the present case — and NCDOT filed cross-motions for summary judgment with respect to the remaining claims for inverse condemnation under N.C. Gen. Stat. § 136-111 and for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program; NCDOT additionally moved to exclude Plaintiffs' affidavits and exhibits submitted in support of Plaintiffs' motion for summary judgment. Over NCDOT's objections, Plaintiffs also moved to amend their complaints, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, to include allegations in support of Plaintiffs' contention that "the taking is presently occurring and did occur at an earlier date upon any of the[] events in time" that Plaintiffs sought to incorporate into their respective complaints.

The trial court entered its order on the parties' cross-motions for summary judgment on 20 June 2013. With respect to Plaintiffs' inverse condemnation claims, the trial court first concluded that Plaintiffs' claims were not yet ripe. Citing Beroth I, the trial court determined that the purported takings at issue were exercises of the State's police power rather than exercises of the State's power of eminent domain, and that an "ends–means" analysis was the proper method to determine whether the exercise of that police power, in fact, resulted in the purported takings.

The trial court reasoned that, in their original complaints, Plaintiffs alleged only that the effective dates of NCDOT's purported takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in the Forsyth County Register of Deeds in 1997 and 2008, respectively. The trial court stated that "it is established North Carolina law that mere recording of project maps do not constitute a taking," and found that all Plaintiffs "claim the date of the taking occurred when the maps were published, and do not claim the taking took place on any other dates." Thus, the trial court granted NCDOT's motion for summary judgment with respect to Plaintiffs' inverse condemnation claims, and denied Plaintiffs' motion for the same.[1]

With respect to Plaintiffs' claims for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program, the trial court determined that all such claims, except for those by Harris Triad, were not ripe and were "subject to dismissal due to a lack of standing to bring a declaratory action." The trial court noted that, with the exception of Harris Triad, no Group 1 Plaintiffs applied for variances, permits, or the Hardship Program, or accepted any offers from NCDOT to purchase their respective properties. Although Plaintiffs in the present case asserted that such applications would be futile, the trial court reasoned that challenges under the Declaratory Judgment Act necessitated a showing that each Plaintiff did, or soon would, sustain an injury as a result of a final determination by NCDOT concerning how each may "be permitted" to use his or her own property. Thus, the trial court granted NCDOT's motion for summary judgment with respect to all Plaintiffs' equal protection claims, except for those brought by Harris Triad, and denied those Plaintiffs' motion for the same.

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1. The trial court also rejected Plaintiffs' argument that they suffered "*de facto* taking[s]" by NCDOT. While Plaintiffs asserted that NCDOT's actions resulted in "*de facto* taking[s]" in their motion for summary judgment, Plaintiffs articulated no such allegation or claim in their respective complaints. Therefore, we decline to consider Plaintiffs' argument on appeal asserting that NCDOT's actions resulted in "*de facto* taking[s]."

With respect to Harris Triad's claim for a declaratory judgment as to the constitutionality of the Map Act and the Map Act's Hardship Program, because Harris Triad had applied for the Hardship Program and was denied, the trial court determined that Harris Triad was "cur[ed]" of the "standing problems that beset the remaining Plaintiffs." The trial court then undertook a rational basis review of Harris Triad's equal protection claim and, after finding that the evidence showed "unequal application of the [H]ardship [P]rogram" and "puzzling decisions that emanated from the NCDOT regional office regarding the [P]rogram," the trial court concluded that Harris Triad "successfully presented evidence that [its] company was denied a [H]ardship [P]rogram offer while other similarly-situated parties were accepted and were paid a fair price for their land and improvements." Thus, the trial court denied NCDOT's motion for summary judgment with respect to Harris Triad's equal protection claim, and concluded that Harris Triad could "go forward in an attempt to prove [an as-applied] claim that [the] company's rights ha[d] been violated," and that the scope of such review "must encompass the entire history of hardship purchases for this particular Forsyth County project," and should not be limited by time or geography — i.e., the review should examine "the entire history of" NCDOT's Hardship Program decisions as to both Western and Eastern Loop purchases.

Plaintiffs appealed from the trial court's 8 January 2013 order granting NCDOT's motions to dismiss Plaintiffs' claims, and from the trial court's 20 June 2013 order on the cross-motions for summary judgment. NCDOT cross-appealed from the same orders.

Because all parties urge this Court to examine the *Beroth I* and *Beroth II* decisions as we undertake our analysis of the issues presented on appeal in the present case, we first examine the questions presented and answered by our appellate Courts' decisions in *Beroth I* and *Beroth II*. In *Beroth I*, as in the present case, the trial court had entered an order denying NCDOT's motion to dismiss the plaintiffs' claims for inverse condemnation and the plaintiffs' requests for a declaratory judgment that the Map Act and the Map Act's Hardship Program were unconstitutional. *See Beroth I*, 220 N.C. App. at 424, 725 S.E.2d at 656. However, unlike the present case, the *Beroth I* plaintiffs did not appeal from that order. *See id.* at 425, 725 S.E.2d at 656. Instead, in *Beroth I*, the question before this Court was whether the trial court had erred by entering a separate order denying the plaintiffs' motion for class certification of their inverse condemnation claims. *Id.* at 425–26, 725 S.E.2d at 656–57. Although this Court did declare that the plaintiffs and "all owners of real property located within the corridor have

sustained the effects of government action," *id.* at 430, 725 S.E.2d at 659, we maintained that "[w]hether this action constitutes a taking . . . [wa]s not the question before this Court," *id.*, and that we were not expressing any opinion on that issue. *See id.*

Nevertheless, to answer the question presented, this Court undertook an extensive review of "takings" law and examined whether the trial court erred by employing an ends–means analysis to conclude that the plaintiffs' individual issues would predominate over their common issues, if any. *See id.* at 431–37, 725 S.E.2d at 660–63. This Court then concluded that "the distinguishing element in determining the proper takings analysis [wa]s not whether police power or eminent domain power [wa]s at issue, but whether the government act physically interfere[d] with or merely regulate[d] the affected property," *id.* at 437, 725 S.E.2d at 663, and determined that the trial court correctly relied on the ends–means analysis because the alleged takings were "regulatory in nature." *Id.* This Court also determined that the property interest at issue was "in the nature of an easement right," *id.* at 438, 725 S.E.2d at 664, because the plaintiffs had "relinquished their right to develop their property without restriction." *Id.* This Court then upheld the trial court's denial of the plaintiffs' request for class certification because we determined: "[w]hile the Map Act's restrictions may be common to all prospective class members, liability can be established only after extensive examination of the circumstances surrounding each of the affected properties," *id.* at 438–39, 725 S.E.2d at 664; and "[w]hether a particular property owner has been deprived of all practical use of his property and whether the property has been deprived of all reasonable value require case-by-case, fact-specific examinations regarding the affected property owner's interests and expectations with respect to his or her particular property." *Id.* at 439, 725 S.E.2d at 664. Finally, although this Court "stress[ed]" that our holding had "no bearing on [the plaintiffs'] declaratory judgment claim[s]," *id.* at 442, 725 S.E.2d at 666, we recognized that the plaintiffs did not need to be members of a class in order to obtain a declaration that the Hardship Program and the Map Act were unconstitutional and invalid exercises of legislative power and were unequal in their application to property owners, because "[i]f the Map Act [wa]s declared unconstitutional to one, it [wa]s unconstitutional to all." *Id.*

Our Supreme Court later affirmed this Court's holding in *Beroth I* that the trial court "did not abuse its discretion in denying plaintiffs' motion for class certification because individual issues predominate over common issues." *Beroth II*, 367 N.C. at 347, 757 S.E.2d at 477. However, our Supreme Court also determined that the trial court and our Court

"improperly engaged in a substantive analysis of plaintiffs' arguments with regard to the nature of NCDOT's actions and the impairment of their properties." *Id.* at 342, 757 S.E.2d at 474. Our Supreme Court then "expressly disavow[ed]" the portion of this Court's opinion that stated: " '[t]he trial court correctly relied upon the ends[–]means test in the instant case, as the alleged taking is regulatory in nature and as [the trial court] ha[s] specifically held this analysis applicable outside the context of zoning-based regulatory takings.' " *Id.* at 342–43, 757 S.E.2d at 474 (first and fourth alterations in original) (quoting *Beroth I*, 220 N.C. App. at 437, 725 S.E.2d at 663).

[1] As we noted above, in the present case, the trial court's 20 June 2013 summary judgment order determined all of Plaintiffs' claims, except for Harris Triad's declaratory judgment claim, which renders the appeals before us interlocutory. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) ("[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes."); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Amer. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[n]otwithstanding this cardinal tenet of appellate practice, . . . immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations omitted); *see* N.C. Gen. Stat. § 1-277(a) (2013) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]"); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013) ("Appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . [a]ffects a substantial right."). Because this Court has previously held that an order granting partial summary judgment on the issue of NCDOT's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right, *see Nat'l Adver. Co. v. N.C. Dep't of*

Transp., 124 N.C. App. 620, 623, 478 S.E.2d 248, 249 (1996) (citing *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 106–07, 338 S.E.2d 794, 797 (1986)), we will consider the merits of the issues on appeal that are properly before us.

II. Analysis

A. Power of Eminent Domain and Police Powers

[2] Plaintiffs first contend the trial court erred when it determined their claims for inverse condemnation were not yet ripe because Plaintiffs' respective properties had not yet been taken. Plaintiffs assert the trial court erred because the takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in 1997 and 2008, respectively. Plaintiffs further urge that the takings were either an exercise of the State's power of eminent domain, for which they are due just compensation, or were an improper exercise of the State's police powers.

"[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation," *Finch v. City of Durham*, 325 N.C. 352, 362–63, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989), our Supreme Court has "inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Id.* at 363, 384 S.E.2d at 14.

"The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction," *City of Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965), and provides that, where private property is "*taken* for a public purpose by a[n] . . . agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an actio*n to obtain just compensation therefor." *Id.* Inverse condemnation is "a term often used to designate a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id.* at 662–63, 140 S.E.2d at 346 (internal quotation marks omitted); *see Ferrell*, 79 N.C. App. at 108, 338 S.E.2d at 798 ("Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." (internal quotation marks omitted)). The remedy allowed by inverse condemnation,

which is now codified in N.C. Gen. Stat. § 136-111, *see Ferrell*, 79 N.C. App. at 108, 338 S.E.2d at 798, provides, in relevant part:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court . . . alleg[ing] with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C. Gen. Stat. § 136-111 (2013).

"An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose." *Adams Outdoor Adver. of Charlotte v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). "In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental[.]" *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982). Because "[t]he question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain," *see Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737–38 (1962) (internal quotation marks omitted), in order to address whether Plaintiffs' respective properties have been taken pursuant to the Map Act, and, thus, whether the trial court erred by dismissing as unripe Plaintiffs' claims for inverse condemnation, we consider whether the Map Act confers upon the State the right to exercise its power of eminent domain or to exercise its police power.

"Eminent domain means the right of the [S]tate or of the person acting for the [S]tate to use, alienate, or destroy property of a citizen for the ends of public utility or necessity." *Griffith v. S. Ry. Co.*, 191 N.C. 84, 89, 131 S.E. 413, 416 (1926). "This power is one of the highest attributes of sovereignty, and the extent of its exercise is limited to the express terms or necessary implication of the statute delegating the power."

Id.; *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) ("The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty."). "The right of eminent domain which resides in the State is defined to be [t]he rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common," *Spencer v. R.R.*, 137 N.C. 107, 121, 49 S.E. 96, 101 (1904) (internal quotation marks omitted), "and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare may demand." *Id.* at 121–22, 49 S.E. at 101 (internal quotation marks omitted). "This right or power is said to have originated in State necessity, and is inherent in sovereignty and inseparable from it." *Id.* at 122, 49 S.E. at 101.

In *Wissler v. Yadkin River Power Co.*, 158 N.C. 465, 74 S.E. 460 (1912), our Supreme Court recognized that the phrase "eminent domain" "originated in the writings of an eminent publicist, Grotius, in 1625," *id.* at 466, 74 S.E. at 460, who wrote:

> The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.

Id. (internal quotation marks omitted). Thus, "[t]he right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged." *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451, 455–56 (2 Dev. & Bat.) (1837) (per curiam).

> [W]hen the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied, that the power to have things before appropriated to individuals again dedicated to the service of the [S]tate, is a power useful and necessary to every body politic.

Id. at 456.

"A familiar instance of the exercise of th[is] power . . . is that of devoting private property to public use as a highway. A nation could not exist without these powers, and they involve also the welfare of each citizen individually." *Id.*; *see Nichols on Eminent Domain* § 1.22[1], at 1-78 (rev. 3d ed. 2013) [hereinafter *Nichols*] ("The primary object for the exercise of eminent domain in any community is the establishment of roads."). "An associated people cannot be conceived, without avenues of intercommunication, and therefore the public must have the right to make them without, or against, the consent of individuals." *Raleigh & Gaston R.R. Co.*, 19 N.C. at 456. "[I]t is a power founded on necessity. But it is a necessity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time." *Id.* at 458.

However, "[o]ur Constitution, Art. I, sec. 17, requires payment of fair compensation for the property so taken [pursuant to the State's power of eminent domain]. This is the only limitation imposed on sovereignty with respect to taking." *Hutton & Bourbonnais Co.*, 251 N.C. at 533, 112 S.E.2d at 113. "The taking must, of course, be for a public purpose, but the sovereign determines the nature and extent of the property required for that purpose." *Id.* "It may take for a limited period of time or in perpetuity." *Id.* "It may take an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes," *id.*, "or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken." *Id.*

"What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." *Nichols* § 1.42, at 1-132 to 1-133 (footnote omitted). "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." *Id.* § 1.42, at 1-133, 1-142. "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979) (citation omitted); *Skinner v. Thomas*, 171 N.C. 98, 100–01, 87 S.E. 976, 977 (1916) ("It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens,

the power to govern men and things by any legislation appropriate to that end." (internal quotation marks omitted)). "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property." *Skinner*, 171 N.C. at 101, 87 S.E. at 977 (internal quotation marks omitted).

> [T]he police power[] [is] the power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

Durham v. Cotton Mills, 141 N.C. 615, 639–40, 54 S.E. 453, 462 (1906).

"Laws and regulations of a police nature . . . do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." *Nichols* § 1.42, at 1-145 to 1-146, 1-148. " 'Regulation' implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the property subject to the regulation." *Id.* § 1.42, at 1-145.

"[T]here is a considerable resemblance between the police power and the power of eminent domain in that each power recognizes the superior right of the community against . . . individuals," *id.* § 1.42, at 1-153, "the one preventing the use by an individual of his own property in his own way as against the general comfort and protection of the public," *id.*, "and the other depriving him of the right to obstruct the public necessity and convenience by obstinately refusing to part with his property when it is needed for the public use." *Id.* § 1.42, at 1-153 to 1-154. "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain," *id.* § 1.42, at 1-157, "but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain." *Id.*

"In the exercise of eminent domain[,] property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public." *Id.* § 1.42[2], at 1-203. "In the exercise of the police power[,] the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment

of such property is injurious to the public welfare." *Id.* "Under the police power the property is not generally appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the [S]tate to be enjoyed and used by it as its own." *Id.* § 1.42[2], at 1-203, 1-212, 1-214 (footnote omitted).

Police powers are "established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety." *Cotton Mills*, 141 N.C. at 638–39, 54 S.E. at 461. "They are a just restraint of an injurious use of property, which the Legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law." *Id.* at 639, 54 S.E. at 461.

> It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.

Id. (internal quotation marks omitted). "Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed expedient." *Id.* "This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor." *Id.* at 639–40, 54 S.E. at 461–62.

The State's police power "prescribe[s] regulations to promote the health, peace, morals, education, and good order of the people, and . . . legislate[s] so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." *Id.* at 641, 54 S.E. at 462 (internal quotation marks omitted). "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 642, 54 S.E. at 462 (internal quotation marks omitted); *Brewer v. Valk*, 204 N.C. 186, 189–90, 167 S.E. 638, 639–40 (1933) ("The police power is an attribute of sovereignty, possessed by every sovereign state, . . . [whereby e]ach State has the power . . . to regulate the relative rights and duties of all persons, individuals and corporations, within its

jurisdiction, for the public convenience and the public good."). Such legislation "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." *Cotton Mills*, 141 N.C. at 642, 54 S.E. at 462 (internal quotation marks omitted).

In order to determine whether the Map Act in the present case is an exercise of the State's power of eminent domain or police powers, we find persuasive and instructive the Florida Supreme Court's approach to a comparable question concerning the constitutionality of a similar state statute in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). In *Joint Ventures*, the court considered the constitutionality of a Florida statute that prohibited the development of property subject to a map of reservation recorded by the Florida Department of Transportation ("the Florida DOT"). *Joint Ventures*, 563 So. 2d at 623. The Florida statute provided that, with limited exception, properties subject to the map of reservation could not develop the land for a minimum of five years, which period could be extended for an additional five years. *Id.* The Florida DOT, like NCDOT in the present case, argued that the legislature "did not 'take' but merely 'regulated' " the plaintiff's property "in a valid exercise of the police power." *Id.* at 624. The court's inquiry thus concerned whether the statute was "an appropriate regulation under the police power, as [the Florida] DOT assert[ed], or whether the statute [wa]s merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain." *Id.* at 625.

The Florida DOT suggested that the statute was "a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons." *Id.* ("[W]ithout a development moratorium, land acquisition costs could become financially infeasible. If landowners were permitted to build in a transportation corridor during the period of [the Florida] DOT's preacquisition planning, the cost of acquisition might be increased."). However, the Florida Supreme Court determined that, "[r]ather than supporting a 'regulatory' characterization," *id.*, the circumstances showed the statutory scheme to be an attempt to acquire land by sidestepping the protections of eminent domain. *See id.* The court reasoned: "[T]he legislative staff analysis candidly indicate[d] that the statute's purpose [wa]s not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. Because the court "perceive[d] no valid distinction between 'freezing' property in this

fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings," *id.*, the court determined that "the state exercised its police power *with a mind toward property acquisition.*" *Id.* at 627 (emphasis added). Thus, although the court "d[id] not question the reasonableness of the state's goal to facilitate the general welfare," *id.* at 626, it was concerned "with the means by which the legislature attempt[ed] to achieve that goal," *id.*, when such means were "not consistent with the constitution." *Id.* Because "[a]ssuring highway safety and acquiring land for highway construction are discrete state functions," *id.* at 627, the court held that the statute was unconstitutional, since it permitted the Florida DOT to take the plaintiff's private property without just compensation or the procedural protections of eminent domain. *See id.* at 627–28.

In the present case, when the General Assembly enacted the Map Act, it stated that the enabling legislation was "an act *to control the cost of acquiring rights-of-way for the State's highway system*." 1987 N.C. Sess. Laws 1520, 1520, 1538–42, ch. 747, § 19 (emphasis added). NCDOT argues that its use of the Map Act is for "corridor protection," which is "a planning tool NCDOT uses in designing and building highways because it allows the highway's proposed location to fit into the long-range plans a community has for its future development," and that corridor protection "accomplish[es] more than merely 'saving taxpayers money.' "

According to an affidavit from Calvin William Leggett ("Mr. Leggett") — the manager of NCDOT's Program Development Branch who is responsible for managing the official transportation corridor map program and is "familiar with NCDOT's corridor protection process and why NCDOT utilizes the Map Act to accomplish corridor protection" — corridor protection generally, and the Map Act specifically: "facilitate[] orderly and predictable development;" "enable[] NCDOT to preserve the ability to build a road in a location that has the least impact on the natural and human environments;" "can minimize the number of businesses, homeowners, and renters who will have to be relocated once the project is authorized for right[-]of[-]way acquisition and construction;" and "protect[] the planned highway alignment by limiting future development within the corridor" and, thus, "reduc[e] future right[-]of[-]way acquisition costs for the proposed highway," which "represent the single largest expenditure for a transportation improvement, particularly in growing urbanized areas where transportation improvements needs are the greatest." In other words, NCDOT asserts that the restrictions of the Map Act are intended to facilitate a less disruptive and lower cost migration of residents and businesses "if or when" the Northern Beltway

Project is sufficiently funded and is under construction, and that, without such restrictions, "proposed urban loop routes could be jeopardized due to increased development, disruption related to relocations, property access issues, and future right[]of[-]way acquisition costs."

Nonetheless, these detriments or harms to the public welfare that are purportedly prevented or averted as a result of the Map Act's restrictions are *only* injurious to the public welfare if the Northern Beltway Project is constructed and NCDOT condemns the properties within the transportation corridor. Effectively, NCDOT urges that "proposed urban loop routes could be jeopardized" due to these "harms," but none of these issues cause harm to the public welfare unless the Northern Beltway Project is built and unless NCDOT has to acquire the affected properties. Thus, there is no detriment to the public interest that the Map Act's purported "regulations" will prevent unless NCDOT needs to condemn Plaintiffs' respective properties to build the Northern Beltway. Therefore, we conclude that the Map Act is a cost-controlling mechanism, and, "[b]y recording a corridor map, [NCDOT] is able to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels." *See Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part). Because the power exercised through this legislation is one "with a mind toward property acquisition," *see Joint Ventures*, 563 So. 2d at 627, we conclude that the Map Act empowers NCDOT with the right to exercise the State's power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map that was recorded in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.50, which power, when exercised, requires the payment of just compensation. *See*, *e.g.*, *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 407, 14 S.E.2d 252, 256 (1941) ("If the land is needed for a public use, the law provides a way for acquiring it, and the Constitution prohibits its appropriation for such a use without compensation." (internal quotation marks omitted)).

B. Filing of Transportation Corridor Maps as an Exercise of Power of Eminent Domain

We next examine whether NCDOT exercised its power of eminent domain by filing the transportation corridor maps in accordance with the provisions of the Map Act. Specifically, we consider whether NCDOT exercised its powers of eminent domain under the Map Act against Plaintiffs' respective properties located in the Western Loop when it filed the transportation corridor map for the Western Loop in

1997, and against Plaintiffs' respective properties located in the Eastern Loop when it filed the transportation corridor map for the Eastern Loop in 2008, and whether the filing of these transportation corridor maps provide the basis for Plaintiffs' takings claims. We begin where the trial court ended, by considering whether Plaintiffs' claims for inverse condemnation were not yet ripe because Plaintiffs "claim[ed] the date of the taking occurred when the maps were published," Plaintiffs "d[id] not claim the taking took place on any other dates,"[2] and "it is established North Carolina law that mere recording of project maps do not constitute a taking."

"The United States Supreme Court has recognized that a 'nearly infinite variety of ways [exist] in which government actions or regulations can affect property interests.' " *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (quoting *Ark. Game & Fish Comm'n v. United States*, __ U.S. __, __, 184 L. Ed. 2d 417, 426 (2012)). "Short of a permanent physical intrusion, . . . no set formula exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property." *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (internal quotation marks omitted). Thus, while our Supreme Court recognized that "the goal of inverse condemnation here is relatively straightforward: to compensate at fair market value those property owners whose property interests have been taken by the development of the Northern Beltway," *id.*, "[d]etermining whether there has been a taking in the first place . . . is much more complicated." *Id.*

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Long*, 306 N.C. at 201, 293 S.E.2d at 110 (internal quotation marks omitted). "The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id.* (internal quotation marks omitted).

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2. Plaintiffs moved to amend their complaints pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, to include additional allegations that the taking of their respective properties was "presently occurring" and "did occur at an earlier date upon any of" the twenty-three dates further alleged in the motion to amend. Plaintiffs' motion was denied by the trial court on 26 July 2013 — nine days after Plaintiffs filed their notice of appeal with this Court from the 8 January 2013 and 20 June 2013 orders. Plaintiffs did not seek to appeal from the trial court's order denying their motion to amend the complaints. Accordingly, we consider only the allegations in Plaintiffs' original complaints, which alleged that Plaintiffs suffered their respective takings when the transportation corridor maps were filed for the Western and Eastern Loops.

A "taking" has been defined as " 'entering upon private property for more than a momentary period, and under warrant or color of legal authority,' " *id.* at 199, 293 S.E.2d at 109 (quoting *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)), " 'devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.' " *Id.* (quoting *Penn*, 231 N.C. at 484, 57 S.E.2d at 819). "Modern construction of the 'taking' requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property." *Id.* at 198–99, 293 S.E.2d at 109. Thus, " 'taking' means the taking of something, whether it is the actual physical property or merely the right of ownership, use or enjoyment." *Tel. Co. v. Hous. Auth.*, 38 N.C. App. 172, 174, 247 S.E.2d 663, 666 (1978) ("[P]roperty itself need not be taken in order for there to be a compensable taking."), *disc. review denied*, 296 N.C. 414 (1979); *see also Beroth II*, 367 N.C. at 351–52, 757 S.E.2d at 479 (Newby, J., dissenting in part and concurring in part) ("A substantial interference with a single fundamental right inherent with property ownership may be sufficient to sustain a takings action; wholesale deprivation of all rights is not required."). "[T]here is a taking when the act involves an actual interference with, or disturbance of property rights, resulting in injuries which are not merely consequential or incidental." *Penn*, 231 N.C. at 484–85, 57 S.E.2d at 820 (internal quotation marks omitted). "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 318 (1945).

"[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ark. Game & Fish Comm'n*, __ U.S. at __, 184 L. Ed. 2d at 426. Nonetheless, the Supreme Court "has recognized few invariable rules in this area." *Id.* at __, 184 L. Ed. 2d at 426. Aside from the cases that involve "a permanent physical occupation of property authorized by government" or "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land, . . . most takings claims turn on situation-specific factual inquiries." *Id.* at __, 184 L. Ed. 2d at 426 (citation omitted).

"It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected." *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135,

139 S.E.2d 227, 230 (1964) (internal quotation marks omitted). "Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *Id.* at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("[T]he mere laying out of a right[-]of[-] way is not in contemplation of law a full appropriation of the property within the lines." (internal quotation marks omitted)). "No damages are collectible until a legal opening occurs by the actual taking of the land. When the appropriation takes place, any impairment of value from such preliminary steps becomes merged, it is said, in the damages then payable." *Browning*, 263 N.C. at 136, 139 S.E.2d at 231 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the Highway Commission. When such appropriation takes place, the remedy prescribed by the statute is equally available to both parties." (internal quotation marks omitted)). "A threat to take, and preliminary surveys, are insufficient to constitute a taking on which a cause of action for a taking would arise in favor of the owner of the land." *Penn*, 231 N.C. at 485, 57 S.E.2d at 820 (citation omitted).

In the present case, this Court must consider whether the restrictions of the Map Act that were applicable to Plaintiffs at the time the maps were filed substantially interfered with the elemental rights growing out of Plaintiffs' ownership of their properties so as to have effected a taking and provided grounds for the trial court to consider Plaintiffs' claims for inverse condemnation as ripe.

Upon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map and the filing of "[t]he names of all property owners affected by the corridor," *see* N.C. Gen. Stat. § 136-44.50(a1)(2), (a1)(3), the statutory restrictions of N.C. Gen. Stat. § 136-44.51(a) are applicable to each "affected" owner noticed pursuant to N.C. Gen. Stat. § 136-44.50(a1). These restrictions prohibit the issuance of building permits "for any building or structure or part thereof located within the transportation corridor," N.C. Gen. Stat. § 136-44.51(a), and "the[se] restrictions imposed by [S]tate law never expire," *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part), and are absolute. NCDOT urges that the statutory restrictions of the Map Act cannot be deemed a taking

because the Map Act merely "creates a temporary three-year restriction on new improvements to properties located within the mapped corridor," (emphasis in original omitted), which restrictions "are lifted, i.e. sunset, three years from when the property owner first submits a permit request to the local government," and that such restrictions "do not affect current property uses." However, the restrictive provisions of the Map Act do not independently or uniformly "sunset" at any time following the date of the filing of a transportation corridor map pursuant to the Map Act. Rather, as the Map Act was written and enacted by the General Assembly, NCDOT was granted the right to exercise its power of eminent domain at any time after the transportation corridor maps for the Northern Beltway Project were filed and the environmental impact statements were completed in accordance with N.C. Gen. Stat. § 136-44.50(d). *See* N.C. Gen. Stat. § 136-44.51(a).

Further, the record includes a letter sent by NCDOT's Chief Operating Officer Jim Trogdon ("Mr. Trogdon") in response to a request for information following a 2010 public meeting concerning the status of the Northern Beltway Project. In the course of his effort to "improve communication regarding advanced acquisition hardship requests and procedures for requesting property improvements within the protected corridor," Mr. Trogdon indicated that NCDOT "will still be constructing existing urban loops in our [S]tate for at least 60 years." Thus, based on our review of the statutory language and based on the evidence in the record before us, the restrictions of the Map Act could quite possibly continue to bind "affected" property owners for "at least 60 years," if the Northern Beltway Project is not completed before then.

Therefore, with potentially long-lasting statutory restrictions that constrain Plaintiffs' ability to freely improve, develop, and dispose of their own property, we must conclude that the Map Act is distinguishable from the cases that established the rule that "the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *See Browning*, 263 N.C. at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted). In the case before us, NCDOT has not merely "made initial alternative planning proposals" that "contemplate ultimate acquisition of certain lands" owned by Plaintiffs for the purpose of constructing the Northern Beltway. *Cf. Barbour v. Little*, 37 N.C. App. 686, 691, 247 S.E.2d 252, 255, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). Rather, between 1996 and 2012, NCDOT acquired at least 454 properties located in the

transportation corridor for the Northern Beltway Project. This Court understands that NCDOT's acquisition of these and other properties located within the Western and Eastern Loops of the Northern Beltway Project does not guarantee that the State has the funds necessary to begin or complete construction of the Northern Beltway. However, this has no bearing on the perpetual applicability of the restrictions of the Map Act upon Plaintiffs' properties, or upon our determination that, without a specified end to the restrictions on development or improvement, NCDOT exercised its power of eminent domain when it filed the transportation corridor maps for the Western and Eastern Loops. Since "[t]he courts have no jurisdiction to determine matters purely speculative, . . . deal with theoretical problems, give advisory opinions, . . . adjudicate academic matters, . . . or give abstract opinions," *see Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), we decline to consider whether our holding would have been different had the General Assembly imposed time limitations upon the restrictions affecting Plaintiffs' properties pursuant to N.C. Gen. Stat. § 136-44.51.

Further, "[w]hile NCDOT's generalized actions [pursuant to the Map Act] may be common to all, . . . liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *See Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (internal quotation marks omitted). "This discrete fact-specific inquiry is required because each individual parcel is uniquely affected by NCDOT's actions. The appraisal process contemplated in condemnation actions recognizes this uniqueness and allows the parties to present to the fact finder a comprehensive analysis of the value of the land subject to the condemnation." *See id.* These issues should be among the trial court's considerations on remand.

III. Conclusion

Accordingly, we hold the trial court erred when it concluded Plaintiffs' claims for inverse condemnation were not yet ripe based on its determination that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps for the Western and Eastern Loops. We remand this matter to the trial court to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings. In light of our disposition that the trial court erred by dismissing Plaintiffs' claims for inverse condemnation, we need not consider NCDOT's issue on appeal concerning

whether the trial court erred by failing to dismiss Plaintiffs' claims for inverse condemnation with prejudice, rather than without prejudice.

Additionally, we note that the relief sought by Plaintiffs in their respective complaints was: for the recovery of damages suffered when NCDOT exercised its power of eminent domain against their properties by recording the transportation corridor maps pursuant to the Map Act; for NCDOT to be compelled to purchase Plaintiffs' properties; and for recovery of fees, costs, taxes, and interest. Plaintiffs' challenge to the constitutionality of the Hardship Program was one of five alternative claims alleged in order to obtain this relief. Because our disposition allows the trial court, upon consideration of evidence to be presented by Plaintiffs, to award Plaintiffs the relief they sought in their respective complaints, we decline to consider the arguments presented on appeal concerning the constitutionality of the Hardship Program as applied to Plaintiffs. Therefore, we decline to further address the arguments presented for this issue on appeal. We also decline to address NCDOT's suggestion that Plaintiffs' claims for inverse condemnation are barred by the statute of limitations because, as NCDOT concedes, construction on the Northern Beltway Project has not been completed. *See* N.C. Gen. Stat. § 136-111 ("Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the [NCDOT] and no complaint and declaration of taking has been filed by [NCDOT] may, *within 24 months of the date of the taking* of the affected property or interest therein or the *completion of the project involving the taking, whichever shall occur later*, file a complaint[.]" (emphases added)). We further decline to address any remaining assertions for which Plaintiffs and NCDOT — as appellants and cross-appellants, respectively — have failed to present argument supported by persuasive or binding legal authority.

Reversed and remanded.

Judges BRYANT and STROUD concur.

MICHAEL RAY PATTON, Administrator of the Estate of THURMAN FRANKLIN PATTON, Deceased Employee, Plaintiff
v.
SEARS ROEBUCK & CO., Employer, SPECIALTY RISK SERVICES, Carrier, Defendants

No. COA14-955

Filed 17 February 2015

1. Workers' Compensation—sufficiency of findings—exposure to asbestos

The Industrial Commission did not err in a workers' compensation case by finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. Findings of fact #3, #7, and #14 supported it.

2. Workers' Compensation—asbestos—occupational exposure—significant contributing factor in death

The Industrial Commission did not err in a workers' compensation case by finding that the decedent's occupational exposure to asbestos was a significant contributing factor in decedent worker's death. Competent evidence showed that decedent's exposure to asbestos contributed to his disease and the occupational disease of asbestosis significantly contributed to his death.

Appeal by defendants from Opinion and Award entered 27 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 January 2015.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff.

Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendants.

ELMORE, Judge.

Sears Roebuck & Co. ("defendant-employer") and Specialty Risk Services (collectively "defendants") appeal from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award. After careful review, we affirm.

I. Facts

Thurman Franklin Patton (the decedent) originally brought a claim for asbestosis against defendants in 2003. The decedent's claim was

resolved through a compromise settlement agreement approved by the Commission on 27 April 2009. On 10 February 2010, the decedent passed away. The decedent's surviving spouse, Artie Patton, passed away on 29 August 2011. As such, the named plaintiff in this action is Michael Ray Patton, the decedent's son and the administrator of his estate.

On 27 June 2014, the Full Commission entered an Opinion and Award reversing the Deputy Commissioner's decision and concluding that the decedent's death was compensable under the North Carolina Workers' Compensation Act. The Commission awarded plaintiff, in relevant part, 400 weeks of compensation benefits at the weekly rate of $400.01 and ordered defendants to pay plaintiff a burial fee of $3,500.00.

The evidence before the Commission tended to show that the decedent worked for defendant-employer from 1958-1995 as a service technician. The decedent developed an expertise in the repair, installation, and maintenance of home heating, ventilation, and air conditioning (HVAC) units.

Johnny Carroll, the decedent's co-worker, testified on behalf of plaintiff before the Commission. Defendant-employer employed Mr. Carroll as a service technician for approximately twenty-four years beginning in 1972. Mr. Carroll testified that he was the decedent's primary working partner from 1978-1995. The pair worked together approximately two days per week. On the other days, they worked on separate, but similar service calls. On average, each would respond to six to ten service calls per day.

Mr. Carroll testified that he and the decedent repaired furnaces between October and March on almost a daily basis. Prior to 1978, most of the decedent's work also involved furnace installations. Mr. Carroll stated that the furnaces contained asbestos materials, including asbestos rope gaskets, asbestos tape, and asbestos cement.

Jerry Dean Davis, a retired employee of defendant-employer, testified that he worked as a service technician for thirty-eight years beginning in August 1971. Mr. Davis testified that he likely went on service calls with the decedent. Mr. Davis recalled that the only time an employee would work on a furnace call would be "in the wintertime." He also testified that he reasonably believed the decedent would have been exposed to asbestos for thirty days in a seven-month period while working for defendant-employer. However, he clarified that he assumed the decedent would have been exposed to asbestos insulation, but he was unsure of whether the decedent was actually exposed to asbestos at that frequency.

Dr. Marc Guerra, the decedent's treating physician, testified it was his understanding that the decedent was exposed to asbestos while doing appliance repairs for defendant-employer. Dr. Guerra treated the decedent for lung problems, shortness of breath, and heart issues. Dr. Guerra testified that asbestosis was a major contributing factor in the decedent's death. When he signed the decedent's death certificate, he listed the decedent's cause of death as asbestosis and chronic obstructive pulmonary disease (COPD).

Plaintiff tendered Dr. Jill Ohar as an expert in pulmonology, internal medicine, and asbestosis-related disease. Dr. Ohar reviewed the decedent's medical records and concluded that he had "clear pathological and radiographic evidence of asbestosis."

On appeal, defendants neither contend that the decedent was not exposed to asbestos at work nor do they deny that he had asbestosis. Instead, they argue that the decedent was not entitled to compensation for this disease because his exposure was not great enough to maintain a claim for benefits and because it is unclear whether his exposure to asbestos caused or significantly contributed to his death. As such, defendants now appeal the Commission's Opinion and Award.

II. Analysis

a.) Asbestos Exposure

[1] Defendants argue that the Commission erred in finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. We disagree.

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.

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) (citations and quotation marks omitted).

N.C. Gen. Stat. § 97–57 provides, in relevant part, that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97–57 (2013). "Under the statute, with respect to asbestosis or silicosis, the worker must have been exposed for 30 working days within seven consecutive months in order for the exposure to be deemed injurious." *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 509, 616 S.E.2d 356, 365 (2005).

Defendants argue that the only evidence that the decedent was exposed to asbestos came from Mr. Carroll, who worked with the decedent approximately twice per week. Defendants calculated that at a rate of twice per week over the six-month winter season, the decedent and Mr. Carroll would have worked together between 48-52 days. Except for when the decedent worked with Mr. Carroll, defendants contend that there is no evidence that the decedent was exposed to asbestos.

Defendants argue that it was faulty for the Commission to assume that each of the 48-52 days involved exposure to asbestos: "There is no reliable way to discern . . . from [the testimony], how many of those calls would have involved exposure to asbestos." Therefore, defendants contend that the record is devoid of competent evidence showing that the decedent was exposed to asbestos for thirty days within a seven-month period.

Defendants' argument is misguided. In the instant case, findings #3, #7, and #14 show that plaintiff was exposed to asbestos for thirty days within a seven-month period:

> 3. Furnace repairs and maintenance were primarily done from October to March. Decedent worked on furnaces almost every day during those months. Most of Decedent's work involved maintenance on older furnaces; however, prior to 1978, Decedent performed many furnace installations for Defendant-Employer.
>
> . . .
>
> 7. Evidence was presented that Decedent worked around asbestos products during his employment with [Defendant-Employer]. During the 1970s and 1980s, Decedent worked with or around asbestos products a minimum of five or six

> times a month. Therefore, in the typical October to March period when furnaces were installed, repaired or maintained, Decedent was exposed to asbestos at a minimum of thirty to thirty-six days.
>
> . . .
>
> 14. The Full Commission finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent had exposure to asbestos fibers for at least thirty days within a seven consecutive month period while in the employ of Defendant-Employer. The Full Commission also finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent's last injurious exposure to asbestos fibers occurred while he was in the employ of Defendant-Employer. The Full Commission further finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent did, in fact, have asbestosis.

These findings of fact are supported by competent evidence in the record.

Mr. Davis testified that defendant-employer's furnaces contained asbestos in the 1960's and 1970's "until the asbestos . . . scare started." He further testified that furnace repair primarily occurred in the winter months. When asked whether it was reasonable to conclude that the decedent would have worked with furnaces and other appliances that had asbestos on them for at least thirty days in a seven-month period, he replied, "yeah, that would sound reasonable, yeah."

Mr. Carroll testified that he and the decedent would respond to three or four furnace calls per week. Of the furnace calls in the 1970's and 1980's between October and March, they would work with asbestos products at a minimum of five or six times per month. Therefore, plaintiff provided evidence that the decedent was exposed to asbestos between thirty and thirty-six times within a consecutive six-month period.

In sum, Mr. Davis' testimony coupled with other competent testimony to show that the decedent was exposed to asbestos for at least thirty days within six consecutive months necessarily support the Commission's finding that the decedent was exposed to asbestos for a minimum of thirty days within a seven-month period.

b.) Contributing Factor

[2] Defendants also contend that the Full Commission erred in finding that the decedent's occupational exposure to asbestos was a significant contributing factor in his death. We disagree.

Pursuant to N.C. Gen. Stat. § 97-38, death resulting from a disease is compensable only when "the disease is an occupational disease, or is aggravated or accelerated by" conditions and causes specific to a claimant's employment. *Walston v. Burlington Industries*, 304 N.C. 670, 679-80, 285 S.E.2d 822, 828 (1982). Asbestosis may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question "significantly contributed to, or was a significant causal factor in," the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

> In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, [a] disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. The burden of proving the existence of a compensable claim is upon the claimant.

Goodman v. Cone Mills Corp., 75 N.C. App. 493, 497, 331 S.E.2d 261, 264 (1985) (citations omitted).

As to the decedent's cause of death, the Commission made the following findings of fact:

> 11. The death certificate for Decedent lists asbestosis and COPD as the causes of death. Dr. Guerra signed the death certificate. Dr. Guerra opined that asbestosis significantly contributed to Decedent's death and that Plaintiff died 'secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD.'
>
> . . .
>
> 12. Dr. Ohar testified that the most likely cause of death was arrhythmia or irregular heart beat caused by a lack of oxygen getting to the heart but that 'asbestosis certainly was a contributing cause" to Decedent's death and

> that 'terminal lung disease drove the train to his death.' Dr. Ohar testified that the arrthymia [sic] would be most likely traced back to the COPD and asbestosis and that the autopsy confirmed the presence of asbestosis.
>
> . . .
>
> 16. Prior to his death, Decedent was suffering from asbestosis caused by his exposure to asbestos while working for Defendant-Employer.
>
> 17. Based upon a preponderance of evidence in view of the entire record, the Full Commission finds that Decedent's work-related asbestosis condition was a significant contributing and causal factor in his death.

The evidence supports each of the Commission's findings relating to causation. Specifically, in support of finding #11, the record contains a copy of the decedent's death certificate signed by Dr. Guerra that clearly lists asbestosis as a cause of death. In addition, the record shows that Dr. Guerra did in fact testify that the decedent died "secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD[,]" as the Full Commission found. In support of findings #12, and #16, and #17, Dr. Ohar testified to a reasonable degree of medical certainty that the decedent "had a history of asbestos exposure and had evidence of asbestosis. And the asbestosis certainly was a contributing cause to his death." Moreover, both Mr. Carroll and Mr. Davis, the decedent's co-workers, testified that the decedent was exposed to asbestos while working for defendant-employer.

Accordingly, competent evidence shows that 1.) the decedent's exposure to asbestos contributed to his disease and 2.) the occupational disease of asbestosis significantly contributed to the decedent's death. Thus, defendants' argument fails.

III. Conclusion

In sum, the findings of fact that 1.) plaintiff was exposed to asbestos for a minimum of thirty days within a consecutive seven-month period and 2.) the decedent's occupational exposure to asbestos was a significant contributing factor in his death are both supported by competent evidence. Thus, we affirm the Commission's Opinion and Award.

Affirmed.

Judges DAVIS and TYSON concur.

RATLEDGE v. PERDUE

[239 N.C. App. 377 (2015)]

JONATHAN RATLEDGE, PLAINTIFF
v.
PHILLIP S. PERDUE, JR., M.D. AND ORTHOPAEDICS EAST AND SPORTS MEDICINE CENTER, INC., DEFENDANTS

No. COA14-500

Filed 17 February 2015

Medical Malpractice—Rule 9(j) certification—dismissal without prejudice and refiling—original certification not valid

The trial court did not err by dismissing a medical malpractice complaint for failure to satisfy the requirements of N.C.G.S. § 1A-1, Rule 9(j) where plaintiff sent unverified responses to interrogatories from defendant seeking to discover the basis for plaintiff's Rule 9(j) certification, a voluntary dismissal without prejudice was filed, plaintiff refiled his complaint with the same allegations after the running of the statute of limitations, and defendants moved to dismiss. Compliance with Rule 9(j) must be established as of the filing of an original medical malpractice complaint where the second complaint is outside the statute of limitations, but plaintiff never received any definitive confirmation that his witness either believed that plaintiff's treatment fell below the applicable standard of care or that his witness would testify to that effect.

Appeal by plaintiff from order entered 19 December 2013 by Judge W. Russell Duke in Pitt County Superior Court. Heard in the Court of Appeals 8 October 2014.

Asbill Stiles, LLC, by Graham Stiles, for plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Robert D. Walker, Jr. and Ashley H. Rodriguez, for defendant-appellees.

CALABRIA, Judge.

Jonathan Ratledge ("plaintiff") appeals from the trial court's order dismissing his medical malpractice complaint against Phillip S. Perdue, Jr., M.D. ("Dr. Perdue") and Orthopaedics East and Sports Medicine Center, Inc. (collectively "defendants") for failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013) ("Rule 9(j)"). We affirm.

On 15 August 2008, plaintiff, a baseball player at East Carolina University, visited Dr. Perdue to seek treatment for pain in his left hand.

Dr. Perdue determined that plaintiff had a fractured hamate hook, which would require surgery to repair. Dr. Perdue performed the surgery on 29 August 2008. During the procedure, Dr. Perdue severed plaintiff's ulnar nerve.

After the operation, Dr. Perdue continued to see plaintiff in order to monitor his progress. Plaintiff complained of ulnar pain and had difficulty moving portions of his hand. Dr. Perdue advised plaintiff that these complications from surgery could take 9-12 months to completely resolve. Plaintiff's last appointment with Dr. Perdue occurred on 19 March 2009.

On 29 May 2009, plaintiff visited Glen Gaston, M.D. ("Dr. Gaston") to seek a second opinion on his symptoms. Dr. Gaston determined that plaintiff's ulnar nerve had been severed and attempted to correct it via surgery. Dr. Gaston performed multiple procedures, but was ultimately unable to reattach the nerve and return functionality to plaintiff's hand.

Plaintiff retained the services of an attorney, who sent plaintiff's medical records to the CorVel Corporation ("CorVel"), a company which performs reviews of potential medical malpractice claims and provides referrals to expert witnesses. The claim was reviewed by Robert Pennington, M.D. ("Dr. Pennington"). CorVel provided plaintiff's counsel with a "Peer Review by a North Carolina Licensed Board Certified Orthopedic Surgeon" which purported to be Dr. Pennington's review of the case.

Based upon Dr. Pennington's review, plaintiff initiated a medical malpractice action against Dr. Perdue in Pitt County Superior Court on 16 March 2012. After receiving the complaint, defendants' counsel sent interrogatories to plaintiff's counsel seeking to discover the basis for plaintiff's Rule 9(j) certification. In response, plaintiff sent unverified answers to the interrogatories. Defendants then filed a motion to compel verified answers as required by Rule 9(j). On 20 December 2012, the trial court entered a consent order whereby plaintiff would provide verified responses to the interrogatories within 15 days of the entry of the order. Plaintiff failed to comply with the consent order. As a result, defendants filed a motion to dismiss on 8 February 2013. On 14 March 2013, plaintiff filed a voluntary dismissal without prejudice. On 30 September 2013, plaintiff refiled his complaint, including the same allegations of medical malpractice from the original complaint.

On 23 October 2013, defendants filed a motion to dismiss on the basis that plaintiff had not fully complied with Rule 9(j) before the

expiration of the statute of limitations. After a hearing, the trial court granted the motion on 19 December 2013. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court erred by dismissing his complaint for failure to satisfy the requirements of Rule 9(j). We disagree.

Rule 9(j) states, in relevant part:

> Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . 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 Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). Moreover, "it is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

When ruling upon a motion to dismiss for failure to comply with Rule 9(j), "a court must consider the facts relevant to Rule 9(j) and apply the law to them. Thus, a plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam*, 357 N.C. 576, 597 S.E.2d 669 (2003).

> When a trial court determines a Rule 9(j) certification is not supported by the facts, "the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination."

Estate of Wooden v. Hillcrest Convalescent Ctr., Inc., ___ N.C. App. ___, ___, 731 S.E.2d 500, 506 (2012) (quoting *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012)).

Initially, we note that our Courts have held that compliance with Rule 9(j) must be established as of the time of the filing of the medical malpractice complaint.

> Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing. The Court of Appeals has held that when conducting this analysis, a court should look at "the facts and circumstances known or those which should have been known to the pleader" at the time of filing. We find this rule persuasive, as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances. As a result, the Court of Appeals has correctly asserted that a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable.

Moore, 366 N.C. at 31-32, 726 S.E.2d at 817 (2012) (internal quotations and citations omitted).

> Our appellate courts have also addressed the situation in which a Rule 41(a)(1) voluntary dismissal was taken after the filing of a complaint lacking any Rule 9(j) certification. The courts have held that if (1) the initial complaint does not contain a Rule 9(j) certification; (2) the required certification is not filed prior to the expiration of the statute of limitations and the 120-day extension permitted by Rule 9(j); and (3) the plaintiff takes a voluntary dismissal under Rule 41, then a re-filed complaint – even though containing a Rule 9(j) certification – must be dismissed . . . .

Ford, 192 N.C. App. at 671, 666 S.E.2d at 156-57.

In the instant case, plaintiff was required to obtain a valid Rule 9(j) certification before he filed his original complaint on 16 March 2012. *See id.* Plaintiff subsequently filed a voluntary dismissal without prejudice of that complaint on 14 March 2013 and a new complaint on 30 September

2013, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2013). However, 16 March 2012 remains the relevant date from which to determine plaintiff's Rule 9(j) compliance, because the new complaint was filed after the expiration of the statute of limitations. *See McKoy v. Beasley*, 213 N.C. App. 258, 263, 712 S.E.2d 712, 716 (2011) (A "defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations."). Therefore, in order to survive defendants' motion to dismiss, plaintiff's 16 March 2012 complaint must have included a valid Rule 9(j) certification.

The trial court's findings of fact indicate that, prior to filing the 16 March 2012 complaint, plaintiff's counsel contacted CorVel, and that CorVel provided him with a "Peer Review by a North Carolina Licensed Board Certified Orthopedic Surgeon" regarding plaintiff's surgery that was purported to be from Dr. Pennington. However, the review was not signed or otherwise formally verified by Dr. Pennington. Moreover, the review never stated that Dr. Perdue's actions during plaintiff's surgery fell below the applicable standard of care or that Dr. Pennington would testify to that effect. Finally, the trial court found that the email correspondence between plaintiff's counsel and CorVel personnel did not include any competent evidence that Dr. Pennington was willing to testify in the instant case that Dr. Perdue's treatment of plaintiff fell below the applicable standard of care.

The trial court's findings, which are supported by competent evidence submitted to the trial court at the Rule 9(j) compliance hearing, establish that plaintiff never received any definitive confirmation that Dr. Pennington either believed that plaintiff's treatment by Dr. Perdue fell below the applicable standard of care or that Dr. Pennington would testify to that effect. Thus, the court's findings support its conclusion of law that plaintiff failed to comply with Rule 9(j) prior to the expiration of the statute of limitations, because, at the time of the filing of the original complaint, "the exercise of reasonable diligence would have led [plaintiff] to the understanding that [his] expectation [that Dr. Pennington would testify] was unreasonable." *Moore*, 366 N.C. at 32, 726 S.E.2d at 817. Accordingly, the trial court properly dismissed plaintiff's complaint. *See id.* at 31-32, 726 S.E.2d at 817. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
TERRY LEE BROUSSARD, JR.

No. COA14-984

Filed 17 February 2015

1. Homicide—jury instruction—imperfect self-defense

In a murder prosecution, the trial court did not err by denying defendant's request for a jury instruction on voluntary manslaughter based on imperfect self-defense. The evidence did not show that defendant reasonably believed it was necessary to stab the unarmed victim in order to escape death or great bodily harm.

2. Homicide—evidence of firearms not used in crime—relevant to show flight

In a murder prosecution, the trial court did not err by admitting evidence of firearms and ammunition found in defendant's car when he was arrested in South Carolina because it was relevant to show that he was in flight. Even assuming that admission of the evidence was erroneous, the trial court gave the jury a limiting instruction, and defendant failed to show any prejudicial error.

Appeal by defendant from judgment entered 5 September 2013 by Judge James G. Bell in Cumberland County Superior Court. Heard in the Court of Appeals 7 January 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

David L. Neal for defendant.

TYSON, Judge.

Defendant appeals from his conviction of second degree murder. We find no error.

I. Facts

Defendant and Ronnell Wright were next-door neighbors. An altercation between defendant and Wright ended when defendant fatally stabbed Wright in the chest. On the evening of 29 August 2009, defendant's half-brother, Ronald Jackson, accused Wright of breaking

his sliding glass door. An argument ensued between Jackson and Wright. Wright called the police. Fayetteville police officers arrived at the residence, spoke with Jackson and Wright, and left about twenty minutes later.

Defendant was in the company of his friends, Marqui Gerald and James Williams, when his mother called and told him to come home. Someone had tried to break in the house. Defendant drove home and parked in the driveway. Gerald and Williams arrived in a separate vehicle and parked at Gerald's aunt's house across the street.

Wright was standing in his driveway with his fiancée, his mother, and his two-year old son. Defendant and Wright began shouting at each other. A physical altercation ensued between the two men in Wright's yard. Wright's mother, Aurelia Wright, and his fiancée, Shonda Cromartie, both witnessed the fight. They testified the fight began by defendant punching Wright. According to Ms. Wright and Ms. Cromartie, Wright's two year-old son came near him while he was fighting with defendant. Wright turned away from defendant to move his son out of the way. He picked up the child and moved him one or two feet. As Wright turned back toward defendant, defendant stabbed him in the chest with a knife. Wright did not possess a weapon during the fight.

Defendant is smaller in height and weight than Wright. According to the medical examiner, Wright was five feet, nine inches tall and weighed 164 pounds. Defendant's mother testified that defendant's height is five feet, two inches tall and he weighs about 120 pounds.

James Williams witnessed the fight and testified on behalf of defendant. Because of the size difference between Wright and defendant, Williams testified that it looked as though Wright was fighting with a "kid." He stated that Wright grabbed defendant and defendant's feet were dangling "like a cartoon character." Williams further testified that he was unsure whether Wright and defendant were "locked up" together when defendant stabbed Wright. Williams realized Wright had been stabbed when he lifted up his arm and stated that defendant had stabbed him.

Defendant's half-brother, Ronald Jackson, also witnessed the fight. Jackson testified Wright had punched defendant first and initiated the fight. Wright held defendant in a headlock and the two wrestled. They bounced off a tree, disengaged, and Jackson saw that Wright had been stabbed. Marqui Gerald was inside his aunt's house and did not witness the fight. He testified that defendant always carried a pocketknife on his belt. He believed the knife had a folding blade four inches long.

Defendant put forth evidence of a dispute that occurred a few days before the fight between Wright and Jackson. A group of people, including Wright and Jackson, were socializing under Wright's carport. Before the day was over, Wright's fiancée's cell phone went missing. Wright went next door to Jackson's house and demanded that Jackson tell his friend, "Squid," to return the phone. He told Jackson there were "going to be some problems." Wright went to the high school that Jackson and Squid attended and told Squid he was going to "beat his ass."

Defendant ran from the scene immediately after he stabbed Wright. Wright walked towards the house and his mother called 911. When police officers arrived, Wright was bleeding badly and losing consciousness. The officers were able to speak briefly with Wright. He told them that he had been involved in an altercation with the neighbor and the neighbor had stabbed him. Wright told the officers that the neighbor said he was going to kill him. Soon thereafter, Wright died of a single stab wound to the left chest.

Defendant was apprehended three days later during a traffic stop in South Carolina. Several firearms were found inside the car. Defendant possessed a passport bearing the name of Shamsiddeen Muhammmand Rasheed in his pocket. A piece of paper was also found inside the car containing the directions to a mosque in Laredo, Texas.

Defendant was indicted on the charge of first degree murder. He was tried capitally before a jury at the 12 August 2013 criminal session of Cumberland County Superior Court. The jury convicted defendant of second degree murder and he was sentenced to a term of 220 to 273 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) denying his request for a jury instruction on voluntary manslaughter based on the theory of imperfect self-defense; and, (2) admitting into evidence weapons and ammunition found in the car with him when he was apprehended in South Carolina.

III. Jury Instruction

[1] Defendant argues the trial court erred in denying his request to instruct the jury on voluntary manslaughter based on imperfect self-defense. We disagree.

a. Standard of Review

Whether the evidence is sufficient to warrant defendant's requested jury instruction is a question of law. Our standard of review is *de novo*. *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995). In determining whether the trial court should have instructed the jury on self-defense, we view the facts in the light most favorable to defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889-90 (1993).

b. Imperfect Self-Defense

The trial court instructed the jury on first degree murder, second degree murder and voluntary manslaughter. The voluntary manslaughter instruction was based on the theory of heat of passion. During the charge conference, defendant requested the trial court to also instruct the jury on voluntary manslaughter based on the theory of imperfect self-defense.

"A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998). Our Supreme Court has explained:

> There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal quotation marks and citations omitted).

A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force. *State v. Bush*, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982). "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974).

The evidence, viewed in the light most favorable to defendant, showed that defendant and Wright engaged in a physical altercation in Wright's yard. Conflicting evidence was presented as to who dealt the first punch. Defendant's two eyewitnesses, Ronald Jackson and James Williams, testified that Wright initiated the fight. Other eye witnesses testified that defendant initiated the fight. Wright was five feet, nine inches tall and weighed 164 pounds, whereas defendant is five feet, two inches tall and weighs around 120 pounds. Jackson testified Wright held defendant in a headlock and defendant held Wright around the waist as they were fighting. They disengaged and Jackson heard Wright say that he had been stabbed.

Defendant's other eyewitness, James Williams, was unsure whether they were "locked up" when defendant stabbed Wright. Williams testified that during the fight, he saw defendant's feet leave the ground and dangle "like a cartoon character." No evidence was presented that Wright possessed a weapon during the altercation. Defendant elected not to testify at trial. A defendant is not required to testify regarding his state of mind for the trial court to determine sufficient evidence exists to instruct the jury on self-defense. *State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681, *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009).

Defendant argues the evidence of his stature and weight compared with that of Wright, and the testimony that Wright held him in a headlock when the stabbing occurred, was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill Wright to protect himself from death or great bodily harm. We are not persuaded.

Viewed in the light most favorable to defendant, the evidence is insufficient to support an instruction on imperfect self-defense. Ronald Jackson testified that Wright was holding defendant in a "headlock," and defendant was holding Wright around the waist when defendant stabbed Wright in the chest. Although defendant uses the term "choke hold" in his brief, our review found no testimony from any witness, which described him in a "choke hold," "choking" or held in a manner by the victim to impede his ability to breathe.

In support of his argument, defendant cites the case of *State v. Johnson*, 184 N.C. 637, 113 S.E.2d 617 (1922), in which our Supreme Court held a self-defense instruction was required. The evidence showed the defendant stabbed the victim while the victim held the defendant tight around his neck with the defendant's head under his arm. We distinguish this case from the facts presented in *Johnson*. In *Johnson*, the

evidence showed that the defendant was attempting to get away from the victim, while the victim struck him about the face and head. The stabbing occurred while the victim had the defendant pinned into a corner. A defendant's unsuccessful attempt to remove himself from the fight is circumstantial evidence that he believed it necessary to kill his adversary to save himself from death or great bodily harm.

Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with Wright in the yard of Wright's home. No evidence was presented that defendant tried to get away from Wright or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab Wright, who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense. Defendant's argument is overruled.

IV. Testimony About Defendant's Arrest

[2] Defendant argues the trial court erred in admitting irrelevant and prejudicial evidence of four firearms found in the car when he was arrested following a traffic stop in South Carolina. We disagree.

a. Standard of Review

Whether evidence is relevant is a question of law that we review *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 501 (2010). Our Supreme Court has stated, "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

b. Relevant Evidence of Flight

"Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013).

Defendant argues the testimony about weapons he possessed upon his arrest is irrelevant and inadmissible because there was no evidence connecting the weapons to the crime. In support of his argument,

defendant cites *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982) and *State v. Samuel*, 203 N.C. App. 610, 693 S.E.2d 662 (2010). In *Patterson*, the State introduced evidence of a sawed-off shotgun found in the defendant's car in addition to the pistol identified by the victim as the weapon used in the commission of the robbery.

This Court granted the defendant a new trial because no evidence connected the shotgun to the robbery and "there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant's conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim]." *Id.* at 653-54, 297 S.E.2d at 630.

In *State v. Samuel*, also an armed robbery case, the trial court admitted evidence of two guns found in the defendant's home without any evidence linking the guns to the robbery. Like in *Patterson*, this Court awarded the defendant a new trial, noting "the weakness in the State's evidence that [the} [d]efendant was the assailant and the substantial evidence tending to show that [the] [d]efendant was not the assailant." *Samuel*, 203 N.C. App. at 624, 693 S.E.2d at 671.

We distinguish the facts of this case from those presented in *Patterson* and *Samuel*. In both of those cases, we acknowledged the weakness in the State's evidence that the defendant was the perpetrator of the crime. Here, the identity of defendant as the perpetrator was not in question. More significantly, in *Patterson* and *Samuel*, the State introduced the firearms as evidence the defendants perpetrated the robberies. Here, the State presented evidence of the weapons to show the circumstances surrounding defendant's flight.

Defendant ran away from the scene immediately after he stabbed Wright. Three days later, he was apprehended following a traffic stop in South Carolina. Defendant, who was riding as a passenger in another person's car, possessed a passport bearing a fictitious name. Also found in the car was a piece of paper with directions to a mosque located in Laredo, Texas. Four firearms were found inside the passenger compartment of the car: a loaded assault rifle, two sawed-off shotguns, and a loaded pistol.

The circumstances surrounding defendant's apprehension in South Carolina, the passport, the paper containing directions to a specific place in Texas, and the firearms are relevant evidence of flight. "An accused's flight is 'universally conceded' to be admissible as evidence of consciousness of guilt and thus of guilt itself." *State v. Jones*, 292 N.C. 513, 525, 234 S.E.2d 555, 562 (1977) (citation and quotation marks

omitted). We are not persuaded by defendant's argument that the State "did not need to introduce the guns in order to argue the flight issue."

Our Supreme Court has recognized that "the degree or nature of the flight is of great importance to the jury." *Id.* at 527, 234 S.E.2d at 562-63. The Court explained that the jury would likely attach a different significance where the defendant fled a short distance to a friend's house than where the defendant attempted to flee the state and assaulted a law enforcement officer in the process. *Id.* at 527, 234 S.E.2d at 563. "Flight is 'relative' proof which must be viewed in its entire context to be of aid to the jury in the resolution of the case." *Id.* The evidence of the firearms found in the car upon defendant's arrest, along with the passport and directions to Laredo, Texas were relevant to show the context of defendant's flight. Defendant's arguments are overruled.

Presuming *arguendo* that the admission of the evidence of the firearms was error, defendant has failed to show any prejudicial error. The trial court instructed the jury as follows:

> Evidence has been introduced that the state contends to show that the defendant was a passenger in a car driven and owned by another person. Firearms and other items of evidence were found in that car. These firearms were not used in the stabbing death of Ronnell Wright and you cannot consider the firearms as evidence of the defendant's intent to kill, malice, proximate cause, premeditation or deliberation. You may only consider the firearms as possible evidence of flight. It is for you, the jury, to determine whether the evidence found in the car is evidence of flight or not. (Emphasis supplied).

Jurors are presumed to have followed the instruction of the trial court. *State v. Hardy*, 353 N.C. 122, 138, 540 S.E.2d 334, 346 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56, 122 S. Ct. 96 (2001). Even if evidence of the firearms was improperly admitted, any resulting prejudice was cured by the court's limiting instruction. *See State v. Oliver*, 52 N.C. App. 483, 486, 279 S.E.2d 19, 21-22 (1981) (any prejudice to the defendant arising from witness testimony was cured and any error was rendered harmless by the issuance of an instruction to the jury to disregard the testimony).

V. Delay in Trial

Finally, our review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013,

almost four years later. Defendant was given credit for 1,464 days spent in confinement awaiting trial. The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant.

While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings. *See State v. Spivey*, 150 N.C. App. 189, 192, 563 S.E.2d 12, 14 (2002) (Timmons-Goodson, J., dissenting), *aff'd*, 357 N.C. 114, 579 S.E.2d 251 (2003) ("This Court cannot continue to overlook such substantial delays because of congested dockets. Under our unified court system and the constitutional right to a speedy trial, the court's resources must not be viewed from the perspective of a single judicial district, but system-wide. A lack of personnel or court sessions in a single judicial district is not a sufficient reason to maintain a defendant who is presumed innocent, confined in jail for four and a half years awaiting his or her day in court.").

VI. Conclusion

The trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based on the theory of imperfect self-defense. The evidence failed to show defendant reasonably believed it was necessary to kill Wright to save himself from death or great bodily harm.

The trial court did not err in admitting evidence of multiple loaded firearms and other evidence found with defendant in the car upon his arrest in South Carolina. This evidence was relevant to flight. The trial court gave a proper limiting instruction to the jury concerning this evidence. Defendant received a fair trial, free from errors he preserved, assigned and argued.

No error.

Judges ELMORE and DAVIS concur.

STATE v. EDWARDS

[239 N.C. App. 391 (2015)]

STATE OF NORTH CAROLINA
v.
JAMEL RASHON EDWARDS

No. COA14-710

Filed 17 February 2015

Criminal Law—failure to give jury instruction—duress—necessity

A de novo review revealed that the trial court did not err in a possession of a firearm by a felon case by denying defendant's request for an instruction on duress or necessity as a defense. Defendant failed to establish any basis for the instruction.

Appeal by defendant from judgment entered 7 January 2014 by Judge Reuben F. Young in Wayne County Superior Court. Heard in the Court of Appeals 4 December 2014.

Attorney General Roy Cooper by Assistant Attorney General Ryan C. Zellar for the State.

Ryan McKaig for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon.

I. Factual and Procedural Background

Officers Anthony Ravine and Cornelius Crittendon of the Goldsboro Police Department were on duty on 24 May 2012. At about 6:00 p.m., they observed Jamel Edwards (defendant) standing with other persons in a vacant lot on the corner of Swan and E. John Streets in Goldsboro. When defendant saw the officers, he "hurriedly started walking away" and "reached into his waistband and pulled out a silver item which [the officers] immediately saw was a handgun[.]" "[Defendant] dropped the handgun" and "was walking away, but when he saw Officer Crittenden he turned and came back[.]" At that time, the officers placed defendant under arrest and took possession of the weapon, a 9 mm. "Smith & Wesson semiautomatic handgun." Following his arrest, defendant executed a written waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and was interviewed

by Officer Crittendon. Defendant's statement to Officer Crittendon is discussed below.

Defendant was indicted for possession of a firearm by a felon on 4 December 2012. This matter came on for trial at the 7 January 2014 criminal session of Superior Court in Wayne County. In addition to the testimony of Officers Ravine and Crittendon, the State presented evidence that defendant had been convicted of a felony prior to the date of his arrest. On 7 January 2014 the jury returned a verdict finding defendant guilty of possession of a firearm by a felon. The trial court imposed an active sentence of 14 to 26 months imprisonment.

Defendant appeals.

II. Instruction on Defense of Duress or Necessity

In his sole argument on appeal, defendant asserts that the trial court erred by denying his request for a jury instruction on duress or necessity as a defense to the charge of possession of a firearm by a felon. We disagree.

A. Standard of Review

"In North Carolina, requests for special jury instructions are allowable under N.C.G.S. § 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statues. N.C. Gen. Stat. §§ 1-181, 1A-1, Rule 51(b) [(2013)]. It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. 'The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case.' " *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005) (citing *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995), and quoting *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901 (1976)).

Defendant contends that there is a "conflict in North Carolina law about whether a trial court's failure to give a jury instruction is reviewed under a *de novo* standard or an abuse of discretion standard." We disagree, and conclude that the conflict posited by defendant reflects the fact that the proper standard of review depends upon the nature of a defendant's request for a jury instruction.

Certain requests for jury instructions require the trial court to exercise its discretion. For example:

> "After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court[.]" N.C. Gen. Stat.

> § 15A-1234(a)(1)[.] . . . "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." Thus, a trial court's decision to grant or deny the jury's request for additional instruction is reviewed by this Court only for an abuse of discretion.

State v. Guarascio, 205 N.C. App. 548, 563-64, 696 S.E.2d 704, 715 (2010) (quoting N.C. Gen. Stat. § 15A-1234(a)(1), and *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986)). In this regard, *State v. Jenkins*, 35 N.C. App. 758, 242 S.E.2d 505 (1978), which defendant argues is "controlling" on this issue, involved the trial court's discretionary determination of whether an instruction was warranted on the credibility of young children.

However, it is axiomatic that "[w]e review questions of law *de novo*." *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (citing *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995)), *aff'd*, 364 N.C. 417, 700 S.E.2d 222 (2010). Similarly, the question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*. We hold that where the request for a specific instruction raises a question of law, "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) (citations omitted).

B. Analysis

Defendant contends that the trial court erred by denying his request that the jury be instructed on the defense of duress to the charge of possession of a firearm by a felon, and urges this Court to explicitly adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion that "recognized justification as an affirmative defense to possession of firearms by a felon." *Craig*, 167 N.C. App. at 795, 606 S.E.2d at 389. The test set out in *Deleveaux* requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Deleveaux, 205 F.3d at 1297.

"Consistent with the precedent from this Court, we assume *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon. Nevertheless, the evidence in the present case, even when viewed in the light most favorable to Defendant, does not support a conclusion that Defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury." *State v. Monroe*, __ N.C. App. __, __, 756 S.E.2d 376, 380 (2014), *aff'd*, __ N.C. __, __ S.E.2d __, (23 January 2015) (2015 N.C. LEXIS 33).

In this case, defendant did not testify or present evidence. The defendant's statement to Officer Crittendon during a brief interview of defendant contains the only evidence pertinent to the circumstances under which defendant came to be in possession of a firearm. This interview contained the following:

> OFFICER CRITTENDON: . . . The first question: How long - how long you had the gun?
>
> DEFENDANT: An hour.
>
> OFFICER CRITTENDON: Next question: Who you get the gun from?
>
> DEFENDANT: A white boy.
>
> OFFICER CRITTENDON: Where did you meet at?
>
> DEFENDANT: From around the way.
>
> OFFICER CRITTENDON: Why did you have the gun?

> DEFENDANT: For protection.
>
> OFFICER CRITTENDON: What problems you having to have a gun?
>
> DEFENDANT: People threatening my life.

Defendant's statements to Officer Crittendon do not constitute evidence of any of the elements of the *Deleveaux* test. Notably, there is no indication of (1) the identity of the "people" who were "threatening [defendant's] life"; (2) the time or place of the threats; (3) the circumstances, if any, indicating that the threat presented an "imminent, and impending threat of death or serious bodily injury"; (4) the circumstances under which defendant was "in a situation where he would be forced to engage in criminal conduct"; (5) whether defendant had a reasonable alternative to violating the law; or (6) the existence of "a direct causal relationship between the criminal action and the avoidance of the threatened harm." We conclude that defendant failed to establish any basis for an instruction on duress or necessity as a defense to the charge of possession of a firearm by a felon, and that the trial court did not err by denying his counsel's request for this instruction.

We also observe that, in arguing for a contrary result, defendant's appellate counsel makes a number of assertions that are not supported by the evidence before the trial court. As discussed above, defendant's statement does not identify or describe the people who threatened him, indicate when the threats were issued, or provide information about whether defendant was under an imminent threat of death or bodily harm. Nonetheless, in his appellate brief, defense counsel makes a number of unsupported assertions:

> [Defendant] "had just received death threats when he obtained a gun."
>
> [Defendant] "was in fear that a group of thugs would make good on their threats to kill him" and was "in mortal fear of being murdered by people who had recently threatened his life[.]"
>
> [Defendant] had "recently received death threats that he believed were credible and presented the possibility of imminent harm."
>
> "[T]he evidence showed that [defendant] was under the unlawful and present threat of imminently being murdered."

> [D]efendant, "in light of the death threats he faced, was justified in getting a gun to protect himself from being murdered."

We reiterate that the record contains no evidence that defendant had been recently threatened, that the threats were credible, that defendant was "in mortal fear," or that he was threatened by "a group of thugs." "On appeal, counsel has a duty to make a fair presentation of the case to the Court. *See* N.C.R. App. P. 34(a)(3). While counsel has the duty to zealously represent his or her client, the duty does not grant to counsel *carte blanche* to distort the facts of a case or to make misleading arguments. . . . [C]ounsel has a duty to apply the law to the facts of the case, not to twist the facts so that they fit a legal theory that will allow them to prevail in the case." *State v. Ward*, __ N.C. App. __, __, 742 S.E.2d 550, 554-55 (2013) (Steelman, J., concurring).

For the reasons discussed above, we conclude that defendant had a fair trial, free of error.

NO ERROR.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
SLADE WESTON HICKS, JR.

No. COA14-57

Filed 17 February 2015

1. Satellite-Based-Monitoring—appeal—civil proceeding—written notice of appeal required—appeal of underlying convictions—not sufficient

Satellite-based monitoring (SBM) orders are civil in nature and a written notice of appeal is required under N.C.R. App. P. 3(a). The Court of Appeals elected in its discretion to allow defendant's petition for certiorari to review a SBM order where defendant filed a written notice of appeal from the underlying convictions but not the SBM order.

2. Evidence—psychologist's testimony—molested child—reason treatment sought—not an opinion on veracity

A psychologist's testimony that a child sexual abuse victim "specifically came in because she had been molested by her older cousin" simply stated the reason why the victim sought treatment. A follow-up question clarified that the psychologist's statement referred to the victim's allegations, not to the psychologist's personal opinion as to veracity.

3. Evidence—psychologist's testimony—post-traumatic stress disorder—not substantive evidence of event

The trial court did not commit plain error in a prosecution for indecent liberties and sexual offense with a child by admitting a psychologist's testimony that she diagnosed the victim with post-traumatic stress disorder ("PTSD"). The evidence of PTSD in the State's redirect was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination.

4. Sexual Offenses—instruction of greater offense—plain error

A conviction for sexual offense with a child by an adult offender was remanded for resentencing where the trial court committed plain error by instructing the jury on the greater offense of sexual offense with a child. The jury charge resulted in a conviction that was not supported by the indictment.

5. Sexual Offenses—instruction on greater offense—not a dismissal of lesser offense

The trial court's failure to instruct the jury on the elements of first degree sexual offense under N.C.G.S. § 14-27.4(a)(1) did not constitute a dismissal of the charge as a matter of law where the indictment alleged all the essential elements of a violation of the statute and the trial court did not omit any of these essential elements from its jury instructions. Rather, the trial court instructed the jury on all the essential elements of the indicted offense plus an additional element of a greater offense. The judgement was vacated and remanded for resentencing. An SBM order based upon a finding that defendant was convicted of sexual offense with a child, N.C.G.S. § 14-27.4A, was error.

6. Sexual Offenses—confusing statutory scheme—call for revision

It was noted that the various sexual offenses in North Carolina are often confused with one another, leading to defective indictments. Given the frequency with which these errors arise, the Court of Appeals strongly urged the General Assembly to consider

reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another.

Appeal by defendant from judgment entered 14 August 2013 by Judge William R. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 7 May 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

GEER, Judge.

Defendant Slade Weston Hicks, Jr. appeals from a judgment entered on his convictions of sexual offense with a child and indecent liberties with a child. On appeal, defendant primarily argues that the trial court committed plain error by instructing the jury on sexual offense with a child under N.C. Gen. Stat. § 14-27.4A (2013) instead of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), the charge for which he was indicted. A conviction must be supported by an indictment that alleges all the elements of the offense. Because the indicted charge, N.C. Gen. Stat. § 14-27.4(a)(1), is a lesser included offense of N.C. Gen. Stat. § 14-27.4A, the indictment did not allege all the elements of the crime set out in § 14-27.4A, the crime of which defendant was convicted. Accordingly, we vacate the judgment.

However, the indictment sufficiently alleges the lesser included offense of first degree sexual offense under § 14-27.4(a)(1), and the jury's verdict on the greater offense of sexual offense with a child necessarily included a determination by the jury that the defendant was guilty of that lesser included offense. We, therefore, remand for entry of judgment and resentencing on the charge of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1).

Facts

The State's evidence tended to show the following facts. Defendant was born in 1985 and is 11 years older than his cousin "Sally" who was born in 1996.[1]

1. To protect the identity of the minor child and for ease of reading we use the pseudonym "Sally" throughout this opinion.

Around 2007, while at a relative's house in Gaston County, North Carolina, defendant asked Sally to go into a walk-in closet. After she went in, defendant closed the closet door, grabbed her shoulder, and told her to get on her knees. He pulled his penis out of his pants so that it was level with her nose. Sally ran out of the closet when she heard her mother calling her name. She did not tell anyone what happened.

In March 2008, when Sally was 11 years old and defendant was 22 years old, Sally went to defendant's father's house in Lincoln County, North Carolina, for a family gathering. Defendant offered to take Sally to his hiding place in the woods. Once there, defendant grabbed Sally's shoulder and asked her to suck his penis, but she refused. At that point, Sally's brother and defendant's sister, who had been sent by Sally's mom to find her, were coming down the trail. Defendant told Sally to tell them something to make them go away, so Sally told her brother that she and defendant were watching the deer.

After Sally's brother and defendant's sister left, defendant picked Sally up and stood her on a tree stump. He pulled Sally's jeans and underwear down to her ankles and began touching, licking, and inserting his fingers into her vagina. He then lifted her off the log, placed her on top of him, and started humping her. Sally pushed away but did not say anything because defendant had shown her a knife and told her not to tell anyone.

In August 2011, when Sally was 16, she told her mother about the incident in the woods and her mother contacted the police. Sally went with her mother to the Gaston County Police Department and told Detective William Sampson what happened in 2007 at her relative's house in the walk-in closet and what happened in 2008 in the woods. Defendant was charged in Gaston County with indecent liberties with a child as a result of the 2007 Gaston County incident and pled guilty to that charge pursuant to an *Alford* plea on 4 April 2013.

With respect to the 2008 incident, defendant was indicted in Lincoln County for indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 and for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). Defendant was tried on these charges at the 12 August 2013 Criminal Session of Lincoln County Superior Court, and the jury found defendant guilty of both charges. The trial court consolidated the offenses into a single judgment and sentenced defendant to a presumptive-range term of 300 to 369 months imprisonment.

In a separate order entered the same day, the trial court found that defendant had been convicted of a reportable conviction under N.C. Gen.

Stat. § 14-208.6, specifically "sexual offense with a child, G.S. 14-27.4A," and ordered defendant to register as a sex offender upon release from prison for his natural life and to enroll in satellite-based monitoring ("SBM") for his natural life.

Discussion

[1] As an initial matter, we must address our jurisdiction over defendant's appeal. Although defendant filed a timely written notice of appeal of his underlying convictions, he did not file written notice of appeal from the 14 August 2013 SBM order. Because SBM orders are civil in nature, written notice of appeal is required under N.C.R. App. P. 3(a). *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). Nevertheless, defendant filed a petition for writ of certiorari to review the SBM order, and we decide, in our discretion, to allow defendant's petition and to review the merits of his appeal of the SBM order.

I

[2] Defendant first argues that the trial court erred by admitting certain testimony of Frieda Bellis, a psychologist who treated Sally after she told her mother about the sexual abuse. Because defendant did not object to the testimony at trial, he contends that this constituted 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[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

At trial, Ms. Bellis testified that she is a psychologist who works at New Directions, a facility that provides psychological testing, therapy, and counseling. Although Ms. Bellis was not tendered as an expert witness by the State, she testified that she has a masters degree in clinical psychology, is licensed to practice psychology, and has attended symposiums regarding treating children, two of which addressed sexual abuse and trauma in children.

On direct examination, the State asked Ms. Bellis about her treatment of Sally:

> Q. Okay. Now, have you ever been contacted with regard to [Sally] pursuant to a request to treat?
>
> A. Yes.
>
> Q. And would you describe that initial meeting with [Sally]?
>
> A. Yes. I first saw her on August 1st, 2011. *They specifically came in because she had been molested by her older cousin.*
>
> Q. Okay. Was there an allegation of molestation?
>
> A. Yes.
>
> Q. And did they discuss with you a goal, a treatment goal regarding why she was there?
>
> A. Yes, to help her with the symptoms of trauma that she was experiencing and help her cope with those.
>
> Q. Do you recall from that meeting the symptoms that she was experiencing?
>
> A. Yes. She was having a hard time falling asleep. Once she fell asleep she would wake up because she would have nightmares concerning the trauma. She was having a hard time paying attention in school, because when she would think about the trauma it would make her feel anxious.
>
> Q. And did you base this conclusion on disclosures from [Sally]?
>
> A. Yes.

(Emphasis added.)

Ms. Bellis testified that she saw Sally about once every two weeks from 1 August 2011 until March 2012. Her direct examination was very brief and closed with the following exchange:

> Q. Do you recall during the course of your meeting with [Sally] the nature of the allegations of molestation? Do you remember if she disclosed any details to you?

A. I believe she did.

Q. And during the course of your treatment, did you discuss those details?

A. We did.

Q. And do you recall if -- whether or not [Sally] remained consistent in those details?

A. She was.

On cross-examination, defense counsel asked Ms. Bellis if "the appointments and treatment evolve[d] shortly into dealing with the death of [Sally's] dog." Ms. Bellis acknowledged that the dog's death was one of the issues that they dealt with, but she was unsure when that issue came up or how long they addressed it. Defense counsel also elicited from Ms. Bellis that she diagnosed Sally with ADHD.

On re-direct, the State asked Ms. Bellis whether ADHD was the only diagnosis made during Sally's treatment:

Q. Besides the diagnosis of ADHD, did you make any official diagnosis that you recollect or that you recall?

A. Yes, post-traumatic stress disorder.

Q. And how do you -- what's the basis of that diagnosis generally speaking, not as it applies to [Sally]?

A. There are many symptoms of PTSD. Some of those can be when you recollect the trauma you feel very fearful, or if there's something that triggers that you feel very afraid, nightmares, certainly, a hard time sleeping, hard time concentrating. It can affect your school performance, or if you're an adult, your job performance.

Q. Based upon those indicators, are you the one that made the diagnosis?

A. Yes.

Defendant first argues that Frieda Bellis' testimony that Sally "specifically came in because she had been molested by her older cousin" amounted to expert testimony that Sally had, in fact, been sexually molested by defendant and impermissibly vouched for Sally's credibility. We disagree.

It is well established that "a witness may not vouch for the credibility of a victim" because it constitutes an impermissible opinion on the guilt of the defendant. *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). Accordingly, our Supreme Court has held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). "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. Nevertheless, an expert opinion that a victim was sexually abused *by the defendant* amounts to an impermissible expert opinion as to the defendant's guilt. *State v. Figured*, 116 N.C. App. 1, 8, 446 S.E.2d 838, 842 (1994).

In support of his argument, defendant cites a number of cases in which our courts have applied this principle to hold that the expert testimony was admitted in error. In the cases cited by defendant, the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse. *See, e.g.*, *State v. Kim*, 318 N.C. 614, 620, 350 S.E.2d 347, 351 (1986) (new trial granted where doctor testified that victim had " 'never been untruthful with [him]' "); *State v. Heath*, 316 N.C. 337, 340, 341 S.E.2d 565, 567 (1986) (expert responded negatively to question whether victim suffered from mental condition that caused her to lie about sexual assault); *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508 (child protective services investigator for DSS testified that DSS had " 'substantiated' " defendant as perpetrator of sexual abuse based on evidence investigator had gathered); *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (new trial granted where expert testified that prosecuting witness was truthful); *Figured*, 116 N.C. App. at 8, 446 S.E.2d at 842 (physician testified that in his opinion children were sexually abused by defendant).

Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of Sally's allegations of molestation or whether she believed that Sally was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [Sally] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why Sally initially sought

treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to Sally's allegations, and not Ms. Bellis' personal opinion as to their veracity.

Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to Sally's credibility or defendant's guilt, we hold that the trial court did not err in admitting it. *See State v. O'Hanlan*, 153 N.C. App. 546, 562, 570 S.E.2d 751, 761 (2002) (rejecting defendant's argument that detective's testimony that had victim not positively identified her attacker, he would have conducted more thorough investigation " 'because [he] wouldn't have known who done it' " impermissibly bolstered victim's testimony, because "[t]he context in which this testimony was given makes it clear [the detective] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case").

[3] Defendant next argues that the trial court committed plain error by admitting Ms. Bellis' testimony that she diagnosed Sally with post-traumatic stress disorder ("PTSD"). Our Supreme Court has held "[i]n no case may [evidence of PTSD] be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *State v. Hall*, 330 N.C. 808, 822, 412 S.E.2d 883, 891 (1992). The Court identified two primary problems with admitting evidence of a PTSD diagnosis as substantive evidence:

> First, the psychiatric procedures used in developing the diagnosis are designed for therapeutic purposes and are not reliable as fact-finding tools to determine whether a rape has in fact occurred. Second, the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices.

Id. at 820, 412 S.E.2d at 889.

Nevertheless, evidence of PTSD may be admitted for certain corroborative purposes. *Id.* at 821, 412 S.E.2d at 890. Evidence that the victim suffers from PTSD may "cast light onto the victim's version of events and other, critical issues at trial. For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent." *Id.* at 822, 412 S.E.2d at 891.

The Supreme Court explained:

> This list of permissible uses is by no means exhaustive. The trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under Evidence Rule 403. It should also determine whether admission of this evidence would be helpful to the trier of fact under Evidence Rule 702. If the trial court is satisfied that these criteria have been met on the facts of the particular case, then the evidence may be admitted for the purposes of corroboration. If admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted.

Id.

This Court applied the rule set forth in *Hall* in *O'Hanlan*. In *O'Hanlan*, the State's expert witness, a physician, testified regarding her treatment of the victim after she had been sexually abused by the defendant. 153 N.C. App. at 555-56, 570 S.E.2d at 758. On cross-examination, "defendant asked questions pertaining to the victim's mental treatment, in particular, a psychiatric evaluation of the victim. This line of questioning elicited responses that could have given the jury the impression that the victim was mentally unstable prior to the time of the assault. On redirect examination, the State introduced the rest of the report to put the evidence introduced by defendant into context, namely that the victim only began suffering such mental problems after that attack." *Id.* at 560, 570 S.E.2d at 760. The report included a diagnosis of PTSD and the physician testified that the victim suffered from PTSD as a result of the sexual assault. *Id.* at 559, 570 S.E.2d at 760. The trial court did not give a limiting instruction. *Id.*

On appeal, the defendant argued that because a limiting instruction was not given, the evidence was admitted for the sole purpose of proving that the rape took place. This Court disagreed and reasoned instead:

> The reference to PTSD was being used to rebut the inference by defendant that the victim was mentally unstable prior to the assault and rape rather than to prove the assault and rape happened. Therefore, the evidence was admissible, but not as substantive evidence. Defendant would have been entitled to request the *Hall/Chavis* limiting instruction. However, since he did not, "[t]he admission of evidence which is competent for a restricted

> purpose will not be held error in the absence of a request by the defendant for limiting instructions."

Id. at 560-61, 570 S.E.2d at 760 (quoting *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988)).

Additionally, the Court noted that "evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant" and "where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's rebuttal or explanatory evidence about the matter." *Id.* at 561, 570 S.E.2d at 761. Therefore, this Court held that the defendant's cross examination of the State's expert opened the door for admission of the PTSD diagnosis as admissible rebuttal evidence.

We find the facts of this case analogous to the facts of *O'Hanlan*. On cross-examination of Ms. Bellis, defense counsel asked about treatment for the death of Sally's dog and about Ms. Bellis' diagnosing Sally with ADHD. This line of questioning elicited responses that raised an inference favorable to defendant -- that Sally's psychological problems were caused by something other than having been sexually assaulted. The State's introduction of evidence of PTSD on re-direct examination was not, therefore, admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. Although defendant could have requested a limiting instruction, he did not do so. We, therefore, hold that the trial court did not commit plain error in admitting this testimony.

II

[4] Defendant next argues that the trial court committed plain error by instructing the jury on "sexual offense with a child," under N.C. Gen. Stat. § 14-27.4A, a crime for which defendant was not indicted. We agree.

Defendant was indicted for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), which is a lesser included offense of "sexual offense with a child; adult offender" under N.C. Gen. Stat. § 14-27.4A. *See* N.C. Gen. Stat. § 14-27.4A(d). While both offenses require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of 13 years, sexual offense with a child under N.C. Gen. Stat. § 14-27.4A has a greater requirement with respect to the age of a defendant at the time of the act. For first degree sexual offense, N.C. Gen. Stat. § 14-27.4(a)(1), the State must prove only that the defendant was at least 12 years old and at least four

years older than the victim, whereas for N.C. Gen. Stat. § 14-27.4A, the State must prove that the defendant was at least 18 years old.

Here, rather than instruct the jury on first degree sexual offense -- the indicted offense -- the trial court instructed the jury on the greater offense of sexual offense with a child. In essence, the trial court submitted to the jury an additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense.

"It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). Correspondingly, "the failure of the allegations [of the indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support [the] resulting conviction." *Id.* at 631, 350 S.E.2d at 357.

In this case, the jury charge on the elements of sexual offense with a child resulted in a conviction that is not supported by the indictment on the lesser included offense of first degree sexual offense. Specifically, the indictment does not allege an essential element of the resulting conviction: that defendant was at least 18 years old. We must, therefore, vacate the judgment.

Nevertheless, this Court has held that "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). In such a case, a new indictment is not required because "[a] verdict of guilty of [a greater offense] necessarily includes the jury's determination that the defendant is guilty of each element of . . . [the] lesser-included offense." *State v. Perry*, 291 N.C. 586, 591, 231 S.E.2d 262, 266 (1977) (internal quotation marks omitted) (where indictment was sufficient to charge defendant with second degree rape, vacating judgment on conviction of first degree rape and remanding for entry of judgment on conviction of lesser included offense of second degree rape). *See also Bullock*, 154 N.C. App. at 244-45, 574 S.E.2d at 24 (arresting judgment on conviction for attempted first degree murder where indictment did not allege essential element of "malice aforethought" and remanding for sentencing and entry of judgment on lesser included offense of voluntary manslaughter, which was sufficiently alleged in indictment).

It is undisputed that the indictment in this case was sufficient to support a conviction of the lesser included offense of first degree sexual

offense under N.C. Gen. Stat. § 14-27.4(a)(1). Furthermore, the verdict of guilty of sexual offense with a child under N.C. Gen. Stat. § 14-27.4A necessarily includes the jury's determination that the defendant is guilty of each element of the lesser included offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1). Therefore, pursuant to *Bullock* and *Perry*, we vacate the judgment entered on defendant's conviction under N.C. Gen. Stat. § 14-27.4A and remand for resentencing and entry of judgment on the lesser included offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1).

[5] Defendant, however, relying primarily upon *Williams*, *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000), and *State v. Mille*r, 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004), contends that the *t*rial court's failure to instruct the jury on the elements of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1) constituted a dismissal of the charge as a matter of law. We disagree.

In *Williams* and *Bowen*, the trial court, in each case, declined to instruct the jury on an essential element of the indicted offense and instead instructed the jury on a separate theory of the offense not alleged in the indictment. *See Williams*, 318 N.C. at 628, 350 S.E.2d at 356 (trial court declined to instruct jury on element of force, an essential element of indicted offense of first degree rape by use of force in violation of N.C. Gen. Stat. § 14-27.2(a)(2)); *Bowen*, 139 N.C. App. at 24-25, 533 S.E.2d at 252-53 (trial court declined to instruct jury on element of force, an essential element of indicted offense of first degree sexual offense by force in violation of N.C. Gen. Stat. § 14-27.4(a)(2)). By declining to instruct the jury on all the essential elements of the indicted offense, the trial courts, in effect, dismissed the charges.

In *Miller*, the indictment for statutory sexual offense cited N.C. Gen. Stat. § 14-27.7A(a) (2001), but the defendant was tried and convicted for first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1). This Court held that the trial court erred in denying the defendant's motion to dismiss because the indictment was fatally defective in that the factual allegations in the indictment were "sufficient to satisfy *some* elements contained in each of these statutes to the exclusion of the other, but the[] averments [we]re insufficient to satisfy *all* of the elements contained in either statute." 159 N.C. App. at 614, 583 S.E.2d at 623. In other words, the factual allegations of the indictment were insufficient to support a conviction for *either* offense.

In contrast, in this case, the indictment alleges all the essential elements of a violation of N.C. Gen. Stat. § 14-27.4(a)(1), and the trial court did not omit any of these essential elements from its jury instructions. Rather, the trial court instructed the jury on all the essential elements of the indicted offense plus an additional element of a greater offense. Under these circumstances, the resulting conviction is not supported by the indictment and judgment on that conviction must be vacated, but the rationale for dismissal of the *indicted* charge -- failure to instruct on all the essential elements thereof -- does not apply. Accordingly, we vacate the judgment on defendant's conviction under N.C. Gen. Stat. § 14-27.4A and remand for resentencing and entry of judgment on the offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1).

The trial court additionally entered an SBM order based upon a finding that defendant was convicted of "sexual offense with a child, G.S. 14-27.4A." The State concedes, and we hold, that this was error. We vacate the SBM order and hold that defendant is entitled to a new SBM determination hearing on remand.

[6] This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments. *See*, *e.g. Miller*, 159 N.C. App. at 614, 583 S.E.2d at 623 (vacating convictions where defendant was indicted under statute governing first degree sexual offense but convicted under statutory rape statute, and indictment mixed elements of both offenses); *State v. Hill*, 185 N.C. App. 216, 220, 647 S.E.2d 475, 478 (2007) (indictment purportedly charged defendant with statutory rape but alleged elements of first degree sexual offense), *rev'd per curiam for reasons stated in dissent*, 362 N.C. 169, 655 S.E.2d 831 (2008).

Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force" under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference

to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

Vacated and remanded.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
JOSHUA WILFORD HOUSER

No. COA14-973

Filed 17 February 2015

1. Evidence—defendant's account inconsistent—not commentary on truthfulness

In a trial for felony child abuse inflicting serious bodily injury, the trial court did not err or commit plain error by admitting an investigating officer's testimony that the existence of a blonde hair in the sheetrock of a bathroom was inconsistent with defendant's account of why there was a hole in the sheetrock. The officer's testimony was not commentary on the truthfulness of defendant's statements. Rather, the testimony explained why the officers returned to defendant's home to collect the hair from the sheetrock.

2. Appeal and Error—failure to raise constitutional issue at trial—no plain error review

The Court of Appeals dismissed defendant's argument that the trial court committed plain error by admitting a video recording containing defendant's request for a lawyer. Constitutional issues not raised at trial may not be raised for the first time before the Court of Appeals—even for plain error review.

3. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instruction—especially

heinous, atrocious, or cruel aggravating factor—no plain error

In a trial for felony child abuse inflicting serious bodily injury, the trial court erred by failing to provide an adequate instruction on the "especially heinous, atrocious, or cruel" aggravating factor. However, the error did not amount to plain error in light of evidence supporting the existence of excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious injury.

4. **Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—charge conference—no material prejudice**

In a trial for felony child abuse inflicting serious bodily injury, the trial court's failure to comply fully with N.C.G.S. § 15A-1231(b) in conducting the charge conference did not materially prejudice defendant's case. Defense counsel had the opportunity to correct the inadequate aggravating factor instruction after the jury had been charged, and there was overwhelming evidence in support of the aggravating factor.

Appeal by defendant from judgment entered 27 February 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 21 January 2015.

Attorney General Roy Cooper, *by Assistant Attorney General Anne M. Middleton*, *for the State.*

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

INMAN, Judge.

Joshua Wilford Houser ("defendant") appeals from judgment entered after a jury found him guilty of felony child abuse inflicting serious bodily injury. The jury also found the existence of two aggravating factors—that the crime was especially heinous, atrocious, or cruel ("EHAC") and that the victim was very young—and the trial court sentenced defendant in the aggravated range. On appeal, defendant argues that: (1) the trial court committed plain error in allowing an investigating officer to testify as to his opinion of defendant's guilt; (2) the trial court committed plain error in admitting evidence showing that defendant asserted his right to counsel during an interrogation; (3) the trial court committed

plain error by failing to give a full jury instruction on the aggravating factor of EHAC; and (4) the trial court reversibly erred by failing to conduct a charge conference during the penalty phase of the trial.

After careful review, we find no error in the guilt-innocence phase of the proceedings, no plain error in the trial court's EHAC instruction, and no material prejudice in the trial court's failure to fully comply with the statutory mandate to conduct a charge conference.

Background

Defendant lived with his wife, Kirbi Davenport ("Ms. Davenport"), and Ms. Davenport's three-year-old daughter from a previous relationship, K.D.,[1] in a mobile home in Indian Trail near Ms. Davenport's parents.

On 16 May 2012, defendant stayed home to watch K.D. while Ms. Davenport was at work. Ms. Davenport called at 2:30 p.m. and spoke with K.D., who sounded normal and said she was having a good day. Ms. Davenport's mother called and spoke with K.D. at 5:30 p.m.; K.D. said she had eaten, taken a bath, and was waiting for her mother to come home.

At 6:07 p.m. defendant called 911. Defendant told the dispatcher that K.D. had urinated in her clothes, fallen from a standing position, and injured her head. Defendant said he picked her up and shook her but she was nonresponsive. The 911 dispatcher alerted the Union County Sheriff's department because defendant's "extremely hectic and excited" demeanor made the dispatcher uncomfortable and raised his suspicion that a crime may have occurred.

Emergency personnel arrived at 6:17 p.m. K.D. was in the front seat of a truck parked outside the home. EMTs noticed that she was not breathing properly and that her eyes had rolled toward the top of her head. In a statement prepared approximately an hour after arriving at the scene, emergency rescue volunteer Robert Holloway wrote that defendant told him that K.D. had fallen and hit her chin.

Defendant told Ms. Davenport on the phone that he heard a thud when K.D. went into the bathroom to clean herself up after urinating in her pants. He said that K.D. was getting up off the floor when he walked

1. In its brief on appeal, the State included a footnote explaining why it referred to the minor victim by her full name. Defendant filed a motion to strike this footnote, which we allow. This Court's policy is to use initials or pseudonyms when referring to minor victims of abuse to protect the privacy and identity of the child. *See*, *e.g.*, *State v. Ridgeway*, 185 N.C. App. 423, 426, n.1, 648 S.E.2d 886, 889, n.1 (2007). The State's arguments against following this policy here refer to matters outside the record and are irrelevant to our analysis in this case.

into the bedroom. When defendant scooped her up and took her pants off, K.D. keeled backward and defecated on herself. Defendant claimed that he punched a hole in the wall because the 911 dispatcher could not understand him when he was trying to give his address. Volunteers thought defendant seemed calm and detached until he spoke on the phone to his wife, at which time he raised his voice to seem anxious and nervous. Ms. Davenport's mother also testified that defendant exhibited no emotion later at the hospital.

K.D. arrived at the hospital in a coma. The attending neurosurgeon noted that internal blood visible on the CT scan reflected a recent injury, not one days or weeks old. The doctor noticed two types of skull fractures, the first being a diastatic fracture on the suture line in the skull that grows and molds together by the time the child is 18 months old. The suture line had been broken apart, an injury which the doctor testified required significant force. The second fracture was a crack running through the hard portion of the skull. K.D. also had bleeding on both sides of her head, in between the lobes of her brain, and under the lining of the brain.

Immediate surgery was needed to remove blood clots, stop bleeding, and treat the swelling in K.D.'s brain. After removing a portion of K.D.'s skull, the doctor removed blood clots and blood that had soaked in between the lobes of K.D.'s brain. During the procedure, K.D.'s brain swelled outward between one half of an inch to an inch beyond her skull. The continued swelling required further cutting from the skull, but even then, K.D.'s brain was so swollen that the doctors had difficulty replacing K.D.'s scalp after surgery.

K.D. was in the hospital for a total of 65 days. Due to the injuries to her brain, she was no longer able to walk, stand up on her own, hold up her head, or feed herself, and she became incontinent. For six months after surgery, K.D. required a tracheotomy tube in her neck to help her breathe. She required around the clock care, which her mother and grandmother provided. The neurosurgeon testified that K.D.'s brain injuries were of the most severe kind, resembling those that can be inflicted by ejection from a car, war wounds, or a fall from a significant height.

Shortly after riding with K.D. to the hospital, defendant returned to his home with Lieutenant Brian Helms of the Union County Sheriff's Department ("Lt. Helms") and Special Agent Brandon Blackman of the State Bureau of Investigation ("Special Agent Blackman"). They photographed the interior of the home, including the hole in the sheetrock of the master bedroom next to the master bathroom door. After being

asked about the hole in the sheetrock by the officers, defendant said he had punched it in frustration when the 911 operator couldn't understand what he was saying over the telephone. Defendant asked the officers to leave when they intimated a belief that he had hurt K.D.

Later, Special Agent Blackman reviewed the photographs and saw what appeared to be blonde hair in the hole of the sheetrock. He testified that this was inconsistent with defendant's statement that defendant had created the hole with his fist, causing the officers to seek consent from Ms. Davenport to search the home and collect the hair. Lt. Helms and Special Agent Blackman went back to the home with Crime Scene Investigator Chris McTeague ("McTeague"). McTeague removed two head hairs from the sheetrock, which he testified were not laying on top of the rock but were partially embedded and provided resistance when he tried to pull them from the damaged area. Subsequent DNA analysis showed that the hairs belonged to K.D. Both hairs were anagen phase hairs, meaning that they were actively growing when they were removed and would have required force to be pulled from K.D.'s head.

Defendant was arrested following the collection of the hairs. He waived his *Miranda* rights and agreed to give a recorded interview to detectives with the Union County Sheriff's Office. When officers accused him of hurting K.D., he asserted his right to counsel and ended the interview.

Defendant testified at trial that while he was cooking dinner on the night in question, K.D. told him that she needed to "pee." Defendant saw that her pants were already wet, so he "popped" her on the "butt" and told her to go into the master bathroom to wash up. He then heard a thud from the bathroom, and when he looked in, he saw K.D. trying to get up from her hands and knees. Defendant tried to hold her up, but K.D. went stiff and defecated on herself. Defendant then cleaned K.D. and called 911. He claimed that he punched the wall in frustration when the 911 dispatcher couldn't understand him, causing the hole in the sheetrock.

The jury found defendant guilty of felony child abuse inflicting serious bodily injury. The trial court then proceeded with a separate penalty phase necessary for the jury to determine the existence of aggravating factors alleged by the State.[2] After the jury found beyond a reasonable doubt that the crime was especially heinous, atrocious or cruel and that the victim was very young, the trial court sentenced defendant in the

2. The jury was not informed that the State sought to pursue aggravating factors until after it returned its guilty verdict.

aggravated range to 92 to 123 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

I. Officer Testimony

[1] Defendant first argues that the trial court committed plain error by admitting testimony from Lt. Helms that the existence of K.D.'s hairs in the sheetrock of the home was inconsistent with defendant's account of the incident. After careful review, we find no error.

Because defendant did not object to the admission of Lt. Helms's testimony, we review for plain error. *See State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007). "To show plain error, the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice." *State v. Elkins*, 210 N.C. App. 110, 119, 707 S.E.2d 744, 751-52 (2011) (citation and quotation marks omitted); *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Lay witness 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." N.C. Gen. Stat. § 8C, Rule 701 (2013). Thus, when police officers testify as lay witnesses, they are not permitted to invade the province of the jury by commenting on the credibility of the defendant. *See*, *e.g.*, *State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 360 (2003).

This Court's reasoning in *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), is persuasive. In *O'Hanlan*, the Court hold there was no error in the admission of a police officer's testimony that he did not fully investigate a rape with forensic analysis because the victim positively identified the defendant as the perpetrator. *Id.* at 562-63, 570 S.E.2d at 761-62. Specifically, the officer testified as follows:

> Q. There was a lot of questions here from counsel for the defendant about the fact that you didn't send this off, you didn't send that off, you didn't do this or that check. What can you tell this jury about why you didn't have these things checked?
>
> A. I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died--

> [Defense Counsel]: Objection, Your Honor, speculative.
>
> [Court]: Overruled.
>
> Q. Go ahead?
>
> A. . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761. Although defendant argued on appeal that the officer's statements were tantamount to expert testimony that the defendant committed the crime, the Court rejected that argument based on the context of the testimony and the fact that the officer was not tendered as an expert:

> The context in which this testimony was given makes it clear [the officer] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. His testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping, and rape. His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.

Id. at 562-63, 570 S.E.2d at 761-62. Accordingly, the Court held that the officer's testimony was permissible as lay opinion testimony under Rule 701. *Id.*

Here, defendant challenges the admission of the following testimony provided by Lt. Helms:

> Q: Lieutenant Helms, what else did you do with Special Agent Blackman after reviewing the 911 call?
>
> A: We began – or I say we, Special Agent Blackman began reviewing the photographs I had taken the night before. And in doing so, he asked me to step into his office to show me something.
>
> Q: Okay, what did he show you?

A: One of the pictures that we had looked at earlier, and that's in the photographs is when we first saw that hair.

Q: Okay. And what did you note about the hair in that photograph?

A: That it appeared to be blonde.

Q: And why was that significant noting the hair in this photograph?

A: Because [K.D.] was – had blonde hair.

. . .

Q: Lieutenant Helms, as a trained investigator and detective, in your opinion was the hair being in that sheetrock wall consistent with the version of the defendant's as to how that hole got there?

A: No.

Q: What did you do after you made that discovery?

A: I got a hold of a couple of other detectives . . . and asked them to locate [Ms. Davenport] at the hospital and try to obtain consent for us to go back into the home to collect the hair.

Like the officer in *O'Hannon*, Lt. Helms was not invading the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, he was explaining the investigative process that led the officers to return to the home and collect the hair sample. Contrary to defendant's arguments, Lt. Helms's testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. Lt. Helms's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. Like the testimony in *O'Hannon*, these statements were rationally based on Lt. Helms's experience as a detective and were helpful to the jury in understanding the investigative process in this case. Accordingly, pursuant to *O'Hannon*, we reject defendant's assertion that Lt. Helms's statements were tantamount to expert testimony or impermissible opinion testimony, and we hold that the trial court's admission of this testimony was not error, let alone plain error. *See Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751.

II. Invocation of the Right to Counsel

[2] Defendant next argues that the trial court committed plain error by admitting evidence that, during the interrogation following his arrest, defendant invoked his right to counsel. With no objection from defendant at trial, the State offered and the trial court admitted into evidence a video recording of the post-arrest interrogation showing that the officers stopped their questioning when defendant said "I want a lawyer."

The invocation of the right to counsel is a constitutional privilege that cannot be admitted into evidence to be used against a defendant. *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983). However, failure to raise this constitutional issue before the trial court bars appellate review. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) (dismissing the contention on appeal that the trial court committed plain error by admitting evidence of the defendant's invocation of the right to counsel because the issue had not been raised at trial). Here, defendant failed to object to the admission of the video showing his invocation of the right to counsel and did not raise this constitutional issue presented on appeal to the trial court. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Global*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (internal citations omitted). Accordingly, we dismiss this assignment of error.[3]

III. Especially Heinous, Atrocious or Cruel Instruction

[3] Defendant next argues that the trial court committed plain error by failing to provide an adequate instruction on the EHAC aggravating factor.

Although defendant does not specifically state the basis for this contention in his brief on appeal, we believe that this issue is whether the trial court's instruction regarding EHAC was unconstitutionally vague. We base this determination on defendant's citation to and reliance on cases from both the North Carolina Supreme Court and United States Supreme Court that assessed whether similar instructions in capital cases violated those defendants' constitutional rights. *See*, *e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398 (1980); *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913 (1976); *Walton v. Arizona*, 497 U.S. 639,

3. We decline to exercise our discretionary authority under Rule 2 of the North Carolina Rules of Appellate Procedure to address this issue. *See* N.C. R. App. P. 2 (2015) ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]").

111 L. Ed. 2d 511 (1990); *State v. Syrian*i, 333 N.C. 350, 428 S.E.2d 118 (1993); *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). Defendant argues that "[j]ust as proper definition of the terms is required in capital sentencing to narrowly channel jury discretion, an instruction must be given in non-capital jury proceedings to ensure the return of a reliable verdict."

Defendant failed to raise this constitutional argument before the trial court, failed to offer any argument regarding this issue in the trial court, and did not object at all to the trial court's instructions during the penalty phase. In *State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 317 (1999), our Supreme Court declined to reach the issue defendant now asks us to consider based on that same failure:

> Next, defendant argues that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, both on its face and as applied, and thus the trial court's instruction to the jury regarding the aggravator was unconstitutional. Defendant, however, failed to object to this instruction at trial. Thus, pursuant to N.C. R. App. P. 10(b)(1), she has not properly preserved the issue for review by this Court. Likewise, defendant made no constitutional claims at trial regarding this instruction and will not be heard on any constitutional grounds now. *State v. Benson*, 323 N.C. 318, 321–22, 372 S.E.2d 517, 519 (1988).

However, because we believe that the trial court erred in failing to define EHAC in its instructions to jurors, we will exercise our discretion under Rule 2 to reach this issue. *See State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (noting that this Court may "pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction" pursuant to Rule 2).

Because defendant did not object to the trial court's instruction on EHAC, our standard of review remains plain error. *See State v. Lemons*, 352 N.C. 87, 92, 96-96, 530 S.E.2d 542, 545, 547-48 (2000) (reviewing an unpreserved constitutional argument for plain error where the Court exercised its discretionary authority under Rule 2 to reach the issue).

The North Carolina Pattern Jury Instruction regarding the EHAC aggravating factor in the capital context provides as follows:

> In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile;

> and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

N.C.P.I. Crim.—150.10(9). There is no separate pattern instruction defining this aggravating factor in non-capital cases. However, our Supreme Court has held that "it is instructive to turn to our capital cases for a definition of an especially heinous, atrocious, or cruel offense." *State v. Blackwelder*, 309 N.C. 410, 413, 306 S.E.2d 783, 786 (1983).

Our Supreme Court has also repeatedly held that this pattern instruction provides "constitutionally sufficient guidance to the jury" as to what the words "especially heinous, atrocious, or cruel" mean. *Tirado*, 358 N.C. at 596-97; 599 S.E.2d at 545; *see also Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141. These provisions "incorporate narrowing definitions adopted by [our Supreme Court] and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved[.]" *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141.

The trial court here did not adapt this pattern instruction from the capital case instructions in its charge to the jury, and provided jurors with none of the approved "narrowing definitions" that are constitutionally required to limit the jury's discretion in finding this aggravating factor. The entire instruction on EHAC consisted of the following conclusory mandate: "If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet." The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 362-64, 100 L. Ed. 2d 372, 378-79 (1988) (holding that the phrase "especially heinous, atrocious, or cruel" was unconstitutionally vague on its face and as applied without narrowing

definitions that limited the jury's discretion in considering that aggravating factor). Therefore, the trial court erred in failing to define EHAC in its instructions to jurors during the penalty phase of the trial.

However, under plain error review, defendant has the burden of demonstrating "not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice." *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52 (citations and internal quotation marks omitted). Defendant has failed to carry that burden here. In non-capital cases, the determination of whether EHAC exists is focused on "whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." *Blackwelder*, 309 N.C. at 413-14, 306 S.E.2d at 786. Here, the State presented substantial evidence that defendant, K.D.'s caregiver, slammed K.D.'s head into a wall of their home with enough force to break sheetrock and rupture the child's skull in two places. K.D. responded to pain stimuli during the beginning of her ambulance transport to the ER, but she gradually grew less responsive and arrived at the hospital in a deep coma. Her injuries required surgical removal of large pieces of her skull to relieve bleeding in her brain, which swelled beyond her skull and protruded roughly one inch from her head. Despite immediate aggressive medical intervention, K.D. could no longer live the life of a normal three-year-old girl. Nor could her life ever again be normal or without suffering. An MRI conducted a few days after surgery showed that K.D. suffered damage to almost every portion of her brain. Her neurosurgeon testified that K.D.'s personality, motivation, speech, memory, and vision would all be permanently affected. Photographs admitted at trial showed K.D. grimacing in pain from the tracheotomy tube inserted into her neck to assist with breathing. As of the date of trial, K.D. could no longer stand, walk, hold up her head, use her hands, or control her bladder or bowel movements.

Therefore, in light of evidence that supports all four factors identified by the *Blackwelder* Court—excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious bodily injury—we cannot conclude that the jury "probably" would have reached a different verdict had it been fully instructed on EHAC. Nor do we believe that the error, in the context of this evidence, was "so fundamental that it caused a miscarriage of justice." *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52. We discern no plain error.

IV. Charge Conference

[4] Defendant's final argument on appeal is that the trial court reversibly erred by failing to conduct a charge conference as required by statute before instructing the jury during the penalty phase of the proceedings. We agree that the trial court failed to fully comply with the applicable statute, but we hold that defendant has failed to show material prejudice.

Although defendant did not request a charge conference before the trial court instructed the jury on aggravating factors during the penalty phase, and although defendant raised no objection at trial on this ground, this issue is properly before us. "[H]olding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial." *State v. Hill*, __ N.C. App. __, __, 760 S.E.2d 85, 89, *disc. review denied*, __ N.C. __, 766 S.E.2d 637 (2014).

N.C. Gen. Stat. § 15A-1231(b) (2013) provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury.

In *Hill*, this Court held that the statutory mandate in section 15A-1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before proceeding to instruct the jury on aggravating factors during the penalty phase of a non-capital case. *Hill*, __ N.C. App. at __, 760 S.E.2d at 89-90.

We agree with defendant that the trial court did not conduct a full charge conference here. Outside the presence of the jury, the trial court engaged in the following colloquy before proceeding with the penalty phase:

> THE COURT: All right. Let the record reflect the jury is out of the hearing of this Court. I notice in the file, it's my understanding that the State is preparing to argue for aggravating factors, aggravating factor statutorily listed as number eight, that the offense was especially heinous,

> atrocious, or cruel; and number twelve, the victim or the child was very young. Is that correct?
>
> [THE STATE]: That's correct, Your Honor. Those are the two aggravating factors that the State wishes to proceed on, and the State did file notice of our intent to proceed with these aggravating factors on December 5th of 2013.
>
> THE COURT: All right. And it's my understanding you are not preparing or asking the Court to submit a third aggravating factor which seems to have the same elements as the crime. Is that right –
>
> . . .
>
> [THE STATE]: That's right, Your Honor.
>
> THE COURT: All right, thank you. All right, anything from the State further on the charge conference?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: From the defendant?
>
> [DEFENSE COUNSEL]: Your Honor, my client has asked me to object to the verdict sheet because it does not correspond to the indictment, so I'm kind of just doing that for the record, Your Honor.
>
> THE COURT: Thank you. Anything further for the record? Let's bring the jury back in.

The jurors were then brought back into the court room to hear argument from counsel and instructions from the trial court, without the trial court first informing counsel of the substance of those instructions.

As the *Hill* Court noted, "[t]he purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and reaching the correct verdict." *Hill*, __ N.C. App. at __, 760 S.E.2d at 89 (internal quotation marks omitted). Here, prior to instructing the jury, the trial court apprised both parties of the aggravating factors that the State sought to pursue, referring to its colloquy with counsel as a "charge conference." After instructing the jury and before deliberations began, the trial court asked counsel whether there was anything further from the State or the defendant. Therefore, unlike in *Hill*, the trial court did not completely fail to comply

with section 15A-1231(b), because it informed the parties of the aggravating factors that it would charge, it gave counsel a general opportunity to be heard at the charge conference, and it gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to "know what instructions will be given," and thus did not "comply fully" with all provisions of section 15A-1231(b). *See Hill*, __ N.C. App. at __, 760 S.E.2d at 88-89.

Under section 15A-1231(b), "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." Although our Courts have not yet defined what it means for a defendant's case to have been "materially prejudiced" by the trial court's failure to fully comply with section 15A-1231(b), our Supreme Court has held that defense counsel's failure to object to jury instructions at trial had bearing on the issue of prejudice in the context of the trial court's failure to record the charge conference. *See State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (1990) (holding that where both sides indicated they were satisfied with the charge and the defendant did not object to the instructions at trial, despite having the opportunity to do so, the defendant could not establish material prejudice on appeal); *see also State v. Wiley*, 355 N.C. 592, 631, 565 S.E.2d 22, 49 (2002) ("As in *Wise*, defendant in the instant case may not assign error to the lack of recordation where he had the opportunity to object to the charge but declined to do so."). Consistent with our Supreme Court's emphasis on the opportunity to object, the *Hill* Court found that the defendant suffered material prejudice because, in addition to failing to conduct any semblance of a charge conference, the trial court did not give counsel an opportunity to object to the charge at the close of instructions. *Hill*, __ N.C. App. at __, 760 S.E.2d at 90.

The trial court here did not err so egregiously. It conducted what it referred to as a "charge conference," during which it conferred with counsel regarding the specific aggravating factors that it would charge to the jury. The trial court asked counsel if either of them wished to be heard before the jury was charged, opening the door for counsel to tender proposed instructions or to ask about instructions. Furthermore, the trial court specifically asked defense counsel if there was anything further before allowing the jury to begin deliberations, opening the door for objection to the instructions if defendant had one.

Given the opportunity that defendant had to correct the trial court's inadequate EHAC instruction after the jury had been charged, and also

considering the aforementioned overwhelming evidence supporting the jury's finding of EHAC in this case, we cannot conclude that defendant has demonstrated material prejudice resulting from the trial court's failure to comply fully with section 15A-1231(b).

Conclusion

After careful review, we hold that the trial court did not err in its evidentiary rulings during the guilt-innocence phase of the underlying proceedings. In light of the evidence presented by the State, we also hold that the trial court did not commit plain error by giving an unconstitutionally vague instruction, and defendant was not materially prejudiced by the trial court's failure to fully comply with section 15A-1231(b).

NO PREJUDICIAL ERROR.

Judges STEELMAN and DIETZ concur.

STATE OF NORTH CAROLINA
v.
SAMUEL AARON JACOBS

No. COA14-774

Filed 17 February 2015

Sentencing—erroneous enhancement—assault with deadly weapon with intent to kill inflicting serious injury—attempted second-degree kidnapping

The trial court erred by enhancing defendant's convictions for assault with a deadly weapon with intent to kill inflicting serious injury and attempted second-degree kidnapping under N.C.G.S. 50B-4.1(d) based on knowingly violating a domestic violence protective order. The sentence enhancements were reversed and remanded for resentencing.

Appeal by Defendant from judgments entered 24 January 2014 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Karen A. Blum, for the State.

Kevin P. Bradley, for Defendant-appellant.

DILLON, Judge.

Samuel Aaron Jacobs ("Defendant") appeals from convictions for assault with a deadly weapon with intent to kill inflicting serious injury, attempted second-degree kidnapping, and violation of a domestic violence protective order with a deadly weapon. For the following reasons, we reverse and remand for resentencing.

I. Background

On 14 March 2011, Defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced by knowingly violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), enhanced by knowingly violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); and violation of a domestic violence protective order with the use of a deadly weapon.

Defendant was tried on all charges at the 13 January 2014 Criminal Session of Robeson County Superior Court. The State's evidence tended to show that in September 2010, Christy Smith[1] received a domestic violence protective order ("DVPO"), valid for one year against Defendant to prevent him from contacting her. Five months later, Ms. Smith was confronted by Defendant at a gas pump outside a convenience store. During the encounter, Defendant stabbed Ms. Smith multiple times before she was able to escape into the store.

The jury acquitted Defendant of the attempted first-degree murder charge. The jury, however, found Defendant guilty of three crimes: (1) attempted second-degree kidnapping, a Class F felony, enhanced to a Class D felony pursuant to N.C. Gen. Stat. § 50B-4.1(d) because Defendant knew the behavior was in violation of a DVPO; (2) AWDWIKISI, a Class C felony, enhanced to a Class B2 felony also pursuant to G.S. 50B-4.1(d); and (3) violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g), a Class H felony.

The trial court sentenced Defendant to a term of 180 to 225 months of imprisonment for the AWDWIKISI conviction; a consecutive term of 73 to 97 months of imprisonment for the attempted second-degree

1. A pseudonym.

kidnapping conviction; and a consecutive term of 8 to 10 months of imprisonment for the violation of a DVPO with a deadly weapon conviction. Defendant gave oral notice of appeal at trial.

II. Analysis

On appeal, Defendant argues that the trial court erred in (1) submitting to the jury the element of knowing violation of a DVPO to enhance the punishment for the AWDWIKISI and attempted second-degree kidnapping convictions[2]; and (2) in sentencing him for attempted second-degree kidnapping as a class D felony.

A. Enhancement under G.S. 50B-4.1(d)

Defendant's first argument pertains to the application of N.C. Gen. Stat. § 50B-4.1(d)(2011) to his convictions for AWDWIKISI and attempted second-degree kidnapping. G.S. 50B-4.1 contains nine subsections; however, only subsections (a), (d) and (g) are relevant in understanding Defendant's argument here.

Subsection (a) of G.S. 50B-4.1 makes it a class A1 misdemeanor to knowingly violate a valid DVPO.

Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon.

Subsection (d) provides that a person who commits another felony knowing that the behavior is also in violation of a DVPO shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." *Id.*

In the present case, Defendant was convicted of two felonies, which were each enhanced pursuant to subsection (d) of G.S. 50B-4.1 as the jury determined that these felonies involved behavior which Defendant knew was in violation of the DVPO. Specifically, his conviction for AWDWIKISI, a Class C felony, was enhanced to a Class B2 felony; and

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2. Defendant argues in the alternative that if the enhancement was correct, the trial court erred in entering judgment on both the conviction for AWDWIKISI in knowing violation of a DVPO and on the conviction for violation of a DVPO with a deadly weapon. However, based on our resolution of Defendant's first argument, we need not address Defendant's argument in the alternative.

his conviction for attempted second-degree kidnapping, a Class F felony, was enhanced to a Class D felony.[3]

Defendant argues that, since G.S. 50B-4.1(d) is not to be applied to "persons charged . . . under subsection (g)" of the statute, the G.S. 50B-4.1(d) enhancements should not have been applied in his case to *any* of his felony convictions since he was "a person" who was also charged (and convicted) under subsection (g). In other words, Defendant argues that the G.S. 50B-4.1(d) enhancements do not apply to *any* felonies a person might be convicted of, no matter the class, where that *person* was also charged with a Class A felony, a Class B1 felony, or under subsection (f) or (g) of G.S. 50B-4.1.

The State argues essentially that the phrase "person charged" in G.S. 50B-4.1(d) should be interpreted to mean "the conviction." Thusly, subsection (d) only prohibits convictions for the Class A and B1 felonies as well as the Class H felonies under subsections (f) and (g) of that statute from being enhanced; but subsection (d) does not prohibit the enhancement of *other* felonies such as AWDWIKISI and attempted kidnapping from being enhanced, even where the defendant was also charged with a Class A or B1 felony or a felony under subsection (f) or (g) of the statute.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Our Supreme Court has further stated that

> [w]hen a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (alterations in original) (quotation marks and citations omitted).

We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, *rather than* to certain

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3. The trial court enhanced Defendant's conviction for attempted second-degree kidnapping, not one class higher, see G.S. 50B-4.1(d), but two classes higher than the principal felony. This issue is addressed in section II, subsection (B.) of this opinion.

felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B-4.1(d) since he was "a person charged" under subsection (g) of that statute. Therefore, we reverse these sentence enhancements and remand for resentencing.

We understand that adopting the construction advocated by Defendant may lead to some interesting results in other cases. For example, a person who is charged with and convicted of second-degree sexual offense, a Class C felony, *see* N.C. Gen. Stat. § 14-27.5 (2011), would be guilty and punished as a Class B2 offender if the act was also in violation of a DVPO. However, this Class C felony conviction could not be enhanced under G.S. 50B-4.1(d) if the defendant was, in fact, initially "charged" with first-degree rape, a Class B1 felony, *see* N.C. Gen. Stat. § 14-27.2 (2011) – even though he was only convicted of second-degree sexual offense – since he would be "a person who is charged with" a Class B1 felony.

The State's interpretation, however, would require this Court to ignore the plain meaning of the words used by the General Assembly in subsection (d). That is, the State's interpretation might be correct if subsection (d) provided that it "shall not apply to *convictions*" for certain felonies. Since the statute refers to "the persons" and also refers to persons who are "charged with" OR "convicted of" certain felonies, we must agree with Defendant.

Further, if the General Assembly had intended for the limitation in subsection (d) to apply to the *convictions* rather than *the persons* charged or convicted, there would have been no need to include the limitation that "Class A" felonies not be subject to enhancement because there is no felony class higher than Class A.

B. Sentencing attempted second-degree kidnapping

Defendant contends and the State concedes that the trial court erred in sentencing Defendant as a Class D felon for attempted second-degree kidnapping enhanced based on knowing violation of a DVPO pursuant to G.S. 50B-4.1(d). As stated above, we review questions of statutory interpretation *de novo*. *Largent*, 197 N.C. App. at 617, 677 S.E.2d at 517.

Second-degree kidnapping is punishable as a Class E felony. N.C. Gen. Stat. § 14-39(b) (2011). Therefore, *attempted* second-degree kidnapping is a Class F felony. *See* N.C. Gen. Stat. § 14-2.5 (2011) ("Unless a different classification is expressly stated, an attempt to commit . . . a

felony is punishable under the next lower classification as the offense which the offender attempted to commit"). Defendant, however, was sentenced two classes higher as a Class D felon for this conviction. As determined above, the trial court erred in enhancing this felony based on language in G.S. 50B-4.1(d) and Defendant should have properly been sentenced for this conviction as a Class F felony.

III. Conclusion

For the forgoing reasons, we reverse the trial court's judgments for AWDWIKISI, and attempted second-degree kidnapping and remand for resentencing to remove the G.S. 50B-4.1(d) enhancement on these convictions and for further correction of Defendant's offense class in the attempted second-degree kidnapping judgment.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
TERRELL KNOX, DEFENDANT

No. COA14-773

Filed 17 February 2015

1. Probation and Parole—revocation hearing—notice requirement

Defendant waived the notice required for the trial court to hold a probation revocation hearing by voluntarily appearing and participating in his hearing.

2. Probation and Parole—revocation hearing—subject matter jurisdiction—probation violation report

The trial court properly exercised subject matter jurisdiction over defendant's probation revocation hearing. Even though the State completed its violation report after the hearing, there was no violation of N.C.G.S. § 15A-1344(f) because the trial court revoked defendant's probation before the period of probation expired.

Appeal by defendant from judgments entered on or about 8 April 2014 by Judge Robert C. Ervin in Superior Court, Gaston County. Heard in the Court of Appeals 18 November 2014.

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

The Exum Law Office, by Mary March Exum, for defendant-appellant.

STROUD, Judge.

Terrell Knox ("defendant") appeals from a judgment entered revoking his probation and activating his sentence for a 2012 offense, and a judgment entered upon a plea agreement in which he pled guilty to a 2014 offense pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). Defendant argues that the trial court lacked (1) statutory authority to hold a probation revocation hearing, because defendant did not receive proper notice of the hearing; and (2) subject matter jurisdiction to revoke his probation, because the State completed its probation violation report after the revocation hearing. We affirm the trial court's judgments.

I. Background

On or about 11 November 2012, defendant committed the offense of assault by strangulation. *See* N.C. Gen. Stat. § 14-32.4(b) (2011). On or about 25 February 2013, defendant pled guilty to assault by strangulation pursuant to a plea agreement. The trial court sentenced defendant to nine to twenty months' imprisonment but suspended the sentence and placed defendant on thirty-six months' supervised probation.

On or about 25 January 2014, defendant committed the offense of felony larceny. *See id.* § 14-72(a) (2013). On or about 3 February 2014, a grand jury indicted defendant for felony larceny and breaking or entering into a motor vehicle. *See id.* §§ 14-56, 14-72(a) (2013).

On 8 April 2014, the trial court held a probation revocation hearing in which defendant accepted a plea agreement and pled guilty to the offense of felony larceny pursuant to *Alford*, 400 U.S. 25, 27 L. Ed. 2d 162. Defendant's counsel stated that defendant acknowledged that he had received a probation violation report, and that defendant admitted the allegations in the report. In the plea agreement, the State dismissed the remaining charge.

On or about 8 April 2014, the trial court ordered that defendant's probation be revoked and activated defendant's sentence for the assault

by strangulation offense. The trial court also sentenced defendant to nine to twenty months' imprisonment for the felony larceny offense. The trial court ordered that defendant serve the sentences consecutively.

On or about 9 April 2014, the State completed a probation violation report. On 9 April 2014, defendant gave timely notice of appeal.

II. Notice

[1] Defendant contends that the trial court lacked statutory authority to hold a probation revocation hearing, because defendant did not receive proper notice of the hearing, in contravention of defendant's right to due process and N.C. Gen. Stat. § 15A-1345(e) (2013). N.C. Gen. Stat. § 15A-1345(e) provides in pertinent part: "The State must give the [defendant] notice of the [revocation] hearing and its purpose, including a statement of the violations alleged. The notice, *unless waived* by the [defendant], must be given at least 24 hours before the hearing." *See* N.C. Gen. Stat. § 15A-1345(e) (emphasis added). "[W]hen a defendant voluntarily appears at the appointed time and place and participates in [a probation revocation] hearing as the defendant did in this case, he is not prejudiced by the failure of the written notice to contain [the date, time, and place of the hearing]." *State v. Langley*, 3 N.C. App. 189, 191, 164 S.E.2d 529, 530 (1968).

At the revocation hearing, defendant's counsel stated that defendant acknowledged that he had received a probation violation report, and that defendant admitted the allegations in the report. Defendant appeared and participated in the hearing voluntarily. Accordingly, we hold that defendant waived the notice requirement. *See* N.C. Gen. Stat. § 15A-1345(e); *Langley*, 3 N.C. App. at 191, 164 S.E.2d at 530. We therefore hold that the trial court violated neither N.C. Gen. Stat. § 15A-1345(e) nor defendant's right to due process.

III. Subject Matter Jurisdiction

A. Standard of Review

[2] We review *de novo* whether a trial court has subject matter jurisdiction in a probation revocation hearing. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). A defendant may raise this issue at any time, even for the first time on appeal. *Id.*, 660 S.E.2d at 625.

B. Analysis

Defendant next contends that the trial court lacked subject matter jurisdiction to revoke his probation, because the State completed its

probation violation report after the revocation hearing, in contravention of N.C. Gen. Stat. § 15A-1344(f)(1) (2013). N.C. Gen. Stat. § 15A-1344(f) provides in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

N.C. Gen. Stat. § 15A-1344(f) (emphasis added). On or about 25 February 2013, the trial court placed defendant on thirty-six months' supervised probation. On or about 8 April 2014, the trial court revoked defendant's probation. Because the trial court revoked defendant's probation *before* the period of probation expired, N.C. Gen. Stat. § 15A-1344(f) is inapplicable here. *See id.*

Defendant's reliance on *State v. Moore* is misplaced. 148 N.C. App. 568, 571, 559 S.E.2d 565, 567 (2002). There, this Court held that, under N.C. Gen. Stat. § 15A-1344(f), the trial court lacked subject matter jurisdiction to modify the defendant's probation *after* the period of probation had expired, because the record lacked sufficient evidence that the State had filed a probation violation report before the period of probation had expired. *Id.*, 559 S.E.2d at 567. In contrast, here, the trial court revoked defendant's probation *before* the period of probation had expired.

Because the trial court revoked defendant's probation before the period of probation had expired, we hold that the trial court did not violate N.C. Gen. Stat. § 15A-1344(f) and properly exercised subject matter jurisdiction. *See* N.C. Gen. Stat. § 15A-1344(f).

IV. Conclusion

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

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

STATE v. SAUNDERS

[239 N.C. App. 434 (2015)]

STATE OF NORTH CAROLINA
v.
SYLVESTER SAUNDERS, JR.

No. COA14-929

Filed 17 February 2015

Rape—first-degree—jury instruction—aggravating factor

The trial court did not err or commit plain error in a prosecution for first-degree rape by failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. There was no overlap in the evidence on these issues.

Appeal by Defendant from judgment entered 16 July 2013 by Judge Edwin G. Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 8 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

In February 2013, Defendant Sylvester Saunders, Jr., was tried in the Forsyth County Superior Court on charges of first-degree rape, second-degree kidnapping, and first-degree burglary. After the jury deadlocked, the trial court declared a mistrial. Defendant was retried before a jury in July 2013. The evidence at the second trial tended to show the following: The victim[1] was an 82-year-old woman who lived alone in her house in Winston-Salem. In the early morning hours of 1 August 2009, a man entered the victim's home, grabbed her around the neck in a choke hold, and demanded money. The victim gave the man all of the money in her purse as well as two checks, but he still forced her into her living room, threw her onto a loveseat, and raped her. The victim attempted to fight back, but the man was too strong. During the rape, the man told the victim to raise her right leg. She explained that she could not do so

1. We identify the victim as such, rather than by her name, in an effort to protect her privacy.

because of her arthritis. The man forced the victim's leg up anyway. The victim asked the man why he would choose an old woman to attack, and he responded that he "like[d] old people." After completing the rape, the man told the victim he was hungry and took her to the kitchen in a choke hold, where she gave him two ice cream cones. Once the man left, the victim called the police.

That same day, after a fingerprint at the victim's home was identified as belonging to Defendant, a warrant was issued for his arrest. Defendant was taken into custody on 2 August 2009 while standing next to his car. Following his arrest, the two checks taken from the victim were discovered underneath Defendant's car. A print matching Defendant's left palm was discovered on one of the checks. Other evidence linking Defendant to the crimes included a dishtowel from the victim's kitchen which was found in the trunk of Defendant's car, as well as hair and fingerprint evidence from inside and outside the victim's home that was matched to Defendant.

At trial, the victim testified that, after the rape and burglary, she felt angry, upset, stressed out, and uncomfortable in social situations. She limited her public activities and worried that people around her knew about the rape. The victim had installed an alarm system and kept a gun in her home. Her family and associates testified that she seemed depressed and withdrawn since the incident. Defendant presented no evidence. The jury found Defendant guilty of each charge and returned verdicts finding three aggravating factors. The trial court imposed an aggravated sentence of life in prison without the possibility of parole.

From the judgment entered upon his convictions, Defendant appeals, raising a single issue: that the trial court erred in failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. Specifically, Defendant contends the jury may have relied on evidence about ongoing emotional suffering and behavioral changes which the victim experienced after the rape to find both an element of the offense and the aggravating factor. We find no error.

One of the aggravating factors submitted to and found by the jury was that the victim was very old. *See* N.C. Gen. Stat. § 15A-1340.16(d)(11) (2013) (providing that it is an aggravating factor if "[t]he victim [of a crime] was very young, or very old, or mentally or physically infirm, or handicapped"). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one

factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d). Defendant acknowledges that he did not request a specific instruction on this point nor did he object to the court's jury instructions as given. Accordingly, Defendant is entitled only to plain error review of his argument.

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary 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.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). Thus, we must consider whether the jury instructions were erroneous and, if so, whether "the error had a probable impact on the jury verdict." *See id.*

Our General Statutes provide that "[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 . . . [i]nflicts serious personal injury upon the victim . . . ." N.C. Gen. Stat. § 14-27.2(a)(2)(b) (2013). Serious personal injury can be mental or emotional harm, but,

> in order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the *res gestae* results present in every forcible rape. *Res gestae* results are those so closely connected to an occurrence or event in both time and substance as to be a part of the happening.

State v. Baker, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994) (citations, internal quotation marks, and brackets omitted; italics in original). For example, in *Baker*, ten to twelve months after the rape, the victim was still experiencing weight loss, depression, sleep disruptions, and social anxiety, and had quit her job, moved, and sought counseling. Id. at 65, 441 S.E.2d at 555. Thus, a jury's determination that a rape victim has

suffered a serious personal injury based on mental or emotional harm involves consideration of the *after-effects* of the crime upon the victim. *See id.*

In contrast, regarding the aggravating factor of the victim being "very old,"

> [t]his Court has observed that the policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of [her] age or mental or physical infirmity.
>
> However, age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already [would be] as a result of committing a violent crime against another person.
>
> A criminal may take advantage of the age of a victim in two different ways: First, he may target the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend [herself].
>
> Appellate review of a . . . finding of the aggravating factor at issue thus necessarily focuses upon *whether the victim, by reason of [her] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been.*

State v. Hilbert, 145 N.C. App. 440, 442-43, 549 S.E.2d 882, 884 (2001) (citations and internal quotation marks omitted; emphasis added). A jury's determination of the aggravating factor that the victim was very old requires consideration of facts and circumstances that existed before or during the crime, to wit, "whether the victim, by reason of [her] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *See id.* at 443, 549 S.E.2d at 884.

Defendant cites *State v. Barrow*, 216 N.C. App. 436, 718 S.E.2d 673 (2011), in support of his position that the trial court plainly erred in its jury instructions. We find that case easily distinguishable. First, we note that *Barrow* did not involve plain error, and thus, that case received a

different standard of review than does Defendant's argument. *Id.* at 445, 718 S.E.2d at 679. More importantly, in *Barrow*,

> the State's theory regarding second[-]degree murder relied almost exclusively on the fact that because of the vulnerability of a five-month[-]old child, shaking him is such a reckless act as to indicate a total disregard of human life — the showing necessary for malice. Thus, the State's theory regarding malice is virtually identical to the rationale underlying submission of the aggravating factor that the victim was "very young and physically infirm."

Id. at 446-47, 718 S.E.2d at 680 (citation omitted). In other words, the victim's infancy was the sole evidence to establish the recklessness of shaking him, and, of course, his age of five months was also the evidence to prove the aggravating factor of the victim in *Barrow* being "very young." *See id.*

Here, as noted *supra*, at trial, testimony from the victim and other witnesses established that, following the rape, the victim suffered mental and emotional consequences from the rape that extended for a time well beyond the attack itself. *See Baker*, 336 N.C. at 62-63, 441 S.E.2d at 554. These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. *See id.* None of the evidence regarding the lingering negative impact of the rape on the victim's emotional well-being was specifically related to her age. Indeed, it would not be surprising for a rape victim of *any* age to suffer such after-effects. Further, because all of this evidence concerned the victim's behavior, mental state, and activities *after* the rape, plainly none of it can have been relevant to "whether the victim, by reason of h[er] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *Hilbert*, 145 N.C. App. at 443, 549 S.E.2d at 884; *see also State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985) (noting that this aggravating factor is properly found "where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized"). The pertinent evidence on this issue was that Defendant was 53 years old, while the victim was 82 years old and attempted to fight back against Defendant but was overpowered by him. In sum, for the age of the victim to be an aggravating factor, the relevant evidence is that existing before or during the crime: whether and how age made the victim a more likely or easier target. For a serious personal injury by emotional suffering to be found to prove first-degree rape, the relevant evidence is that existing after and caused by the crime: on-going

harmful effects of the crime on the victim's well-being. In this case, there is no overlap in the evidence on these issues, and thus, the jury cannot possibly have relied on the same evidence in making these two distinct determinations. Accordingly, there was no need for the trial court to give any instruction cautioning against a violation of section 15A-1340.16(d).

NO ERROR.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA
v.
DEMARIO LAMONT SNEAD

No. COA14-940

Filed 17 February 2015

1. Evidence—store surveillance video—not properly authenticated

The trial court improperly admitted a video recording as substantive evidence in a case involving the theft of clothing from a department store (Belk) where defendant argued that the trial court erred by admitting the surveillance videotape without it being properly authenticated. The sole authenticating witness, the Belk regional loss prevention manager, explained how Belk's video surveillance system worked and testified that he had reviewed the video images after the incident but he admitted he was not at the store at the time of the incident, and could not testify whether the images on the video recording accurately presented the events depicted. Nor was he the person in charge of maintaining the video recording equipment and ensuring its proper operation and the State did not offer any evidence of who made the recording onto the compact disc ("CD"), how or when it was copied, or who took custody of the CD after it was copied.

2. Evidence—admission of store surveillance video—erroneous—prejudicial

Defendant was prejudiced by the erroneous admission of a video recording as substantive evidence in a case involving the larceny of clothing from a department store. The video recording was the only evidence offered to establish the value of the property

stolen. This testimony was the only evidence before the jury of the value of the stolen goods.

3. Evidence—value of stolen merchandise—not within personal knowledge of witness

The trial court erred in admitting testimony about the value of property stolen from a store in a larceny prosecution. The only contested issue at trial was the total value of the stolen merchandise and the State presented no other evidence to establish that the value of the stolen property exceeded $1,000, an essential element of felonious larceny.

4. Larceny—felonious larceny—erroneous admission of evidence of value—resentencing for misdemeanor larceny

Defendant's conviction of felonious larceny was vacated and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny where the trial court erroneously admitted the only evidence of value. Defendant admitted at that trial he stole the merchandise and all of the essential elements of the lesser included offense of misdemeanor larceny were established at trial.

5. Conspiracy—larceny—evidence sufficient

There was sufficient evidence that a jury could return a verdict of guilty on a conspiracy to commit larceny charge where the conviction for felonious larceny was vacated due to erroneously admitted evidence of the value of the property. Defendant testified that he did not steal "the right kind of shirts that [the woman he was with] wanted" and that he went to Belk "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on." Defendant pled guilty to being an habitual felon.

Appeal by defendant from judgment entered 13 March 2014 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for the State.

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

TYSON, Judge.

Demario Lamont Snead ("Defendant") appeals from convictions of felony larceny and conspiracy to commit felony larceny. We vacate the judgment in part and remand for entry of judgment on a lesser included offense and for resentencing. We find no error in Defendant's conviction of conspiracy to commit felonious larceny and affirm Defendant's guilty plea and conviction as an habitual felon.

I. Factual Background

On 1 February 2013, a theft was reported at Belk Department Store ("Belk") at Carolina Mall in Concord, North Carolina. The store's video surveillance system recorded the theft and showed two men entered the store at approximately 4:58 p.m. One of the men, identified as Defendant, is seen grabbing an armful of Polo-style shirts and running out of the store. The other man is shown grabbing a pile of hooded sweatshirts.

On 4 March 2013, Defendant was indicted for felony larceny. On 25 March 2013, Defendant was indicted for attaining habitual felon status. On 10 February 2014, a superseding indictment was entered for the felony larceny charge that added the charge of conspiracy to commit felony larceny. The superseding indictment stated, in pertinent part, as follows:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did steal, take and carry away store merchandise, clothing including but not limited to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.
>
> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant conspire [sic] with others to commit the crime of felony larceny 14-72(a) against Belk, Inc. by stealing and taking away store merchandise, including but not Limited [sic] to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.

A. State's Evidence

A jury trial was held in Cabarrus County Superior Court on 11 March 2014. Toby Steckler ("Mr. Steckler"), regional loss prevention manager for Belk, testified he was familiar with the operation of the video

surveillance system. He explained that the system was an "industry standard digital video recorder," which allowed for live monitoring and recording. He further stated the images produced by the video recorders were water-marked to ensure against tampering and displayed a time and date stamp. He also testified that he reviewed the surveillance camera video recording after the theft was reported.

During *voir dire*, Mr. Steckler testified that, after viewing the video and based on his familiarity with the layout of Belk stores and Belk merchandise displayed on the table from which the shirts were taken, he believed the shirts stolen were Ralph Lauren Polo shirts. He also stated the stacks of shirts on the table would have consisted of six to eight shirts per stack, valued at $85 to $89.50 per shirt.

During Mr. Steckler's testimony, the trial court intervened and excused the jury to engage in a discussion with the prosecutor, Defendant's counsel, and Mr. Steckler. During this discussion, the trial court asked Mr. Steckler whether he had reviewed the surveillance video directly from the monitor or after it had been copied onto a disk. Mr. Steckler responded "I'm not sure. Yes. Yes." Mr. Steckler also testified the recording equipment was in working order on the date of the theft.

However, Mr. Steckler later testified he was not present at the store when the incident occurred. The video recording was admitted as substantive evidence of the crimes over Defendant's objection.

After the video recording was admitted into evidence, it was shown and published to the jury, while Mr. Steckler gave a narration of the images. He described the layout of the store and stated the videotape showed Defendant in the Ralph Lauren Polo section. He testified that the fair market value of the Ralph Lauren Polo shirts on the date of the theft would have been between $85 and $89.50 each. When the prosecutor asked Mr. Steckler whether he could tell from the videotape how many shirts were taken, Mr. Steckler replied, "An exact amount, no, sir." Mr. Steckler testified that he "estimate[d] between 20 and 30 of the Polo shirts" were taken by Defendant.

B. Defendant's Evidence

Defendant testified and admitted he had stolen seven shirts from Belk on 1 February 2013. He stated, although he could not recall from which table he took the shirts, he knew they were not Ralph Lauren Polo shirts. Defendant explained the woman he was with "got mad at [him] because they wasn't [sic] the right kind of shirts that she wanted."

On 13 March 2014, the jury returned verdicts finding Defendant guilty of felonious larceny and conspiracy to commit felonious larceny. Defendant has a long criminal record and was wearing electronic monitoring from a prior offense during the theft. Defendant also admitted to two other "snatch and grab" larcenies committed at Macy's and Dick's Sporting Goods the same day as the incident at Belk. Defendant pled guilty to having attained the status of habitual felon.

The trial court sentenced Defendant to an active term of 84 to 113 months imprisonment for his felonious larceny and habitual felon convictions, to run consecutively and beginning at the end of any other sentences. He was also sentenced to a concurrent term of 33 to 52 months imprisonment for the conspiracy and habitual felon convictions. Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) admitting into evidence the surveillance videotape, which was not properly authenticated; and (2) allowing Mr. Steckler to provide lay opinion testimony outside his personal knowledge of the value of the stolen property.

A. Authentication of Surveillance Videotape

Defendant argues the trial court erred by admitting the surveillance videotape into evidence for substantive purposes without being properly authenticated. We agree.

1. Standard of Review

A trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal. *State v. Crawley*, 217 N.C. App. 509, 719 S.E.2d 632 (2011). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

2. Analysis

Video recordings are admissible into evidence for both substantive and/or illustrative purposes provided that the offeror lay a proper foundation. N.C. Gen. Stat. § 8-97 (2013).

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately

> illustrates the events filmed (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape; (3) testimony that the photographs introduced at trial were the same as those the witness had inspected immediately after processing (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (citations and internal quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

When reviewing the foundation for admissibility of a video recording, our precedents have defined three significant areas of inquiry: "(1) whether the camera and [recording] system in question were properly maintained and were properly operating when the [recording] was made, (2) whether the video [recording] accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

(a) Foundation

[1] Defendant argues the State failed to lay a proper foundation for the admission of the surveillance video recording. He asserts the State failed to offer any information about the history of maintenance on the camera and recording system or its operation. At trial, Mr. Steckler, the sole authenticating witness, explained how Belk's video surveillance system worked and testified that he had reviewed the video images after the incident. Mr. Steckler also testified that the video equipment was "working properly" on the day of the incident.

However, the State's witness admitted he was not at the store at the time or on the date of the incident, nor was he the person in charge of maintaining the video recording equipment and ensuring its proper operation. The State did not offer any other evidence that the video equipment was properly maintained or operating correctly when the incident occurred.

The State failed to offer any other evidence of chain of custody. Mr. Steckler testified that he "reviewed the video after it was burned [sic] off onto a CD." However, the State did not offer any evidence of who "burned" the recording onto the compact disc ("CD"), how or when it was copied, or who took custody of the CD after it was copied. Although

Mr. Steckler reviewed the video on CD shortly before trial and was able to identify it as the same video he had previously viewed, we have held that this testimony fails to establish an adequate chain of custody. *Id.* at 27, 550 S.E.2d at 15-16 (holding that State had not shown adequate evidence of chain of custody where "[n]o testimony was presented from any witness who handled the tape," despite one witness' testimony that video shown in court was the same video she watched after the incident).

Mr. Steckler could not testify whether the images on the video recording accurately presented the events depicted because he was not present at the time or on the date of the incident. *See Mason*, 144 N.C. App. at 23, 550 S.E.2d at 13 (holding employee could not attest to accuracy of videotaped robbery scenes because she had been unable to see actual robbery).

The State did not offer testimony of any employees who were present at the time of the incident depicted in the video recording. Mr. Steckler's testimony, without more, was insufficient to properly establish the chain of custody. We conclude the trial court improperly admitted the video recording as substantive evidence. *State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 838 (2000) (holding video recording not properly authenticated, and thus inadmissible, where "[t]he State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming").

(b) Prejudice

[2] Having concluded that the State failed to lay a proper foundation for admission of the video recording as substantive evidence, we review whether the erroneous admission of the videotape prejudiced Defendant. An error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2013). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16 (citation omitted).

If it appears reasonably possible that the jury would have reached a different verdict without the erroneously admitted evidence, the error is reversible. *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001). With Defendant's admission of the larceny, the main issue before the jury was the value of the stolen merchandise. In order to be convicted of felonious larceny, the State was required to prove that Defendant stole

property or merchandise valued *in excess of $1,000*. N.C. Gen. Stat. § 14-72(a) (emphasis added).

Mr. Steckler estimated, solely based on his review of the video, that approximately twenty to thirty Ralph Lauren Polo shirts were taken from the table. Defendant testified that he stole seven shirts and they were not Ralph Lauren Polo shirts.

Mr. Steckler testified that his estimation of the number of shirts taken was based on how the video depicted the stacking of the shirts. The erroneously admitted video recording was the *only* evidence the State offered which tended to establish the total value of the shirts stolen. The State conceded that Mr. Steckler's opinion regarding the value of the stolen merchandise was "based on his review of the video."

We cannot conclude there is no reasonable possibility the jury would have found that the value of the stolen merchandise exceeded $1,000 without Mr. Steckler's estimate of the number and value of shirts stolen. His testimony was based solely upon his review of the erroneously admitted video recording.

The video recording was the only evidence offered to establish the value of the property stolen to support Defendant's conviction of felonious larceny. Since this testimony was the only evidence of value of the stolen goods before the jury, Defendant was prejudiced by the erroneous admission of the video recording as substantive evidence. *Sibley*, 140 N.C. App. at 587, 537 S.E.2d at 838 (holding that admission of videotape was prejudicial where it constituted the only evidence to support Defendant's conviction of possession of a firearm).

B. Lay Opinion Testimony

[3] Defendant also argues the trial court erred by allowing Mr. Steckler to render an opinion before the jury regarding the value of the stolen merchandise, where such opinion was not based on his personal knowledge.

1. Standard of Review

We review the admissibility of lay opinion testimony for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

2. Analysis

Under Rule 701 of the North Carolina Rules of Evidence, witness lay opinion testimony "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." N.C. R. Evid. 701. In allowing lay opinion testimony, we have held: "statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *State v. Davis*, 77 N.C. App. 68, 73, 334 S.E.2d 509, 512 (1985) (citation omitted).

In *Buie*, we held that an officer's narration of a video and his opinions regarding the contents of the video constituted "inadmissible lay opinion testimony that invaded the province of the jury." 194 N.C. App. at 732, 671 S.E.2d at 355. Here, as in *Buie*, Mr. Steckler "offered his opinion, at length, about the events depicted in the surveillance [recording]." The State correctly asserts Mr. Steckler's testimony concerning the price of each of the Ralph Lauren Polo shirts on the date of the incident was based on his own perception because it was "based upon his review of Belk's internal reporting."

However, Mr. Steckler's testimony of the total value of the stolen merchandise was based solely on his review of the surveillance video. The trial court stated in the record: "this witness has testified that he does not know of his own knowledge, independent knowledge what was on that table."

This testimony "was not based on any firsthand knowledge or perception by [Mr. Steckler], but rather solely on [his] viewing of the surveillance video." *Id.* at 733, 671 S.E.2d at 356. The admission of Mr. Steckler's testimony, based upon his review of the video, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise was error.

Having found the trial court erroneously admitted Mr. Steckler's lay opinion testimony, we must determine whether Defendant was prejudiced by this error. N.C. Gen. Stat. § 15A-1443(a); *State v. Wilson*, 121 N.C. App. 720, 723, 468 S.E.2d 475, 478 (1996) ("A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error.").

Defendant argues this error was prejudicial because Mr. Steckler's lay opinion was the only evidence before the jury of the total value of the stolen merchandise to raise the level of his larceny charge from a misdemeanor to a felony. Without the admission of the video recording and Mr. Steckler's opinions regarding the amount and total value of the stolen merchandise, formed while reviewing the video, Defendant has shown a reasonable possibility a different verdict would have resulted.

Without Mr. Steckler's opinion, the State presented no other evidence to establish the value of the stolen property exceeded $1,000, an essential element of felonious larceny. N.C. Gen. Stat. § 14-72(a) (2013). The jury could have reasonably reached a different conclusion about the number of shirts taken, the kind of shirts taken, and the total value of the merchandise stolen. We conclude the admission of this lay opinion testimony, under these facts, was prejudicial to Defendant.

C. Lesser Included Offense

[4] These errors do not require us to remand for a new trial. Defendant admitted at trial he stole shirts from Belk on 1 February 2013, and he is one of the persons depicted in the surveillance video recording. With these admissions, the only contested issue at trial was the total value of the stolen merchandise. All of the essential elements for a conviction of misdemeanor larceny, a lesser included offense of felonious larceny, were established at trial. The trial court also instructed the jury on the lesser included offense of misdemeanor larceny.

We vacate Defendant's conviction of felonious larceny and remand this case for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating judgment of first degree burglary and remanding for entry of judgment on lesser included offense of second degree burglary where evidence insufficient to prove an additional essential element of greater offense); *State v. Hatcher*, __ N.C. App. __, __, 750 S.E.2d 598, 602 (2013) (remanding for resentencing on lesser included offense of involuntary manslaughter where evidence was insufficient to find defendant acted with malice in shooting victim but evidence was sufficient to find defendant unintentionally killed victim); *State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000) (remanding for resentencing on lesser included offense of attempted trafficking by possession where evidence insufficient to establish greater offense of trafficking in marijuana by possession); *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995) (remanding for resentencing on lesser included offenses of conspiracy and solicitation of misdemeanor assault

where evidence was insufficient for one element of greater offenses of conspiracy and solicitation to commit assault with a deadly weapon inflicting serious injury).

D. Conspiracy and Habitual Felon Convictions

[5] The jury also returned a verdict of guilty on Defendant's conspiracy to commit felonious larceny charge. Our review of the record, including Defendant's testimony that he did not steal "the right kind of shirts that [the woman he was with] wanted" and he went to Belk on 1 February 2013 "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on" shows there was sufficient evidence that a jury could return a verdict of guilty on the conspiracy charge. There is no error in Defendant's conviction of conspiracy to commit felonious larceny, and it remains undisturbed. *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (holding that it is not necessary that the unlawful act be completed in order for the State to prove conspiracy). Defendant pled guilty to being an habitual felon. His conviction of having attained habitual felon status is affirmed. These convictions may be taken into consideration by the trial court upon resentencing.

Conclusion

The trial court's judgment is vacated in part and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny. We find no error in Defendant's conspiracy to commit felonious larceny conviction and affirm his habitual felon conviction.

VACATED IN PART AND REMANDED FOR ENTRY OF JUDGMENT AND RESENTENCING FOR LARCENY; NO ERROR IN PART FOR CONSPIRACY; AFFIRMED IN PART FOR HABITUAL FELON.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
VICTOR LEE TURNER

No. COA14-958

Filed 17 February 2015

1. Criminal Law—motion for DNA testing—incorrect theory of law given for dismissal—ruling upheld

The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-degree sexual offense, crime against nature, first-degree kidnapping, and felony possession of cocaine case by denying defendant's motion for DNA testing. Defendant failed to establish a condition precedent to the trial court's authority to grant his motion (*i.e.*, materiality). Even if dismissal was for the wrong reason, the trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gave a wrong or insufficient reason for it.

2. Constitutional Law—failure to consider request for appointment of counsel—failure to meet burden of showing materiality

The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-degree sexual offense, crime against nature, first-degree kidnapping, and felony possession of cocaine case by failing to consider defendant's request for the appointment of counsel pursuant to N.C.G.S. § 15A-269(c). Defendant failed to meet his burden of showing materiality under N.C.G.S. § 15A-269(a)(1), and thus, was not entitled to the appointment of counsel.

Appeal by Defendant from order entered 21 May 2014 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals on 6 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Don Willey for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Victor Lee Turner ("Defendant") appeals from an order denying his motion for postconviction DNA testing pursuant to N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 (2013). Defendant contends that the trial court erred in (1) denying Defendant's motion for DNA testing, and (2) failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c). For the following reasons, we find no error and affirm the trial court's order.

I. Factual & Procedural History

On 13 April 2005, Defendant pled guilty, in accordance with a plea agreement, to robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon, two counts of first degree sexual offense, crime against nature, first degree kidnapping, and felony possession of cocaine. The facts presented as a foundation for the plea tended to show the following.

On the evening of 27 April 2004, Penelope Jones ("Ms. Jones"),[1] an employee of the Days Inn Motel in Gastonia, reported that she had been robbed and sexually assaulted while working as the night shift clerk. Officers from the Gastonia Police Department responded to the scene and, after interviewing Ms. Jones, transported her to the hospital. There, hospital personnel collected DNA specimens from Ms. Jones and placed the specimens into a sexual assault evidence kit. Gastonia Police took custody of the sexual assault evidence kit and placed it into evidence at the police station.

Subsequent investigation led police to identify Defendant as a suspect, and Defendant's DNA was sent to the State Bureau of Investigation ("SBI") for comparison with the DNA collected from the scene and from Ms. Jones' sexual assault evidence kit. A forensic biologist with the SBI analyzed the DNA samples and determined that the DNA profile obtained from Ms. Jones' thigh matched Defendant's DNA profile. The SBI analyst further found that the DNA profile obtained from Ms. Jones' vaginal swab was consistent with a mixture of DNA profiles of Ms. Jones and Defendant. The SBI analyst's report indicates that the DNA profile obtained from Ms. Jones' thigh is approximately "9.62 million trillion times more likely to be observed if it came from [Defendant] than if it came from another unrelated individual in the N.C. Black population."

On 17 May 2004, Defendant was indicted for robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon,

1. The victim's name has been changed to protect her identity.

two counts of first degree sexual offense, crime against nature, and first degree kidnapping. On 13 April 2005, Defendant pled guilty to all crimes for which he was indicted, as well as an unrelated felony possession of cocaine charge. The trial court consolidated the convictions into two judgments and imposed consecutive active terms of imprisonment of 61 to 83 months and 275 to 339 months.

Eight years later, on 17 June 2013, Defendant filed a *pro se* "Motion for DNA Testing" in Gaston County Superior Court, citing N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270. Defendant's motion alleges, *inter alia*, that "the ability to conduct the requested DNA testing is material to defendant[']s defense."

On 21 May 2014, Superior Court Judge Jesse B. Caldwell, III entered an order denying Defendant's motion for DNA testing without hearing. The trial court found that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion[.]" Defendant's written notice of appeal was untimely filed on 16 June 2014; however, Defendant filed a petition for writ of certiorari with this Court on 13 October 2014. We allow Defendant's petition for writ of certiorari to address the underlying legal issues.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of certiorari. "The 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).

III. Standard of Review

"Our standard of review of a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief." *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 354 (2013). Therefore, the lower court's "[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.*

IV. Analysis

On appeal, Defendant presents two arguments of error. First, Defendant argues that the trial court erred in concluding that Defendant's

"Motion for DNA Testing" cited only statutes for pretrial DNA testing, and thus the trial court erred in denying Defendant's motion. Second, Defendant argues that the trial court erred in failing to consider his request for the appointment of counsel, in violation of N.C. Gen. Stat. § 15A-269(c). We address these arguments in turn.

A. Defendant's Motion for DNA Testing

[1] Defendant cites N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 as the legal basis for his entitlement to DNA testing. He errs in part. The only statute relevant here is N.C. Gen. Stat. § 15A-269. The other statutes do not apply to this case. Section 15A-267 pertains to *pretrial* access to DNA samples from the crime scene. Section 15A-268 pertains to the preservation of biological evidence collected at the scene. Defendant's motion does not contend that the evidence in this case has been improperly preserved. Section 15A-270 pertains to post-test procedures after the trial court grants a motion for postconviction DNA testing. Therefore, we need only analyze Defendant's legal claims under N.C. Gen. Stat. § 15A-269, which addresses requests for postconviction DNA testing.

N.C. Gen. Stat. § 15A-269 provides:

> (a) A defendant may make a motion before the trial court . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269 (2013). By the plain language of the statute, the burden is on the defendant to make the required showing under each subsection (1), (2), and (3) before the trial court. As in a proceeding for a postconviction motion for appropriate relief, "the moving party has the burden of proving by the preponderance of the evidence every fact

to support his motion." *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1983). Absent the required showing, the trial court is not statutorily obligated to order postconviction DNA testing. *See State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012); *see also State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 239 (2014) (so holding in the context of pretrial motions for DNA testing).

With regard to the materiality element set forth in section (a)(1), we held in *State v. Gardner* that "where a motion brought under [subsection (a)(1)] provided no indication of how or why the requested DNA testing would be material to the petitioner's defense, the motion was deficient and it was not error to deny the request for the DNA testing." ___ N.C. App. at ___, 742 S.E.2d at 354 (2013); *see also Foster*, ___ N.C. App. at ___, 729 S.E.2d at 120. In *Gardner*, the defendant pled guilty to fifteen counts of statutory rape. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 353. The trial court consolidated judgment and sentenced the defendant to 173 to 217 months imprisonment. *Id.* Eleven years later, the defendant filed a *pro se* motion for postconviction DNA testing. *Id.* In his motion, with regard to the materiality element, the defendant asserted only the conclusory statement that DNA testing would be material to his defense. *Id.* at ___, 742 S.E.2d at 356. This Court upheld the trial court's denial of the defendant's motion for postconviction DNA testing, holding that the defendant's burden of showing materiality requires more than a conclusory statement. *Id.*

This case is indistinguishable from *Gardner*. Here, Defendant's motion for DNA testing contains only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" This is the identical conclusory statement that was used by the defendants in *Gardner* and *Foster*. As in *Gardner* and *Foster*, we hold that Defendant's motion in this case is insufficient to satisfy his burden under N.C. Gen. Stat. § 15A-269. Because we find that Defendant failed to establish a condition precedent to the trial court's authority to grant his motion (*i.e.*, materiality), we do not reach the State's argument that a defendant can never establish materiality for postconviction DNA testing after entering a guilty plea.

While the trial court correctly denied Defendant's motion for DNA testing, we recognize that the trial court's reasoning for reaching that conclusion was somewhat flawed. The trial court's order denying Defendant's motion states that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion." This conclusion is erroneous,

as Defendant's motion clearly cites N.C. Gen. Stat. § 15A-269 as one legal basis for his motion—a statute providing exclusively for requests for postconviction DNA testing. Nevertheless, because the trial court reached the correct conclusion—that Defendant's motion for DNA testing should be denied—we affirm its order. "[E]ven if dismissal was for the wrong reason, a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (internal quotation marks omitted); *see also Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984) ("[A] judgment that is correct must be upheld even if it was entered for the wrong reason.").

Therefore, we affirm the result of the trial court denying Defendant's motion for DNA testing.

B. Defendant's Request for Appointment of Counsel

[2] Defendant's second and final argument on appeal is that the trial court erred in failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), which provides that

> [i]n accordance with rules adopted by the Office of Indigent Defense Services, the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C. Gen. Stat. § 15A-269(c) (2013). Defendant argues that, pursuant to this statute, the trial court should have either appointed him counsel or held a hearing to determine whether DNA testing "may be material to [his] claim of wrongful conviction." However, in *Gardner*, we rejected this identical argument. In *Gardner*, we held that " '[a]ccording to the plain language of the statute, a trial court is required to appoint counsel for a defendant bringing a motion under this section only if the defendant makes a showing (1) of indigence and (2) that the DNA testing is material to defendant's claim that he or she was wrongfully convicted.' " *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355 (quoting *State v. Barts*, 204 N.C. App. 596, 696 S.E.2d 923, 2010 WL 2367302, at *1 (June 15, 2010) (unpublished)). Therefore, an indigent defendant must make a sufficient

showing of materiality before he is entitled to appointment of counsel. *Id.* at ___, 742 S.E.2d at 355 ("[I]n order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).").

Here, because we hold that Defendant has not met his burden of showing materiality under N.C. Gen. Stat. § 15A-269(a)(1), he is not entitled to the appointment of counsel, and the trial court did not err in failing to consider his request for counsel.

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's motion for DNA testing.

Affirmed.

Judges BRYANT and STROUD concur.

MONICA WILSON AND WILSON LAW GROUP PLLC, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF COMMERCE; NC DEPARTMENT OF COMMERCE; DIVISION OF EMPLOYMENT SECURITY; SHARON ALLRED DECKER, IN HER CAPACITY AS SECRETARY OF COMMERCE; AND DALE R. FOLWELL, IN HIS CAPACITY AS ASSISTANT SECRETARY OF EMPLOYMENT SECURITY, DEFENDANTS

No. COA14-975

Filed 17 February 2015

1. Appeal and Error—interlocutory orders—substantial right

A preliminary injunction order compelling the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers affected a substantial right because defendants alleged that the notices contained confidential information and disclosure could result in a loss of federal administrative funding. Therefore, the interlocutory order was immediately appealable.

2. Appeal and Error—mootness—effect of statutory amendment

A statutory amendment did not render plaintiffs' appeal of an interlocutory order moot. The amendment did not provide plaintiffs the relief they sought—the disclosure of daily hearing notices from

the Division of Employment Security prior to the statutory amendment and attorney fees.

3. Injunctions—preliminary—consideration of federal regulations

A preliminary injunction order by the trial court, which compelled the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers, was vacated, and the matter was remanded for findings and conclusions addressing plaintiffs' likelihood of success in light of federal regulations. The trial court was instructed to reconsider the likelihood of substantial injury to plaintiffs in the absence of injunctive relief after determining the issue of likelihood of success.

4. Injunctions—preliminary—effect of statutory amendment passed after order

A preliminary injunction order by the trial court, which compelled the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers, was vacated, and the matter was remanded for findings and conclusions addressing, among other things, the effect of a statutory amendment passed after the trial court issued its order.

Appeal by defendants from order entered 13 March 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 7 January 2015.

Law Office of James C. White, P.C., by James C. White and Michelle M. Walker, for plaintiffs-appellees.

The North Carolina Department of Commerce Division of Employment Security, by Ted Enarson and Jeremy L. Ray, for defendants-appellants.

INMAN, Judge.

Defendants appeal the order granting plaintiffs a preliminary injunction compelling the disclosure of unemployment hearings information. Defendants contend that the interlocutory order is immediately appealable because it involves a substantial right. Furthermore, they allege that the trial court erred in entering the preliminary injunction because plaintiffs are unable to show a likelihood of success on the merits because federal law prohibits the disclosure of the unemployment appeals

hearing notices. In contrast, plaintiffs argue that the appeal should be dismissed not only because it is moot but also because it is interlocutory and does not affect a substantial right. In the alternative, plaintiffs contend that the order should be affirmed because it was decided correctly under the law in effect at the time of the hearing.

After careful review, we vacate the order and remand for the trial court to enter additional findings and conclusions not inconsistent with this opinion.

Factual and Procedural Background

This appeal involves the North Carolina Division of Employment Security's ("DES's") decision to terminate its practice of providing third parties, specifically plaintiffs Monica Wilson ("Ms. Wilson") and her law firm Wilson Law Group PLLC ("WLG") (collectively, Ms. Wilson and WLG are referred to as "plaintiffs"), with daily access to appeals hearing notices about unemployment claimants (the "hearing notices"). The hearing notices listed all scheduled hearings set before DES appeals referees and hearing officers and provided various information about each claimant, including, among other things, the claimant's name, address, phone number, information about her termination, and the last four digits of her social security number. Since 2004, Ms. Wilson and several other attorneys received daily hearing notices from DES in exchange for a monthly fee of $300. Ms. Wilson picked her copy up daily via courier from DES because the notices provided only 14 days notice of the scheduled hearings.

On 26 February 2014, in addition to the day's hearing notices, DES sent Ms. Wilson an undated letter stating:

> Due to security concerns, the process of entering [DES] through the back door of our building near the mail room and outside our security guards [sic] knowledge will no longer be allowed after February 28th. I understand the process of allowing attorneys to pick up appeals hearing notices was established by a former DES General Counsel years ago, but for the safety of our employees and constituents, this will end.

The letter went on to say that the hearing notices would be sent to the law offices "at least three times per month" and that the monthly cost would increase from $300 to $600. The letter was signed by defendant Dale R. Folwell ("Mr. Folwell"), the Assistant Secretary of DES. According to

plaintiffs, this change negatively impacted claimants' ability to obtain counsel which resulted in an unfair advantage for employers.

On 28 February 2014, plaintiffs filed a complaint and request for injunctive relief against DES, Mr. Folwell, the North Carolina Department of Commerce, and Sharon Decker ("Ms. Decker"), the Secretary of Commerce (collectively, these parties are referred to as "defendants") challenging the withholding of daily hearing notices.[1] Plaintiffs claimed that defendants violated Chapter 132 of the General Statutes, commonly referred to as North Carolina's Public Records Act. Plaintiffs alleged that the daily hearing notices constituted public records under N.C. Gen. Stat. § 132-6(a) and that they were entitled to injunctive relief compelling DES to provide copies of the daily hearing notices. Plaintiffs further contended that they were entitled to expedited discovery and to compensation from defendants for their attorneys' fees.

Plaintiffs' request for a temporary restraining order ("TRO") was heard by Judge Michael Morgan on 3 March 2014. After concluding that plaintiffs were likely to prevail on their claim that DES's refusal to provide the hearing notices constituted a violation of section 132-6(a), the trial court issued a TRO and scheduled a preliminary injunction hearing.

On 10 March 2014, plaintiffs' petition for a preliminary injunction came on for hearing before Judge Paul Ridgeway. Counsel for the respective parties submitted affidavits, exhibits, and arguments, and the trial court took the matter under advisement.

On 13 March, the trial court issued an order concluding that plaintiffs had met their burden of proving the likelihood that they would succeed in their public records claim and that injunctive relief was necessary to protect plaintiffs' rights until the matter could be resolved. Furthermore, the trial court required defendants to allow any person access to DES headquarters "for the purposes of picking up copies of hearing notices generated that day in accordance with that person's previous request."

Defendants timely appealed. On 27 May 2014, defendants filed a petition for writ of supersedeas to stay the trial court's 13 March 2014 order pending outcome of the appeal, which petition this Court granted.

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1. During the pendency of this appeal, Sharon Decker resigned her position as Secretary of Commerce. This change does not render plaintiffs' claims moot but may lead to an amendment of the pleadings with regard to acts or omissions after her departure date. *See* N.C. Gen. Stat. § 1A-1, Rule 25(f) (2013) ("When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.").

During the pendency of this appeal, on 25 August 2014, the General Assembly enacted Session Law 2014-117, "An Act to Clarify the Confidentiality of Unemployment Compensation Records," providing that unemployment appeal hearing notices are "confidential information" and are specifically exempt from the Public Records Act.

Analysis

I. Jurisdiction

[1] Initially, we must determine whether the interlocutory preliminary injunction is immediately appealable. *See generally A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (noting that "[a] preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits" and is not immediately appealable absent a showing that it involves a substantial right). This Court has held that interlocutory orders requiring the disclosure of information that an appellant claims constitutes trade secrets, *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003), and orders mandating the disclosure of information that a party asserts is protected by a statutory privilege, *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999), are immediately appealable. We conclude that the preliminary injunction order at issue here similarly affects a substantial right because the order requires the disclosure of information that defendants contend constitutes confidential information under both state and federal law and because defendants allege that this disclosure could result in the loss of federal administrative funding. Consequently, the preliminary injunction is immediately appealable.

II. Mootness

[2] Next, we must address plaintiffs' contention that, in light of the amendment to section 96-4(x), defendants' appeal is moot. Although an amendment to a statute may render an appeal moot, *see Davis v. Zoning Bd. of Adjustment of Union Cnty.*, 41 N.C. App. 579, 582, 255 S.E.2d 444, 446 (1979), statutory amendment does not moot an appeal when the relief sought has not been granted or the questions originally in controversy are still at issue, *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed."). *See also Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003).

Here, N.C. Gen. Stat. 96-4(x) was amended in August 2014 specifically to classify the hearing notices as confidential information and exempt them from the public records disclosure requirements of state law. While the language of the amendment appears to go to the heart of plaintiffs' claims, it is plaintiffs' contention that the amendment substantially changes the statute and therefore is not retroactive. *See Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 682 (2012) (distinguishing between clarifying amendments that apply both to cases brought after the statute's effective dates and to cases pending before the courts when the amendment is adopted and substantive amendments where "the effective date appl[ies]"). Thus, plaintiffs' position is still that, based on the 2013 version of section 96-4(x), at least with respect to hearings scheduled prior to the statutory amendment, they were entitled to disclosure of daily hearing notices and to recover their attorneys' fees incurred in enforcing their right. The statutory amendment does not provide plaintiffs the relief they sought: compelled disclosure of the hearing notices prior to the August 2014 amendment and attorneys' fees for enforcing that right. Accordingly, the amendment of N.C. Gen. Stat. § 96-4(x) has not mooted the appeal.

III. Standard of Review

Our standard of review from a preliminary injunction is "essentially *de novo*." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004). However, the trial court's ruling is "presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Id.* Generally, on appeal from an order granting or denying a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, 308 N.C. at 402, 302 S.E.2d at 760. However, the Court may vacate an injunctive order and remand to the trial court for entry of additional findings where the order's findings fail to make all necessary determinations. *See N. Star Mgmt. of Am., LLC v. Sedlacek*, __ N.C. App. __, __, 762 S.E.2d 357, 363 (2014) (vacating the trial court's preliminary injunction order and remanding for further proceedings because the trial court failed to make findings as to the reasonableness of the geographic scope and prohibited activities of a non-compete agreement); *Conrad v. Jones*, 31 N.C. App. 75, 79, 228 S.E.2d 618, 620 (1976) (vacating a permanent injunction and remanding for the trial court to make findings as to the plaintiff's interest in the property allegedly being trespassed upon).

IV. Analysis

[3] A preliminary injunction is "an extraordinary measure" and will only issue:

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Ridge Cmty. Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (alteration in original). Pursuant to Rule 65(d), an order granting injunctive relief must, among other things, "set forth the reasons for its issuance [and] shall be specific in terms[.]" N.C. Gen. Stat. § 1A-1, Rule 65(d) (2013). This Court has interpreted Rule 65(d) to require the trial court to "adequately set forth findings that succinctly state[] the reasons for the issuance of the injunction[.]" *Staton v. Russell*, 151 N.C. App. 1, 12, 565 S.E.2d 103, 109-110 (2002). With regard to plaintiffs' likelihood of success on the merits, here, the trial court concluded that "[p]laintiffs have met their burden, for the purposes of this Preliminary Injunction, of proving that there is probable cause the [p]laintiffs will be able to established [sic] their asserted rights under the North Carolina Public Records Law at the trial of this matter." Defendants contend that this conclusion is erroneous because: (1) under the 2013 version of N.C. Gen. Stat. § 96-4(x), any disclosure of confidential unemployment information must be consistent with federal law; (2) federal regulations—specifically, 20 C.F.R. §§ 603.2(a) and 603.4(b)—prohibit the disclosure of the hearing notices because they contain the name of the employee and employer, addresses, and the reasons for the claim; (3) the hearing notices do not fall within any exception to the federal regulations' general prohibition on disclosure of confidential information; and (4) the United States Department of Labor intended the federal regulations to set the minimum requirements on the confidentiality of unemployment information.

At the preliminary injunction hearing, defendants argued that the disclosure of the hearing notices violated federal law and that this violation could "impact [the] grant money that [DES] use[s]" to administer the appeal hearing system. To support their contention, defendants introduced, and the trial court allowed for the purpose of "explaining what [DES] did upon receipt of [the] letter," a letter from the United States Department of Labor claiming that the practice of selling the hearing information constitutes "a failure to comply substantially with [f]ederal law." Specifically, the letter asserts that the information contained in the hearing notices is confidential and that federal law only permits the disclosure of appeals records and decisions when they are "final."

In addition to involving federal regulations, plaintiffs' claims and DES' defenses require interpretation of two state statutes. North

Carolina's Public Records Act, specifically, section 132-6, requires that "in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Act must be made available for public inspection[,]" *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992). The second statute, N.C. Gen. Stat. § 96-4, describes the administration, powers, and duties of DES and is the statute amended since the trial court's issuance of the preliminary injunction at issue here.

Prior to its amendment, N.C. Gen. Stat. § 96-4(x) required that any disclosure of unemployment information be consistent with 20 C.F.R. Part 603, the federal regulations concerning the confidentiality of unemployment insurance information. N.C. Gen. Stat. § 132-6 compels disclosure of public records when there is no statutory exception or exemption. *News & Observer*, 330 N.C. at 486, 412 S.E.2d at 19. Accordingly, to determine whether plaintiffs would likely succeed in their claims, the trial court would necessarily have to consider how the federal regulations affect a person's right to disclosure of the hearing notices under the Public Records Act. Here, the trial court's order does not mention the federal regulations and their bearing, if any, on plaintiffs' public records claim. Such analysis would be necessary before finding whether plaintiffs had a likelihood of success on the merits. Given the absence of any findings on this issue, we must vacate the order and remand for the trial court to make the necessary findings and conclusions addressing plaintiffs' likelihood of success in light of the applicable federal regulations.

In addition to showing a likelihood of success on the merits, a party seeking a preliminary injunction must show either that in the absence of injunctive relief, plaintiffs would suffer an irreparable injury or that injunctive relief is necessary to protect rights that cannot be enforced later, *A.E.P.*, 308 N.C. at 405, 302 S.E.2d at 761-62 (noting that the second element may be satisfied by either finding). In this case, the trial court found that because plaintiffs were entitled to receive the hearing notices on a daily basis, injunctive relief was necessary to protect that right. However, since the trial court must enter additional findings and conclusions as to the first element, this second finding may change. Consequently, on remand, the trial court should make sufficient findings as to this second element based on its analysis of the interplay between state and federal law.[2]

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2. Because the trial court's order was not based on a finding of irreparable harm and defendants do not put forth any argument on this issue on appeal, we do not address whether plaintiffs would be able to establish irreparable harm in support of their request for injunctive relief.

[4] In addition to making the necessary findings and conclusions discussed above, the trial court also will have to consider the amendment of N.C. Gen. Stat. § 96-4(x) in August 2014, after the trial court's order but before this appeal was heard. During that time, the General Assembly passed Session Law 2014-117, "An Act to Clarify the Confidentiality of Unemployment Compensation Records." Prior to this change, section 96-4(x) (2013), which was in effect at the time of plaintiffs' hearing, only required that the disclosure of unemployment information be consistent with 20 C.F.R. Part 603. However, the 2013 version of section 96-4(x) does not specifically exempt unemployment information from North Carolina's Public Records Act nor does it classify that information as "confidential information." The statute was "clarified"[3] in August 2014 to provide that unemployment compensation information constitutes "confidential information" and is exempt from the public records disclosure requirements.

Thus, on remand, the trial court also must determine whether the amendment to N.C. Gen. Stat. § 96-4(x) changed the substance of the statute or merely clarified it, and in turn, whether the amendment applies to plaintiffs' claims for the disclosure of hearing notices created prior to the amendment. *See Ray*, 366 N.C. at 9, 727 S.E.2d at 681 (distinguishing between amendments that change the substance of a statute and those that clarify a statute, and noting that clarifying amendments "apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment").

If the trial court concludes that the amendment is substantive, the trial court's consideration on the merits of plaintiffs' claims will be twofold. First, whether plaintiffs are entitled to a preliminary injunction for the hearing notices issued before 25 August 2014 will depend on the trial court's analysis discussed above and must include findings and conclusions regarding how the federal regulations affect the disclosure of unemployment information. Second, to determine whether plaintiffs are entitled to a preliminary injunction for the hearing notices issued on 25 August 2014 and afterwards, the trial court must take into consideration the new statutory language of section 96-4(x).

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3. We note that we use the term "clarified" in quotation marks because the General Assembly titled the session law "An Act to Clarify." We make no determination at this time of whether the amendment constituted a clarifying amendment or a substantial change to the statute, leaving that analysis for the trial court in the first instance.

In contrast, if the trial court concludes that the amendment to N.C. Gen. Stat. § 96-4(x) is clarifying, the new version of the statute would apply to plaintiffs' requests for the hearing notices regardless of the fact that the amendment occurred after plaintiffs' claim arose. In other words, the amendment may be used in interpreting the earlier statute. *See Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993). For purposes of remand, this means that if the trial court concludes that the amendment is clarifying, it should apply the statute as amended to determine whether plaintiffs are able to show a likelihood of success on their claims that defendants' refusal to provide access to the hearing notices violates N.C. Gen. Stat. § 132-6(a).

Conclusion

Based on the foregoing reasons, we vacate the trial court's order granting plaintiffs a preliminary injunction and remand for the trial court to enter necessary findings and conclusions in accordance with this opinion.

VACATED AND REMANDED.

Judges STEELMAN and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 FEBRUARY 2015)

ATKINSON v. REIKOWSKY No. 14-624	Surry (11CVS575)	Affirmed
BENNETT v. BENNETT No. 14-548	Catawba (13CVD1469)	Dismissed
BLAIR v. BLAIR No. 14-887	Buncombe (13CVD3615)	Dismissed
BUCK v. BUCK No. 14-279	Rowan (11CVS1361)	No Error
CURRY v. TAYLOR No. 14-869	Nash (03CVD2117)	Vacated and Remanded
GREEN v. CLARKE No. 14-969	Wake (13CVS8399)	Dismissed
HOMETRUST BANK v. MURPHY No. 14-734	Haywood (12CVS591)	Affirmed
IN RE: G.P. No. 14-857	Cumberland (10JT229) (10JT230) (10JT231) (11JT669)	Affirmed
IN RE J.T.N. No. 14-827	Johnston (09JT143)	Affirmed
IN RE R.D.L. No. 14-781-2	Robeson (10JT206)	Vacated
IN RE S.G. No. 14-824	Cumberland (12JA417) (12JA418)	Affirmed
IN RE V.A.P. No. 14-1007	Guilford (12JT55)	Affirmed
KEDAR v. PATEL No. 14-735	Mecklenburg (13CVS9860)	Dismissed
LEAZER v. LEAZER No. 14-778	Rowan (13CVD1217)	Affirmed

MARTIN v. MOREAU No. 14-811	Wake (11CVS15808)	Affirmed
PIRO v. PIRO No. 14-962	Mecklenburg (06CVD12628)	Affirmed in part, Vacated in part and Remanded
RIBELIN v. CREEL No. 14-643	Rowan (06CVD1646)	Affirmed and Remanded
ROBERSON v. ROBERSON No. 14-920	Pitt (12CVD730)	Vacated and Remanded
SHOWCASE CONSTR. CO. v. PROPS. OF S. WAKE, LLC No. 14-644	Cumberland (13CVS6848)	Affirmed
SIMS v. BECKNELL No. 14-936	Mecklenburg (14CVD8403)	VACATED and DISMISSED
STATE v. BAKER No. 14-260	Davidson (10CRS55741)	No Error
STATE v. BAKER No. 14-501	Mecklenburg (12CRS201355-61)	No prejudicial error.
STATE v. BARNES No. 14-863	Mecklenburg (11CRS235347) (11CRS235349)	No Error
STATE v. BLACKWELL No. 14-865	Person (12CRS297-99) (12CRS50170-72)	Affirmed
STATE v. CADE No. 14-785	Buncombe (08CRS59746-47) (08CRS711-713)	Affirmed
STATE v. DARCELIEN No. 14-582	Wake (11CRS12449)	No Error
STATE v. DILLS No. 14-906	Moore (12CRS1942-43)	Affirmed
STATE v. FOXWORTH No. 14-693	Guilford (09CRS72211)	Affirmed in part and Reversed in part and Vacated in part and Remanded.
STATE v. FRIDAY No. 14-529	Alamance (09CRS55360)	Affirmed

STATE v. McCRAE No. 14-790	Cabarrus (10CRS54559)	No Error
STATE v. O'NEIL No. 14-472	McDowell (13CR50033)	Affirmed
STATE v. PUGH No. 14-930	Wake (05CRS115060)	Affirmed
STATE v. SEGARRO No. 14-746	New Hanover (11CRS51860)	No Error
STATE v. SMITH No. 14-839	Wake (12CRS211960)	No Error
STATE v. THOMAS No. 14-713	Union (12CRS2038) (12CRS51101-02)	No Error
STATE v. WALSTON No. 12-1377-2	Dare (09CRS85-91)	Other
STATE v. WATKINS-PRICE No. 14-946	Pender (12CRS51464) (13CRS1531-1532)	Affirmed
STATE v. WHITE No. 14-797	Columbus (10CRS51833)	No Error
STATE v. WHITEHEAD No. 14-737	Craven (01CRS53730)	Affirmed
STATE v. WILSON No. 14-813	Mecklenburg (11CRS247467-68) (11CRS247473)	No Error
STATE v. WOODS No. 14-677	Buncombe (11CRS56562)	No Error
STATE v. YOUNG No. 14-989	Cabarrus (11CRS2421) (11CRS3027)	NO PREJUDICAL ERROR
WILLIAMS v. LIVINGSTONE COLL., INC. No. 14-696	Rowan (13CVS2791)	Affirmed
WILLIAMSON v. WILLIAMSON No. 14-838	Catawba (07CVD3914)	Dismissed

GONZALEZ v. TIDY MAIDS, INC.

[239 N.C. App. 469 (2015)]

PRISILA GONZALEZ, EMPLOYEE, PLAINTIFF
v.
TIDY MAIDS, INC., EMPLOYER
ERIE INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA14-18

Filed 3 March 2015

1. Workers' Compensation—findings of fact—timeliness of appeal from administrative order

In an appeal of the order and award of the full Industrial Commission, the Court of Appeals affirmed the Commission's determination that plaintiff timely appealed the administrative order approving defendants' request to terminate payment of benefits. There was competent evidence to support the Commission's finding regarding the date that plaintiff received the administrative order.

2. Workers' Compensation—claim related to compensable injuries—presumption in favor of plaintiff

The full Industrial Commission did not err by concluding that the treatment sought by plaintiff for her back pain was related to her compensable injuries. Because defendants had paid plaintiff and never contested her claim, plaintiff was entitled to the presumption that her current claim was related to her compensable injuries. Defendants presented no evidence that rebutted the presumption.

3. Workers' Compensation—conclusions of law—disability and job search

In an appeal of the order and award of the full Industrial Commission, the Court of Appeals affirmed the Commission's conclusions of law regarding plaintiff's disability. Competent evidence supported the Commission's findings that plaintiff was under partial disability, had made a reasonable but unsuccessful job search, and later became totally disabled as a result of the compensable injury.

Appeal by defendants from opinion and award entered 18 October 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 May 2014.

The Bricio Law Firm, P.L.L.C., by Francisco J. Bricio, for plaintiff-appellee.

McAngus, Goudelock & Courie, PLLC, by Laura Carter and Cassie M. Keen, for defendants-appellants.

GEER, Judge.

Defendants Tidy Maids, Inc. and its workers' compensation insurance carrier, Erie Insurance Group, appeal an opinion and award of the Full Commission reinstating disability compensation to plaintiff Prisila Gonzalez retroactively from 1 August 2011 and granting plaintiff's request for compensation for medical treatment related to pain in her back and her shoulder. Defendants primarily argue that they successfully rebutted the evidentiary presumption under *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), which provides that a plaintiff is entitled to a presumption that her current discomfort and related medical treatment are directly related to her compensable injuries ("the *Parsons* presumption").

Because, however, defendants presented no evidence suggesting that the pain and discomfort for which plaintiff now seeks compensation is unrelated to injuries the defendants accepted as compensable in 2010, we hold that defendants have failed to rebut the *Parsons* presumption. We find defendants' remaining arguments equally unpersuasive and affirm the opinion and award.

Facts

The following facts are undisputed. Plaintiff was born 13 January 1963 and has a sixth grade education received in Mexico. She speaks only a little English. Prior to her employment as a housekeeper with Tidy Maids, plaintiff worked as a housekeeper in hotels, homes, and offices and in the kitchen of a Bojangles.

On 10 September 2010, plaintiff was involved in a car accident while traveling from Tidy Maids' office to a job site. She sustained injuries to her head, neck, back, and right shoulder, and she suffered headaches and vertigo. On 29 September 2010, plaintiff gave notice of her injuries to her employer by filing a Form 18 "Notice of Accident." On 13 October 2010, defendants filed a Form 63, "Notice to Employee of Payment of Compensation Without Prejudice." Defendants commenced paying compensation at $155.00 per week beginning 13 September 2010. Plaintiff has not worked since the accident.

On 1 August 2011, defendants filed a Form 24, "Application to Terminate or Suspend Payment of Compensation," alleging that "plaintiff

is no longer disabled . . . as she has no restrictions on her ability to work at this time." On 7 November 2011, a special deputy commissioner granted defendants' Form 24 request, and defendants immediately ceased payments to plaintiff. On 10 January 2012, plaintiff filed a Form 33, "Request that Claim be Assigned for Hearing." On 19 January 2012, defendants filed a Form 33R, "Response to Request that Claim be Assigned for Hearing," arguing that plaintiff's claim should not be heard because the Form 33 request was untimely. Nonetheless, plaintiff's claim was heard before a deputy commissioner on 3 April 2012.

On 16 July 2012, plaintiff filed a Form 23, "Application for Reinstatement of Disability Compensation." The deputy commissioner granted defendants' Form 24 request and denied plaintiff's Form 23 request in an opinion and award filed 15 February 2013. Plaintiff appealed the deputy commissioner's decision to the Full Commission.

The Full Commission entered an opinion and award reversing the deputy commissioner's decision and entering an award in plaintiff's favor. The Full Commission's opinion and award made the following findings of fact. Plaintiff was injured in a car accident "while on the job" for defendant Tidy Maids on 10 September 2010.

Plaintiff first sought treatment, in September 2010, from Dr. Jeffrey Gerdes, a chiropractor, for neck pain, right shoulder pain with numbness to the right elbow, mid and low back pain, and headaches. Subsequently, in October 2010, she began receiving treatment from Dr. Kapil Rawal, a neurologist, upon referral from the defendant carrier. At that time, plaintiff complained of neck pain, back pain, pain from the shoulder down into the right arm, pain in the right leg, and headaches associated with stabbing pain, nausea, and vomiting on occasions. Dr. Rawal diagnosed plaintiff with neck sprain/strain, lumbar sprain/strain, post traumatic headache, dizziness, insomnia, and thoracic sprain/strain.

On 13 October 2010, defendants filed a Form 63 and began making payments to plaintiff without prejudice for the September 2010 accident, acknowledging that plaintiff's injuries included " 'neck, back, headache, vertigo, [and] rt [sic] shoulder.' " However, defendants subsequently failed to file a Form 61 denying the compensability of plaintiff's claim. As a result, the Commission found, plaintiff's claim "is deemed accepted."

Between 13 October 2010 and 1 August 2011, plaintiff not only saw Dr. Rawal for her back pain, but also, in May 2011, she was evaluated by Dr. Gary Smoot at Cary Orthopedics for lumbar pain. Dr. Smoot performed a physical exam and diagnosed plaintiff as having lumbar sprain

and possible discogenic pain. Dr. Rawal kept plaintiff out of work from 27 October 2010 to mid-December 2010, and then from 19 January 2011 to mid-February 2011.

For problems with her shoulder, plaintiff received treatment from Dr. Brian Szura beginning in March 2011. Dr. Szura diagnosed plaintiff with having a "right rotator cuff strain with a possible tear[,]" as well as "some AC joint arthritis." Dr. Szura restricted plaintiff's use of her right arm but, in June 2011, he noted "maximum medical improvement" and released her to full duty work with respect to her shoulder.

On 12 May 2011, when plaintiff saw Dr. Rawal, he took her out of work for another week and restricted her to light duty work of "lifting no more than five (5) pounds . . . for a period of six (6) weeks[,]" beginning 23 May 2011. Dr. Rawal testified at his deposition that these light duty work restrictions were not intended to be indefinite.

Dr. Smoot did not treat plaintiff or impose work restrictions because he did not have enough information " 'to figure out what was going on.' " Although plaintiff went to a follow-up appointment with Dr. Smoot on 8 June 2011, plaintiff and a nurse had a disagreement, and plaintiff left without seeing Dr. Smoot. Plaintiff did not see Dr. Smoot again after that appointment.

Plaintiff saw Dr. Rawal again on 10 May 2012, complaining of "severe low back pain, headaches, and right arm pain." Dr. Rawal diagnosed plaintiff with "lumbar sprain/strain, neck sprain/strain, post-traumatic stress headache, and dizziness" and kept plaintiff out of work for at least six weeks. The Full Commission further found that Dr. Rawal had testified that plaintiff's continuing back pain was caused by one of three possible conditions: "(1) the L1-2 floating disc herniation, (2) the L5-S1 disc bulge, or (3) the back sprain." In addition, the Commission found, Dr. Rawal expressed his opinion that given the mechanism of injury and findings from an MRI scan, there were likely two underlying pathologies of the pain: (1) the lumbar sprain, and (2) the radiculopathy because of an eccentric disc bulge.

The Commission then concluded that plaintiff was entitled, under *Parsons*, to a presumption that her current back and shoulder conditions were causally related to her compensable injury. The Commission further concluded that defendants had failed to offer any competent medical evidence that plaintiff's present back and shoulder pain were unrelated to her compensable injury and, therefore, defendants had failed to rebut the presumption that her current conditions were related to her compensable accident. Accordingly, the Commission determined

that plaintiff was entitled to further medical treatment for her current back and shoulder conditions. With respect to plaintiff's right shoulder, the Commission also granted plaintiff's request for a second opinion.

Further, the Full Commission found sufficient evidence under *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), that plaintiff was disabled from 1 August 2011 through 9 May 2012 and that "Plaintiff . . . conducted a reasonable job search but was unsuccessful in finding employment . . . ." According to the Commission, plaintiff also met her burden under *Russell* of showing that she had been disabled since 10 May 2012 because "Plaintiff has been completely written out of work since May 10, 2012 by Dr. Rawal." The Commission noted further that "Defendants offered no evidence to contradict Dr. Rawal's opinion that Plaintiff was unable to work as of May 10, 2012."

The Full Commission, therefore, concluded (1) that the special deputy commissioner had improvidently granted defendants' Form 24 request, (2) that plaintiff was entitled "to receive medical treatment [for her current conditions] that may reasonably be required to effect a cure, give relief, or tend to lessen Plaintiff's period of disability[,]" (3) that plaintiff was "entitled to a second opinion regarding her ongoing right shoulder pain[,]" and (4) that plaintiff was entitled to reinstatement of her disability compensation, including compensation from 1 August 2011 and continuing until plaintiff returns to work or further order of the Commission. Defendants timely appealed to this Court.

Discussion

"'Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.'" *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), and therefore "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence 'notwithstanding evidence that might support a contrary finding.'" *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred*, ___ N.C. App. at

___, 743 S.E.2d at 51. "The Commission's conclusions of law are reviewable *de novo*." *Id.* at ___, 743 S.E.2d at 51.

I

[1] We first address defendants' contention that the Full Commission erred in determining that plaintiff timely appealed the special deputy commissioner's administrative order approving defendants' Form 24 request to terminate payment of benefits. The Full Commission found that plaintiff actually received the administrative order on 10 January 2012 and, therefore, her appeal, filed the same date, was timely. Although the finding of fact regarding the date plaintiff received the order is included within a conclusion of law, we still treat it as a finding of fact. *See Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925 (2001) ("The Commission's designation of a finding as either a 'finding of fact' or a 'conclusion of law' is not conclusive.").

Defendants argue that this finding of fact is erroneous because it "is based solely on plaintiff's testimony" and disregards defendants' evidence of a printout of the United States Postal Service website showing that the parcel was delivered to plaintiff's address in August 2011. However, the Commission expressly acknowledged that the Commission file included a U.S. Postal Service receipt and tracking number and that a printout from the web site of the Postal Service showed delivery of the mail piece in zip code 27511 in August 2011. Nonetheless, the Commission further found that a copy of the green card -- which was missing from the Commission file -- would have shown "the individual who received the mail with the tracking number identified, the address where it was delivered, and the date delivered." The Commission further found that defendants did not receive a copy of the administrative decision and order until 7 November 2011.

The Commission then concluded that in the absence of a green card and given the date defendants received the decision, "insufficient evidence exists to determine if then *Pro Se* Plaintiff received the Order" prior to 10 January 2012, the date when the Commission emailed the decision to plaintiff's newly-retained counsel. In arguing that the Commission should have concluded that plaintiff's appeal was untimely based on the Postal Service's website, defendants have cited no authority suggesting that the Postal Service tracking printout is conclusive regarding a party's receipt of an order.

Since plaintiff's evidence is competent to support the Commission's finding that she received the administrative order on 10 January 2012, and only the Commission may determine the weight and credibility of

the evidence, we are compelled to uphold the Commission's determination that plaintiff's appeal was timely. *See Gonzalez v. Worrell*, 221 N.C. App. 351, 355, 728 S.E.2d 13, 16 (2012) (concluding that, although delivery status based on tracking number showed that notice of insurance policy cancellation was delivered, lack of signed green card from intended recipient supported conclusion that service of notice was not completed), *aff'd per curiam*, 366 N.C. 501, 739 S.E.2d 552 (2013); *Goodson v. Goodson*, 145 N.C. App. 356, 363, 551 S.E.2d 200, 205 (2001) (holding party's testimony that she did not receive notice of judicial sale was "competent evidence to support [the trial court's] finding that notice was not given").

II

[2] Defendants next argue that the Full Commission erred in concluding that defendants did not successfully rebut the presumption that plaintiff's current condition is directly related to the compensable injuries she suffered in the September 2010 accident. Defendants do not now contest the compensability of the September 2010 accident. Therefore, "plaintiff was entitled to seek compensation for such injuries as resulted from that accident." *Erickson v. Lear Siegler*, 195 N.C. App. 513, 521, 672 S.E.2d 772, 777 (2009). The Commission noted that the parties stipulated that because defendants filed a Form 63 and commenced payment of compensation without prejudice, but subsequently failed to file a Form 61 denying compensability, they accepted plaintiff's claim for "neck, back, headache, vertigo, rt [sic] shoulder" injuries.

In *Parsons*, this Court explained that once a plaintiff establishes her injuries are compensable, "[l]ogically, defendants [then] have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." 126 N.C. App. at 542, 485 S.E.2d at 869. Therefore, "[i]f additional medical treatment [for the compensable injury] is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury." *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999).

It is unclear from defendants' brief whether they contend that the *Parsons* presumption does not apply when a defendant is deemed to

have accepted a claim. However, in an unpublished decision, *Williams v. Law Cos. Grp.*, 204 N.C. App. 212, 694 S.E.2d 522, 2010 WL 1957919, at *11, 2010 N.C. App. LEXIS 829, at *29-30 (2010), this Court applied the *Parsons* presumption when, as in this case, a defendant employer filed a Form 63 following the plaintiff's accident but failed to contest the compensability of the plaintiff's injuries within the 90-day statutory period set forth in N.C. Gen. Stat. § 97-18(d) (2009). *Williams* concluded that under those circumstances, the plaintiff "was entitled to a presumption that her medical treatment was related to her compensable injury." *Id.*, 2010 WL 1957919, at *11, 2010 N.C. App. LEXIS 829, at *30.

Although *Williams* is not a published decision, we find its reasoning persuasive and hold that when, as here, a defendant pays a plaintiff pursuant to a Form 63 and never denies the plaintiff's claim, the plaintiff is entitled to rely upon the *Parsons* presumption. Consequently, because defendants in this case filed a Form 63 acknowledging injuries to plaintiff's "neck, back, . . . [and] r[igh]t shoulder" and failed to timely contest the compensability of any portion of plaintiff's claim, the Commission correctly concluded that the *Parsons* presumption applied with respect to those injuries.

Defendants, therefore, bore the burden of showing that plaintiff's current claims regarding her back and right shoulder are not related to her compensable injuries. *See Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136 n.1, 620 S.E.2d 288, 293 n.1 (2005) ("We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.").

Defendants argue that they "rebutted any presumption of compensability with regard to medical treatment for plaintiff's back and shoulder" because "[n]one of plaintiff's physicians provided an opinion to a reasonable degree of medical certainty, or even to a preponderance of the evidence, that plaintiff's current pain and restrictions are causally related to the automobile accident of September 10, 2010." With respect to plaintiff's back pain, they point to testimony from Dr. Rawal that they contend merely established a "temporal connection between [the] accident and the onset of symptoms [which] is not competent evidence of causation[.]" *See Cooper v. BHT Enters.*, 195 N.C. App. 363, 372, 672 S.E.2d 748, 756 (2009) (explaining evidence showing at most that onset of symptoms coincided with accident is " 'inconclusive as to [the] proximate cause' " of a controversial medical condition (quoting *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000))).

However, defendants' argument is simply a claim that they have rebutted the *Parsons* presumption -- which relieves a plaintiff of the burden of proving causation -- by showing that plaintiff has failed to prove causation. Since defendants accepted as compensable plaintiffs' claim for injuries to her back, under *Parsons*, medical causation is presumed, and defendants bore the burden of showing that plaintiff's current back complaints were unrelated to her initial back injury. Defendants misconstrue their burden by overlooking the reasoning behind the *Parsons* presumption, which is to avoid the injustice of requiring a plaintiff to reprove the causation of a compensable injury each time she seeks additional treatment for it. 126 N.C. App. at 542, 485 S.E.2d at 869.

Because the *Parsons* presumption applies to plaintiff's current pain here, defendants needed to present "expert testimony or affirmative medical evidence tending to show that the treatment [plaintiff seeks] is not directly related to the compensable injury[.]" *Perez*, 174 N.C. App. at 137, 620 S.E.2d at 293. The testimony from Dr. Rawal that defendants point to, at best, merely establishes that plaintiff's current symptoms might not be related to her compensable injuries. Further, in their own brief, defendants point to testimony from Dr. Rawal " '[t]hat the pain syndrome that [plaintiff] is suffering with *is a consequence of the trauma* [*of the September 2010 accident*].' " (Emphasis added.)

The Commission properly concluded that this evidence is insufficient to rebut the *Parsons* presumption. *See McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 559, 703 S.E.2d 471, 475 (2010) ("[Doctor's] statements as to 'some correlation' do not satisfy defendants' burden of showing 'that the medical treatment is not directly related to the compensable injury.' " (quoting *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292)); *Perez*, 174 N.C. App. at 137, 620 S.E.2d at 293, 294 (holding defendant failed to rebut *Parsons* presumption when it relied upon either "equivocal" medical testimony or medical testimony that "it was impossible to say" plaintiff's current back problems were related to compensable injuries from original accident, and medical expert admitted to possibility that current symptoms were related to original injuries).

Nonetheless, defendants contend that they rebutted the *Parsons* presumption with testimony from Dr. Smoot who, defendants assert, testified that plaintiff's current pain has a psychological cause. However, even assuming without deciding that this testimony could adequately show that plaintiff's current symptoms are unrelated to her original compensable back injuries, the Commission discredited this testimony, as it was entitled to do. Dr. Smoot admitted in his deposition that he did not have all of plaintiff's medical records and that he only saw plaintiff one

time, whereas Dr. Rawal saw plaintiff multiple times. The Commission noted that Dr. Smoot testified that he needed additional information including information on plaintiff's medications and previous medical records and that he did not assign any work restriction because " 'he didn't have enough information to go on to figure out what was going on.' "

Because the question of Dr. Smoot's credibility was a question solely for the Commission to decide, and because defendants have otherwise failed to point to any evidence showing that plaintiff's current back pain is unrelated to the compensable injuries from her September 2010 car accident, we hold that the Full Commission did not err in concluding that the treatment plaintiff seeks for her current back pain is directly related to her compensable injuries.

We also note that while defendants purport to challenge the Commission's presumption that plaintiff's current shoulder pain is causally related to her compensable injuries, defendants have pointed to no record evidence whatsoever in support of this contention. In this regard, we conclude that defendants have failed to meet their burden on appeal challenging this finding. *See State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994) ("[I]t is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal.").

III

[3] Defendants next challenge the Commission's conclusions regarding plaintiff's disability. Establishing disability is a separate question from establishing the compensability of an injury and "admitting compensability and liability . . . does not create a presumption of continuing disability[.]" *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001).

Under *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted), an employee can establish disability in one of four ways:

> (1) the production of medical evidence that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [s]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) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

Defendants first contend that the Commission erred in concluding that plaintiff met her burden of proving that she was disabled from 1 August 2011 to 9 May 2012 through production of evidence under the second *Russell* option. The Commission determined that plaintiff "conducted a reasonable job search but was unsuccessful in finding employment from August 1, 2011 through May 9, 2012 despite being under a five (5) pound lifting restriction by Dr. Rawal."

Defendants first argue that the "greater weight of the evidence" established that plaintiff had been released to return to full duty work by 4 July 2011. Although Dr. Rawal, on 12 May 2011, had limited plaintiff to light duty work with a five pound lifting restriction and no pushing, pulling, bending, or stooping, defendants point out that this restriction was only supposed to last six weeks, and, further, the Commission found that Dr. Rawal did not intend for his restrictions to be indefinite. Plaintiff did not, however, return to see Dr. Rawal until 10 May 2012, so he never actually lifted the work restriction. Further, Dr. Rawal testified that when he saw defendant again on 10 May 2012, his clinical findings were substantially unchanged from when he saw plaintiff on 12 May 2011. Dr. Rawal expressed his opinion that it would have been unlikely that between May 2011 and May 2012 plaintiff would have been without work restrictions. This evidence supports the Commission's finding that plaintiff was "under a five (5) pound lifting restriction by Dr. Rawal" during the 1 August 2011 to 9 May 2012 time period. Thus, while plaintiff was capable of some work, she was under work restrictions.

Defendants next challenge the Commission's conclusion that plaintiff showed that she had, after a reasonable effort on her part, been unsuccessful in her effort to obtain employment, as required by the second *Russell* method of proof. The Commission, in support of its determination, relied upon plaintiff's testimony that notwithstanding her ongoing pain, she had completed multiple job applications with several employers including, but not limited to, Bojangles, Burger King, Chick-fil-a, Life Centers (a nursing home), Comfort Suites, Golden Corral, and Netcom Hospitality, but she had not received any job offers. Defendants acknowledge that plaintiff's evidence indicates that she applied for 17 positions with 14 employers between 20 December 2011 and 24 March 2012.

Defendants argue that given plaintiff's evidence, the Commission was required to conclude that she had not made a reasonable effort to

try to find employment. However, no general rule exists for determining the reasonableness of an injured employee's job search. Rather, "[t]he Commission [is] free to decide" whether an employee "made a reasonable effort to obtain employment under the second *Russell* option" so long as the determination is supported by competent evidence. *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006). The Commission was free to find that plaintiff's job search was reasonable based on the Commission's finding that plaintiff submitted multiple job applications despite ongoing pain.

Defendants nonetheless contend the holding in *Russell* is controlling. In *Russell*, the Commission concluded that the plaintiff had *not* made a reasonable effort to find employment even though the plaintiff testified "that he made seven or eight job applications and was refused employment in each instance." 108 N.C. App. at 766, 425 S.E.2d at 457. However, the Commission in *Russell* also found the plaintiff's testimony "not credible on the grounds that *Russell* 'was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied[.]' " *Id.* Here, on the other hand, the Commission found plaintiff's testimony concerning her job applications credible.

Defendants also contend, citing *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 587 S.E.2d 440 (2003), that plaintiff was required to contact two potential employers per week over the 39 weeks she did not work from 1 August 2011 to 9 May 2012, which would result in a required total of 78 possible job contacts. In *Hooker*, the plaintiff testified that the North Carolina Employment Security Commission ("NCESC") required her to "conduct at least two in-person contacts with different employers on different days each week." *Id.* at 117, 587 S.E.2d at 445. This Court upheld the Commission's determination that the plaintiff had made reasonable but unsuccessful efforts to obtain employment because she complied with the NCESC's requirements for receiving unemployment benefits over a period of at least three and a half months. *Id.* at 116-17, 587 S.E.2d at 444-45.

Contrary to defendant's assertion, however, *Hooker* does not stand for the proposition that failure to comply with the NCESC's regulations for obtaining unemployment benefits means an injured employee has not conducted a reasonable search for employment. Indeed, in the past, this Court has not required such exacting evidence to be presented for the Commission to find a reasonable job search under *Russell*. *See, e.g.*, *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 664, 672, 606 S.E.2d 389, 395, 399 (2005) (holding Commission's finding that plaintiff had

"'made reasonable efforts to find suitable employment'" binding on appeal where evidence was that "[a]fter [the plaintiff] resigned . . . [f]or approximately five months, [he] applied for various jobs, both directly and through the Employment Security Commission").

Because competent evidence supports the Commission's findings that plaintiff was under partial disability from 1 August 2011 to 9 May 2012 and, despite her ongoing pain, made a reasonable but unsuccessful job search during that time, we hold that the Commission did not err in concluding plaintiff had met her burden under the second *Russell* option in establishing her disability during that period caused by her compensable injury. *See, e.g.*, *Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 675 (2014) (upholding Commission's conclusion that plaintiff was disabled under second prong of *Russell* based on plaintiff's testimony regarding her job search, her ongoing pain, and her range-of-motion limitations after being released to work).

Defendants next contend that plaintiff did not meet her burden of establishing her disability since 10 May 2012 under the first *Russell* method of proof. Defendants do not contest the finding that "Plaintiff has been completely written out of work since May 10, 2012 by Dr. Rawal" which is, therefore, binding on appeal. Defendants rely exclusively on their contention that since they rebutted the *Parsons* presumption, the Commission should have concluded that plaintiff failed to prove that her disability was caused by her compensable injury. Because we have already upheld the Commission's conclusion that defendants failed to rebut the Parsons presumption, we hold that the Commission did not err in its conclusion that plaintiff has been totally disabled since 10 May 2012. Consequently, we affirm the Commission's opinion and award.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN RE D.S.B.

[239 N.C. App. 482 (2015)]

IN THE MATTER OF D.S.B.

No. COA14-666

Filed 3 March 2015

Juveniles—violation of probation—notice of legal status and level of commitment

A motion for review provided adequate notice to a juvenile that he was alleged to have violated the conditions of the only term of probation to which he was then subject. Moreover, even assuming that the motion for review failed to provide the juvenile with notice that he could receive a Level III disposition for violation of the conditions of probation, the record and transcript of the hearing established that the juvenile had actual notice of his legal status.

Appeal by juvenile from order entered 3 March 2014 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Mary McCullers Reece for the juvenile.

STEELMAN, Judge.

Where the juvenile was adjudicated delinquent for commission of a class H felony, and received a Level II probationary disposition, the trial court had authority to impose a Level III disposition upon finding, after notice and a hearing, that the juvenile had violated the conditions of probation. Where the motion for review asserted that the juvenile had violated the conditions of probation, accurately stated the date the probation would expire, and listed violations occurring after the juvenile was placed on the probation with the specified expiration date, the motion for review adequately notified the juvenile of his probationary status, even though the motion for review contained a clerical error in that it referenced an earlier expired term of probation. Even assuming, *arguendo*, that, because the motion for review incorrectly referenced an expired term of probation based on commission of a misdemeanor, the motion for review did not provide the juvenile with notice that he could receive a Level III disposition for violation of his probation, the record

establishes that the juvenile had actual notice that a Level III disposition was possible.

I. Factual and Procedural History

On 12 May 2011 a juvenile petition was filed against D.S.B., alleging that he had committed the offense of disorderly conduct, a Class 2 misdemeanor. On 8 August 2011 Judge John Dickson adjudicated D.S.B. delinquent for that offense, and on 1 September 2011 Judge Dickson entered a Level 1 disposition order, placing D.S.B. on probation for one year, subject to certain conditions. On 19 September 2011 a motion for review was filed, alleging that D.S.B. had violated the conditions of his probation by being suspended from school. D.S.B. admitted the violation at a hearing conducted on 18 October 2011, and on 8 November 2011 Judge Dickson entered a Level 2 disposition order placing D.S.B. on probation for a period of one year beginning 18 October 2011. On 24 July 2012, prior to the expiration of this probation, a motion for review was filed, alleging that D.S.B. had violated the conditions of probation. D.S.B. admitted the new violations at a hearing on 20 August 2012, and on 30 August 2012 Judge Dickson ordered D.S.B. "placed on a new Level II probation for one year" beginning on 20 August 2012.

On 22 February 2013 a juvenile petition was filed alleging that D.S.B. had possessed drug paraphernalia. A second petition was filed on 17 April 2013 alleging that D.S.B. had committed the offense of robbery with a dangerous weapon, and a third petition was filed 3 May 2013, alleging that D.S.B. had committed the offense of resisting, delaying, or obstructing a law enforcement officer. On 19 August 2013, prior to the resolution of these petitions, the probation imposed on 20 August 2012 expired. As a result, D.S.B. was not on probation between 20 August 2013 and 9 December 2013, the date that a hearing was conducted on the new petitions.

At the 9 December 2013 hearing, D.S.B. admitted the offense of larceny from the person, a class H felony. Pursuant to a plea agreement, in exchange for D.S.B.'s admission, the State reduced the charge of robbery with a dangerous weapon to larceny from the person, and dismissed the petitions alleging possession of drug paraphernalia and resisting an officer. Judge Edward A. Pone accepted the plea arrangement and adjudicated D.S.B. delinquent based on commission of larceny from the person. On 20 December 2013 Judge Pone entered a disposition order placing D.S.B. on Level 2 probation, beginning 9 December 2013. The disposition order found that D.S.B.'s delinquency level was medium, and

that the offense for which he was adjudicated delinquent was serious. On 20 December 2013, Judge Pone entered an order addressing petitions for review filed on 11 December 2012 and 3 May 2013, alleging violations of D.S.B.'s expired term of probation. Judge Pone "ordered that there be no further court involvement" as to the motions for review of the expired probationary term.

On 31 January 2014 D.S.B.'s juvenile court counselor filed a motion for review of "[D.S.B.'s] progress on probation and to determine whether [D.S.B.] has violated the conditions of probation." The motion for review alleged that D.S.B. had violated the conditions of his probation by being suspended from school on 13 December 2013, failing to maintain a study log, testing positive for THC (the active ingredient in marijuana) on 18 December 2013, and sneaking out of his home without permission on 24 January 2014. The motion for review stated that the term of probation to which D.S.B. was then subject would expire on 8 December 2014. However, the motion for review erroneously referenced the term of probation running from 20 August 2011 to 20 August 2013, which had been based upon the charge of disorderly conduct, rather than his current term of probation entered 9 December 2013, based upon the charge of larceny from the person.

At a hearing conducted on 27 February 2014, D.S.B. admitted violating the conditions of his probation by being suspended from school, leaving home without permission, testing positive for THC, and failing to maintain a study log. The prosecutor reminded the trial court that the last time D.S.B. had been in court, the trial court stated that the next time D.S.B. was in court he would likely be sent to a youth development center ("YDC") of the North Carolina Division of Juvenile Justice. The record does not include a record of the prior court appearance to which the prosecutor referred; however, D.S.B. did not object to this characterization of the previous proceedings.

D.S.B.'s counsel argued that, although D.S.B. "underst[ood] that YDC is on the table," instead of committing D.S.B. to a YDC, "it would be a better benefit for [D.S.B.] if he was placed in some type of program" where he might receive help with substance abuse and anger management issues. His counsel acknowledged the possibility of commitment to a YDC, but requested an alternative disposition:

> [W]e're asking that the Court would consider, as opposed to – even though he is YDC eligible, placing him in some type of program so that he can get the treatment that he needs first, and . . . if that does not work, then . . . [the]

> Court can at that time consider whether YDC would actually be appropriate for him. (emphasis added)

After hearing the arguments of counsel, the trial court proceeded as follows:

> TRIAL COURT: [Defense counsel], your client had an armed robbery charge that was broken down?
>
> DEFENSE COUNSEL: Yes, your Honor. that was a situation that he did plead responsible to that. . . . [H] e felt it was in his best interest to enter into a plea agreement, and it was broken down your Honor.
>
> TRIAL COURT: . . . [T]he Court will find that the juvenile was previously given a Level II disposition and was placed on probation, and that he has violated terms of the probation. That the Court will find that the juvenile has been previously adjudicated for a serious offense, and therefore would order that the juvenile be committed to the Division of Juvenile Justice for placement in a Youth Development Center for a minimum of six months and up until his 18th birthday. . . .

On 3 March 2014 the trial court entered a Disposition and Commitment Order, stating that D.S.B. had been placed on probation on 9 December 2013 for committing the offense of larceny from the person, and thus had "been adjudicated for a violent or serious offense and Level III [disposition] is authorized[.]" The order committed D.S.B. to a YDC for a period of at least six months and not longer than his 18th birthday.

D.S.B. appeals.

II. Commitment to YDC

In his sole argument on appeal, D.S.B. argues that the trial court "exceeded its statutory authority by ordering a Level Three commitment" because the motion for review alleged that D.S.B. had "violated conditions of probation that arose from a minor offense and therefore did not give [D.S.B.] notice that he might receive a Level Three disposition." We disagree.

A. Standard of Review

N.C. Gen. Stat. § 7B-2510 provides in relevant part that:

> (e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has

> violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. . . .
>
> (f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508.

" '[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 Z.T.W.*, __ N.C. App. __, __, __ S.E.2d __, __ (2014) (2014 N.C. App. LEXIS 1408) (quoting *In re O'Neal*, 160 N.C. App. 409, 412, 585 S.E.2d 478, 481 (2003) (internal citation omitted).

"One's violation of court supervision is not a distinct "crime" like that associated with violations of statutory and common law offenses[, and a] . . . 'probation violation hearing is not a criminal prosecution.' " *In re D.J.M.*, 181 N.C. App. 126, 130, 638 S.E.2d 610, 613 (2007) (quoting *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 335 (1999)). Thus, "a motion for review [is] a form of 'dispositional' hearing with procedural safeguards that differ significantly from those imposed on allegations that a juvenile committed a statutory or common law criminal offense." *D.J.M.*, 181 N.C. App. at 131, 638 S.E.2d at 613. For example, the rules of evidence do not apply to probation revocation proceedings. *Z.T.W.*, __ N.C. App. at __, __ S.E.2d at __ (2014) (citing *State v. Murchison*, 367 N.C. 461, 758 S.E.2d 356 (2014)).

B. Analysis

As noted above, N.C. Gen. Stat. § 7B-2510(e) authorizes the trial court to enter a new disposition if, "after notice and a hearing" the court "finds by the greater weight of the evidence that the juvenile has violated the conditions of probation[.]" On appeal, D.S.B. does not dispute that in December 2013 he received a Level II disposition for commission of a felony, does not challenge the substantive merits of the trial court's ruling that he had violated the conditions of probation, and does not dispute that imposition of a Level III disposition was appropriate given his prior juvenile record. Instead, the juvenile argues that, because the

"motion for review referenced an earlier probation order arising from a minor offense" the motion for review "did not give [D.S.B.] notice that he might receive a level three disposition."

On 31 January 2014, when the motion for review was filed, the only probationary term to which D.S.B. was subject was the Level II disposition imposed on 9 December 2013 for larceny from the person. A "violation" of the earlier probation, which had expired, would not have provided the trial court with authority to enter a new disposition. *See In re: A.F.*, __ N.C. App. __, 752 S.E.2d 245 (2013) (where the juvenile's probationary term expired and was not extended, the trial court could not implicitly or retroactively extend it and thus could not impose record points based on the assumption that the juvenile remained on probation after its expiration).

In addition, the erroneous reference to the earlier term of probation appears only in the section of the motion captioned "facts and circumstances indicating need for review." However, above the "facts and circumstances" section, D.S.B.'s court counselor avers that D.S.B. had violated the conditions of a term of probation that "is scheduled to end on 12/8/2014" (emphasis added). Thus, the motion for review accurately states the expiration date of the juvenile's probation. Moreover, the violations of probation that are listed in the "facts and circumstances" all occurred after he was placed on probation in December 2013. We conclude that the motion for review provided adequate notice to D.S.B. that he was alleged to have violated the conditions of the only term of probation to which he was then subject.

Moreover, even assuming, *arguendo*, that the motion for review failed to provide the juvenile with notice that he could receive a Level III disposition for violation of the conditions of probation, the record and transcript of the hearing establish that D.S.B. had actual notice of his legal status:

> 1. D.S.B. did not object to an order requiring him to be restrained with leg irons at the hearing, based in part on "[t]he nature of the charges," and the need to "prevent the juvenile's escape[.]" This strongly suggests that D.S.B. was aware that the hearing did not pertain to his adjudication for disorderly conduct three years earlier.
>
> 2. During the hearing, D.S.B.'s counsel acknowledged several times that commitment to a YDC was "on the table" but asked the trial court to consider other options.

> 3. During the hearing, D.S.B. did not challenge the prosecutor's assertion that at a prior court appearance the trial court had warned D.S.B. that if he were returned to court, he would face commitment to a YDC.
>
> 4. D.S.B. did not object when the trial court expressly confirmed at the hearing that he was on probation for commission of the felony of larceny from the person, a Class H felony.

Based on the above facts and circumstances, we conclude that D.S.B. had actual notice that violation of the conditions of probation would expose him to a possible Level III disposition.

In seeking to persuade us to reach a contrary result, the juvenile appears to contend that the notice required by N.C. Gen. Stat. § 7B-2510(e) can only come from the motion for review, such that a clerical error in the motion for review "trumps" the juvenile's actual notice of his probationary status. In support of this position, D.S.B. contends that in *In re S.B.*, 207 N.C. App. 741, 701 S.E.2d 359 (2010), this Court "held that the pleadings in the violation report controlled and limited the potential outcome of the probation proceedings." However, the issue in *S.B.* was the interplay between N.C. Gen. Stat. § 7B-2510(f) and N.C. Gen. Stat. § 7B-2508(g). The case did not present any issue regarding whether the "pleadings in the violation report controlled" the outcome of the proceeding.

D.S.B. also argues that he was "prejudiced by the inadequacy of the motion because he did not have notice that he might be subject to a level three disposition when he made the decision to stipulate to several of the violations." We have concluded, however, that D.S.B. did have notice that he was potentially subject to a Level III disposition. In addition, the violations to which D.S.B. stipulated were that he had been suspended from school, had not brought a study log to the meeting with his court counselor, had tested positive for THC, and had left home without permission. D.S.B. does not argue that these violations, which appear to involve straightforward issues of fact, would have been difficult to establish in the absence of a stipulation.

IV. Conclusion

For the reasons discussed above, we conclude that D.S.B. had notice that upon the trial court's finding of a violation of the conditions of probation he might receive a Level III disposition, and that the trial

court did not err by imposing a Level III disposition committing D.S.B. to a YDC.

AFFIRMED.

Judges GEER and STEPHENS concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
ROBERT W. ADAMS, ATTORNEY, DEFENDANT

No. COA14-703

Filed 3 March 2015

1. Attorneys—discipline—trust account—admission of prior audits

In an a proceeding for the discipline of an attorney, the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not violate Rule 404(b) by admitting the results of two prior audits, which indicated several deficiencies in defendant's management of his trust account. The DHC had already determined that defendant had violated the Rules of Professional Conduct in its default judgment at the adjudicatory phase, and, during the disposition phase, the DHC will consider "any evidence relevant to the discipline to be imposed.

2. Evidence—discipline of attorney—trust account mismanagement—prior audits

In an a proceeding for the discipline of an attorney, the probative value of evidence of prior audits indicating deficiencies in defendant's management of his trust account was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence.

3. Attorney—misconduct—trust account—potential significant harm to clients

The finding in a disciplinary proceeding against an attorney that defendant's misconduct involving his trust account resulted in potential significant harm to his clients was supported by the evidence even though no client funds were misappropriated. A third party attempted to draft from the commingled trust account while

the account held client funds, although the transaction failed for insufficient funds. But for the fact that the trust account held insufficient funds, defendant's mismanagement of the trust account would have directly led to the misappropriation of client funds and defendant's misconduct led to potential harm that extends well beyond that attributable to the commingling alone.

4. Attorneys—discipline—potential significant harm to supported by substantial evidence—prior misconduct

In a disciplinary proceeding against an attorney involving his trust account, substantial evidence supported the North Carolina State Bar Disciplinary Hearing Commission's findings of fact that defendant's misconduct created the potential for significant harm to clients and to the public's perception of the legal profession. Defendant had been publicly disciplined on six prior occasions, including several instances of financial mismanagement, and had been the subject of two trust account audits with deficiencies, yet still failed to maintain his trust account properly.

5. Attorneys—discipline—trust account violations—foreseeable harm

Findings of fact by the North Carolina State Bar Disciplinary Hearing Commission adequately supported its conclusions of law in disciplining an attorney for trust account violations. Findings on defendant's long history of mismanaging entrusted funds and defendant's failure to block Alltel's repeated drafting of funds from the trust account supported the conclusion that defendant intended to commit acts where the harm or potential harm was foreseeable and created significant potential harm to client funds.

6. Attorneys—discipline—trust account mismanagement—suspension

Findings of fact and conclusions of law by the North Carolina State Bar Disciplinary Hearing Commission adequately supported its ultimate decision to suspend defendant-attorney's license for mismanagement of his trust account.

Appeal by defendant from order of discipline entered 3 February 2014 by the North Carolina State Bar Disciplinary Hearing Commission. Heard in the Court of Appeals 18 November 2014.

The North Carolina State Bar, by David R. Johnson and Katherine Jean, for plaintiff-appellee.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for defendant-appellant.

STROUD, Judge.

Robert W. Adams ("defendant") appeals from an order of discipline entered by the North Carolina State Bar Disciplinary Hearing Commission ("the DHC"). The DHC found that defendant had mismanaged his trust account and ordered that defendant's law license be suspended. Defendant argues that (1) the DHC erred in admitting evidence of prior audits' results; (2) substantial evidence does not support the DHC's findings of fact; (3) the DHC's findings of fact do not adequately support its conclusions of law; and (4) the DHC's findings and conclusions do not adequately support its level of discipline. We affirm the DHC's order of discipline.

I. Background

Defendant was licensed by the North Carolina State Bar in 1972. On or about 10 November 1991, the Grievance Committee of the State Bar reprimanded defendant for mismanagement of his trust account. On or about 5 May 1994, the Grievance Committee admonished defendant for failure to file proper accountings in an estate and failure to handle a refinancing transaction properly. On or about 9 August 1996, defendant was reprimanded for failure to respond to a grievance filed by a client. On or about 23 September 1996, pursuant to a random audit, a State Bar auditor examined defendant's trust account and informed defendant of several deficiencies in defendant's management of the account. On or about 30 April 1997, the Grievance Committee censured defendant for failure to notify his clients of a deposition, failure to appear for the deposition, and failure to inform his clients of sanctions ordered.

On or about 6 November 1997, the DHC imposed a two-year stayed suspension on defendant for his neglect of a client's case, failure to communicate with a client, and failure to respond to the grievance. On 7 June 1999, the DHC extended defendant's stayed suspension. On 10 May 2000, based upon defendant's failure to file North Carolina individual tax returns for three prior years, the DHC imposed a three-year suspension with an opportunity for defendant to apply for a stay of the remaining period of the suspension after nine months. On or about 10 October 2008, pursuant to another random audit, a State Bar auditor examined defendant's trust account and informed defendant of several deficiencies in defendant's management of the account.

From 1 January 2012 to 1 July 2012, defendant practiced law in Hickory and held client funds in his trust account. Among his areas of practice, defendant represented clients in Social Security Administration cases. Defendant (1) commingled his personal funds with client funds in the trust account, (2) failed to ensure that checks drawn on the trust account showed the client balance, (3) failed to reconcile the trust account quarterly, (4) failed to maintain a record related to the electronic transfers from the trust account showing the name of the client or other person to whom the funds belong, and (5) failed to maintain a ledger containing a record of receipts and disbursements for each person from whom and for whom funds were received and showing the current balance of funds held in the trust account for each such person. *See* Revised Rules of Professional Conduct of the North Carolina State Bar R. 1.15-2(a), 1.15-2(f), 1.15-2(h), 1.15-3(b)(2), 1.15-3(b)(3), 1.15-3(b)(5), and 1.15-3(d)(1) (2012).

Defendant gave Alltel Wireless ("Alltel"), a cell phone company, bank account information for his trust account in order to pay a former client's cell phone bill. Alltel made drafts from the trust account on 30 January 2012, 16 February 2012, 13 March 2012, and 2 April 2012. On 24 May 2012, Alltel attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but the transaction was unsuccessful because the trust account held insufficient funds to cover the draft. Defendant's bank issued a notice of non-sufficient funds to the State Bar. On 25 May 2012, Alltel made a successful draft from the trust account for a much lower amount. But defendant did not misappropriate any client funds, since the attempted 24 May 2012 draft was unsuccessful.

On 10 July 2013, the State Bar filed a complaint against defendant alleging that defendant had mismanaged his trust account from 1 January 2012 to 1 July 2012. Defendant failed to file an answer or any responsive pleading. On 10 December 2013, the DHC entered a default judgment against defendant, thus admitting the State Bar's allegations at the adjudicatory phase. On 10 January 2014, the DHC held a hearing on the disposition phase to determine the appropriate level of discipline. On 3 February 2014, in its order of discipline, the DHC imposed a four-year suspension with an opportunity for defendant to apply for a stay of the remaining period of the suspension after two years if he complies with certain conditions. On 27 February 2014, defendant gave timely notice of appeal.

II. Admission of Evidence

Defendant contends that the DHC erred in admitting the results of two prior audits, in contravention of North Carolina Rules of Evidence 404(b) and 403. N.C. Gen. Stat. § 8C-1, Rules 403, 404(b) (2013).

A. Standard of Review

We review *de novo* the DHC's decision to admit evidence under Rule 404(b). *See State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (discussing Rule 404(b) in the context of a criminal trial); N.C. Gen. Stat. § 8C-1, Rule 404(b). But we review the DHC's Rule 403 determination for an abuse of discretion. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159; N.C. Gen. Stat. § 8C-1, Rule 403. "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotation marks omitted).

B. Analysis

[1] Attorney discipline cases have two phases: (1) an adjudicatory phase in which the DHC determines whether the defendant committed the misconduct; and (2) a disposition phase in which the DHC determines the appropriate discipline. *N.C. State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003). In a hearing before the DHC, the North Carolina Rules of Evidence govern the admissibility of evidence. 27 N.C. Admin. Code § 1B.0114(t) (2014); *N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 527, 400 S.E.2d 123, 125 (1991). Rule 404(b) provides in pertinent part:

> Evidence 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.

N.C. Gen. Stat. § 8C-1, Rule 404(b). This list of permissible purposes is not exclusive, and evidence of other crimes, wrongs, or acts is admissible so long as it is relevant to any fact or issue other than the defendant's character to act in conformity therewith. *State v. Gordon*, ___ N.C. App. ___, ___, 745 S.E.2d 361, 364, *disc. rev. denied*, ___ N.C. ___, 749 S.E.2d 859 (2013).

Defendant argues that the prior audits' results, which indicate several deficiencies in defendant's management of his trust account, were inadmissible under Rule 404(b). Defendant asserts that this evidence was not proffered to show intent, knowledge, or absence of mistake, because, in its default judgment at the adjudicatory phase, the DHC had already determined that defendant had violated the Rules of Professional Conduct.

But during the disposition phase, the DHC will consider "any evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code § 1B.0114(w). "[I]ntent of the defendant to commit acts where the harm or potential harm is foreseeable" is a factor that the DHC considers in imposing suspension, and "a pattern of misconduct" is a factor that the DHC considers in all cases. *Id.* § 1B.0114(w)(1)(B), (3)(F). The prior audits' results were relevant to these two factors and were not used to show defendant's propensity to mismanage his trust account, because the DHC had already determined that defendant had committed that misconduct. Accordingly, we hold that the DHC did not violate Rule 404(b) in admitting this evidence. *See Gordon*, ___ N.C. App. at ___, 745 S.E.2d at 364; N.C. Gen. Stat. § 8C-1, Rule 404(b).

[2] Defendant next contends that the prior audits' results were inadmissible under Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008).

As discussed above, the prior audits' results were relevant to the factors of "intent of the defendant to commit acts where the harm or potential harm is foreseeable" and "a pattern of misconduct[.]" *See* 27 N.C. Admin. Code § 1B.0114(w)(1)(B), (3)(F). Defendant has not demonstrated an improper basis on which the DHC may have considered this evidence. *See Cunningham*, 188 N.C. App. at 836, 656 S.E.2d at 700. We hold that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that the DHC did not violate Rule 403 in admitting this evidence.

III. Order of Discipline

A. Standard of Review

We review the DHC's order of discipline under the "whole record" test. *Talford*, 356 N.C. at 632, 576 S.E.2d at 309.

> [We] determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law. Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id., 576 S.E.2d at 309-10 (citations, quotation marks, and footnotes omitted).

We consider three questions to determine if the DHC's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed findings of fact? (2) Do the order's expressed findings of fact adequately support the order's subsequent conclusions of law? (3) Do the expressed findings and conclusions adequately support the lower body's ultimate decision? *Id.* at 634, 576 S.E.2d at 311. "[T]he mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the [DHC]." *N.C. State Bar v. Key*, 189 N.C. App. 80, 84, 658 S.E.2d 493, 497 (2008). The DHC determines the credibility of the witnesses and the weight of the evidence. *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 665, 657 S.E.2d 378, 386 (2008).

The DHC must support its punishment choice with written findings that are consistent with the statutory scheme of N.C. Gen. Stat. § 84-28(c). *Talford*, 356 N.C. at 638, 576 S.E.2d at 313; *see also* N.C. Gen. Stat. § 84-28(c) (2013). The order must also include adequate and specific findings that address how the punishment choice (1) is supported

by the particular set of factual circumstances and (2) effectively provides protection for the public. *Id.*, 576 S.E.2d at 313.

B. Findings of Fact

[3] Defendant contends that Findings of Fact Regarding Discipline 7 and 8 are not supported by substantial evidence. Those findings of fact state:

> 7. The Alltel draft on [the trust account] created the potential for significant harm to clients of Defendant with entrusted funds in [that account].
>
> 8. Defendant's failure to comply with the State Bar's regulations related to his trust account has the potential to cause significant harm to clients of Defendant and to the public's perception of the legal profession.

In *Talford*, the North Carolina Supreme Court discussed the difference between "potential harm" and "significant potential harm" within the context of a defendant's mismanagement of his trust account. *Id.* at 640, 576 S.E.2d at 314-15. There, the defendant had commingled his personal funds with client funds in his trust account and had made several withdrawals from the account that were in excess of those funds to which he was entitled. *Id.*, 576 S.E.2d at 314. But no client suffered a loss or a financial setback, since the defendant maintained enough personal funds in the account to cover any amounts due to clients. *Id.*, 576 S.E.2d at 314. The North Carolina Supreme Court held that, within the confines of these circumstances, the defendant's misconduct had created "potential harm" to clients but had not created "a risk of *significant* potential harm" to clients. *Id.* at 640-41, 576 S.E.2d at 314-15. The Court ultimately held that the DHC's order of discipline did not have a "rational basis in the evidence" because (1) the order failed to provide either pertinent findings of fact or conclusions of law that addressed the statutory factors delineated in N.C. Gen. Stat. § 84-28(c); and (2) inadequate evidence supported the findings of fact and conclusions of law that would be necessary to justify the DHC's punishment choice. *Id.* at 642, 576 S.E.2d at 315-16.

The default judgment here established the facts as alleged in the State Bar's complaint that defendant (1) commingled his personal funds with client funds in the trust account, (2) failed to ensure that checks drawn on the trust account showed the client balance, (3) failed to reconcile the trust account quarterly, (4) failed to maintain a record related to the electronic transfers from the trust account showing the name of

the client or other person to whom the funds belong, and (5) failed to maintain a ledger containing a record of receipts and disbursements for each person from whom and for whom funds were received and showing the current balance of funds held in the trust account for each such person. *See* Revised Rules of Professional Conduct of the North Carolina State Bar R. 1.15-2(a), 1.15-2(f), 1.15-2(h), 1.15-3(b)(2), 1.15-3(b)(3), 1.15-3(b)(5), and 1.15-3(d)(1). The default judgment also established that on 24 May 2012, Alltel had attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but that the transaction was unsuccessful only because the trust account held insufficient funds to cover the draft.

Relying on *Talford*, defendant contends that his misconduct did not cause "significant potential harm" as stated in Findings of Fact Regarding Discipline 7 and 8, because no client funds were misappropriated. *See Talford*, 356 N.C. at 640, 576 S.E.2d at 314-15. *Talford*, however, is distinguishable for two reasons. First, in *Talford*, the DHC's order failed to provide either pertinent findings of fact or conclusions of law that addressed the statutory factors delineated in N.C. Gen. Stat. § 84-28(c). *Id.* at 642, 576 S.E.2d at 315-16. To satisfy N.C. Gen. Stat. § 84-28(c), an order imposing suspension or disbarment must show (1) how a defendant's actions resulted in significant harm or significant potential harm; and (2) why suspension and disbarment are the only sanction options that can adequately serve to protect the public from potential future transgressions by the defendant. *Id.* at 638, 576 S.E.2d at 313. In *Talford*, the DHC's order addressed neither statutory factor. *Id.* at 639, 576 S.E.2d at 314. The DHC limited its findings of fact regarding discipline to "six conclusory statements about the aggravating and mitigating factors surrounding defendant's misconduct." *Id.*, 576 S.E.2d at 314.

In contrast, here, the DHC's order includes findings of fact and conclusions of law that satisfy N.C. Gen. Stat. § 84-28(c). *See id.* at 638, 576 S.E.2d at 313. The DHC's order includes findings and conclusions that address the first issue and explain how defendant's actions resulted in significant potential harm:

> [Finding of Fact Regarding Discipline] 4. Defendant's mismanagement of his trust account resulted in numerous violations of the Rules of Professional Conduct.
>
> . . .
>
> 6. The attempt by Alltel to draft $1,458.98 from [the trust account] on May 24, 2012 failed because [the trust

> account], though containing entrusted funds, had insufficient funds to cover the Alltel draft.
>
> 7. The Alltel draft on [the trust account] created the potential for significant harm to clients of Defendant with entrusted funds in [that account].
>
> 8. Defendant's failure to comply with the State Bar's regulations related to his trust account has the potential to cause significant harm to clients of Defendant and to the public's perception of the legal profession.
>
> . . . .
>
> [Conclusion of Law Regarding Discipline] 4. Defendant['s] misconduct resulted in potential significant harm to his clients by placing entrusted client funds at risk of misapplication and misappropriation.
>
> 5. Defendant's failure to properly maintain, manage and handle entrusted funds betrays a vital trust that clients and the public place in attorneys and the legal profession.

The DHC's order also includes conclusions of law that address the second issue and explain why suspension is the only sanction option that can adequately serve to protect the public from potential future transgressions by defendant:

> [Conclusion of Law Regarding Discipline] 6. The [DHC] has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of the factors noted in paragraphs 1 and 3 of this section and the gravity of the potential significant harm to the clients. The [DHC] further concludes that such discipline would fail to acknowledge the seriousness of the offenses committed by Defendant and send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.
>
> 7. [The DHC] has considered lesser alternatives and concludes that a suspension is appropriate under the facts and circumstances of this case to address the potential for significant harm to Defendant's clients, and for the protection of Defendant's clients and the public.

> 8. For these reasons, the [DHC] finds that an order imposing discipline less than a suspension of Defendant's law license would not be appropriate.

Unlike the order in *Talford*, the DHC's order here includes findings of fact and conclusions of law that satisfy the statutory framework of N.C. Gen. Stat. § 84-28(c). *See id.*, 576 S.E.2d at 313.

Second, in *Talford*, the defendant's misconduct did not result in any potential harm to clients "beyond that attributable to any commingling of attorney and client funds[.]" *Id.* at 640, 576 S.E.2d at 314-15. There, the trust account contained sufficient personal funds belonging to the defendant to cover obligations owed to or on behalf of clients. *Id.*, 576 S.E.2d at 314. In contrast, here, on 24 May 2012, a third party, Alltel, attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but the transaction was unsuccessful only because the trust account held insufficient funds to cover the draft. But for the fact that the trust account held insufficient funds, defendant's mismanagement of the trust account would have directly led to the misappropriation of client funds. Unlike in *Talford*, defendant's misconduct here led to the potential misappropriation of client funds, potential harm that extends well beyond that attributable to commingling alone. *See id.*, 576 S.E.2d at 314-15. In light of these two distinctions, we hold that *Talford* is distinguishable.

[4] Defendant further contends that substantial evidence does not support Finding of Fact Regarding Discipline 8, because the State Bar proffered no evidence of potential harm to the public's perception of the legal profession. Defendant cites no authority which requires that any particular type of evidence be presented to show potential harm "to the public's perception of the legal profession[,]" nor have we found any such authority. The very purpose of attorney discipline presupposes that attorney misconduct can harm the public and can tarnish the public's perception of the legal profession. *See* 27 N.C. Admin. Code. § 1B.0101 (2014) ("Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession."). In this case, defendant had been publicly disciplined on six prior occasions, including several instances of financial mismanagement, and had been the subject of two trust account audits with deficiencies in both, and yet he still failed to maintain his trust account properly. Defendant's repeated failures to comply with the Rules of Professional Conduct and prior lesser sanctions and the risk of significant harm to clients supports a finding of potential harm

to the public's perception of the legal profession. Because defendant's mismanagement of the trust account directly led to the potential misappropriation of client funds, we hold that substantial evidence supports the DHC's Findings of Fact Regarding Discipline 7 and 8 that defendant's misconduct created "the potential for significant harm" to clients and to the public's perception of the legal profession.

C. Conclusions of Law

[5] Defendant next contends that the findings of fact do not adequately support Conclusion of Law Regarding Discipline 1. This conclusion states:

> The [DHC] has carefully considered all of the different forms of discipline available to it. In addition, the [DHC] has considered all of the factors enumerated in [27 N.C. Admin. Code § 1B.0114(w)(1)] of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension of Defendant['s] license:
>
> a. Intent of Defendant to commit acts where the harm or potential harm is foreseeable;
>
> b. Circumstances reflecting the Defendant's lack of honesty, trustworthiness, or integrity;
>
> c. Negative impact of Defendant's actions on client's or public's perception of the legal profession; and
>
> d. Multiple instances of failure to participate in the legal profession's self-regulation process.

Defendant contends that the DHC's findings of fact do not adequately support its sub-conclusion of law that defendant intended "to commit acts where the harm or potential harm is foreseeable[,]" because he did not authorize the 24 May 2012 draft by Alltel. But the default judgment establishes that, in addition to the unsuccessful 24 May 2012 draft, Alltel had made successful drafts from the trust account on 30 January 2012, 16 February 2012, 13 March 2012, 2 April 2012, and 25 May 2012. The DHC found that defendant "had several months to take action with [his bank] to block the drafts but failed to do so."

Additionally, the DHC made other findings of fact to support its sub-conclusion that defendant intended to commit acts where the harm or potential harm is foreseeable:

> [Finding of Fact Regarding Discipline] 1. The State Bar conducted two prior random audits of [the trust account], one in 1996 and the second in 2008. Both audits disclosed deficiencies in Defendant's trust account management practices.
>
> 2. Among other deficiencies, both random audits disclosed that at the time of the audits Defendant: 1) did not maintain ledgers for each person or entity from whom or for who[m] trust money was received; and 2) did not conduct quarterly reconciliations.
>
> 3. After the 1996 random audit, Defendant wrote to the State Bar agreeing to correct the deficiencies in his trust account management practices including maintaining a ledger and conducting quarterly audits; however, those same deficiencies, as well as the others noted above, continued in the present proceeding.
>
> . . . .
>
> 9. Defendant has received prior discipline by the Grievance Committee and the DHC, as follows: 90G0044—Reprimand (noting deficiencies in handling entrusted funds)[.]

In light of its findings on defendant's long history of mismanaging entrusted funds and defendant's failure to block Alltel's repeated drafting of funds from the trust account, we hold that the DHC's findings of fact adequately support its sub-conclusion that defendant intended to commit acts where the harm or potential harm is foreseeable. *See id.* at 634, 576 S.E.2d at 311.

Defendant further argues that the DHC's findings of fact do not adequately support its sub-conclusion that circumstances reflect defendant's lack of honesty, trustworthiness, or integrity, because he "fully complied" with the State Bar's investigation. But defendant's compliance with the State Bar's investigation does not undermine the DHC's findings that defendant repeatedly mismanaged his trust account, even after prior disciplinary proceedings addressing similar issues of financial mismanagement, and exposed his clients to significant potential harm. These findings adequately support the DHC's sub-conclusion that circumstances reflect defendant's lack of honesty, trustworthiness, or integrity. *See id.*, 576 S.E.2d at 311.

Defendant next argues that the DHC's findings of fact do not support its sub-conclusion that defendant's misconduct negatively impacted his clients' or the public's perception of the legal profession. But Finding of Fact Regarding Discipline 8, which states that defendant's misconduct had the potential to cause significant harm to clients and to the public's perception of the legal profession, adequately supports this sub-conclusion. *See id.*, 576 S.E.2d at 311.

Defendant also contends that the DHC's findings of fact do not support its Conclusion of Law Regarding Discipline 4. This conclusion states: "Defendant['s] misconduct resulted in potential significant harm to his clients by placing entrusted client funds at risk of misapplication and misappropriation." But, as discussed above, substantial evidence supports the DHC's Findings of Fact Regarding Discipline 7 and 8 that defendant's misconduct created significant potential harm to client funds. These findings adequately support Conclusion of Law Regarding Discipline 4. *See id.*, 576 S.E.2d at 311. We hold that the DHC's findings of fact adequately support its Conclusions of Law Regarding Discipline 1 and 4. *See id.*, 576 S.E.2d at 311.

D. Level of Discipline

[6] Defendant further contends that the DHC's findings of fact and conclusions of law do not adequately support its ultimate decision to suspend defendant's license. In order to suspend a defendant's license, the DHC's order must show (1) how the defendant's actions resulted in significant harm or significant potential harm; and (2) why suspension is the only sanction option that can adequately serve to protect the public from potential future transgressions by the defendant. *Id.* at 638, 576 S.E.2d at 313. As discussed above, the DHC's order here includes findings of fact and conclusions of law that satisfy this requirement. Accordingly, we hold that the DHC's findings and conclusions adequately support its ultimate decision to suspend defendant's license. *See id.* at 634, 576 S.E.2d at 311.

IV. Conclusion

For the foregoing reasons, we affirm the DHC's order of discipline.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

SIMS-CAMPBELL v. WELCH

[239 N.C. App. 503 (2015)]

SANDRA SIMS-CAMPBELL, Plaintiff
v.
HARRY L. WELCH, JR., Individually and in his Official Capacity as Register of Deeds of Rowan County, North Carolina, Defendant

No. COA14-938

Filed 3 March 2015

Public Officers and Employees—wrongful termination—county register of deeds—firing for political reasons—intentional infliction of emotional distress

The trial court did not err by dismissing plaintiff assistant register of deed's case challenging her termination after she announced her plans to run against her boss in the next election. County registers of deeds may fire their assistant registers of deeds for political reasons without violating the United States and North Carolina Constitutions or state laws. Further, the mere firing of an employee can never be "extreme and outrageous" conduct sufficient to state a claim for intentional infliction of emotional distress.

Appeal by plaintiff from orders entered 3 June 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 7 January 2015.

Ferguson Chambers & Sumter, P.A., by Christina L. Trice and James E. Ferguson, II, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, L.L.P., by James R. Morgan, Jr., for defendant-appellee.

DIETZ, Judge.

This case requires us once again to delineate when certain government employees may be fired for political reasons. From 2010 to 2014, Defendant Harry L. Welch was the Rowan County Register of Deeds. In February 2014, Plaintiff Sandra Sims-Campbell, who was Welch's Assistant Register of Deeds and second-in-command in the office, announced her plan to run against Welch in the upcoming election. Shortly after that announcement, Welch fired Sims-Campbell. Sims-Campbell sued to challenge her termination. The trial court dismissed her case and she then appealed to this Court.

Government employees generally are protected from termination because of their political viewpoints. But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss's opponents during an election. *See, e.g.*, *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). This exception is necessary because these deputies are authorized to act on behalf of their elected superiors and their actions are binding on their bosses. It would be untenable if employees with these broad-ranging powers could not be terminated when they were also actively working to undermine their superiors for their own political gain.

Assistant registers of deeds have the same authority within their office as deputy sheriffs and deputy clerks of court do in theirs, including the authority to act on behalf of, and bind, their elected bosses. Indeed, the same sections of the General Statutes govern all three positions. Thus, we find our precedent governing deputy sheriffs and deputy clerks of court controlling in this case. Under that precedent, county registers of deeds may fire their assistant registers of deeds for political reasons without violating the United States and North Carolina Constitutions or state laws. We therefore affirm the trial court's dismissal of this action.

Facts and Procedural History

The following recitation of facts represents Plaintiff Sandra Sims-Campbell's version of events, viewed in the light most favorable to her. Because this appeal stems from the trial court's order granting Defendant Harry Welch's motion to dismiss, we must view the allegations in the complaint as true and consider the record in the light most favorable to Sims-Campbell. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

Sims-Campbell began working for the Office of the Register of Deeds of Rowan County on 1 September 1991. After receiving outstanding reviews as a deputy register of deeds, Sims-Campbell accepted a promotion in December 2008 to the position of Assistant Register of Deeds. In this position, Sims-Campbell "acted as the Register of Deeds in the absence of the Register of Deeds."

Welch assumed the office of Register of Deeds in 2010, and Sims-Campbell continued to serve as Assistant Register of Deeds under his direction. She consistently received exceptional performance

evaluations, with Welch once noting, "[Sims-Campbell] is a blessing to my team. She is not only the most knowledgeable[,] but she readily shares with the rest of my staff. She is great with the public."

On 27 February 2014, Sims-Campbell informed Welch of her intention to run against him in the upcoming election for the office of Register of Deeds. Later that day, Welch asked Sims-Campbell to take the following day off, with pay, so that he could consider her announcement. The next day, Welch terminated Sims-Campbell from her position as Assistant Register of Deeds.

Sims-Campbell filed a Verified Complaint and motion for a preliminary injunction on 9 April 2014, asserting claims for wrongful discharge in violation of North Carolina public policy and intentional infliction of emotional distress. In response, Welch moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court entered orders on 30 June 2014 denying Sims-Campbell's motion for a preliminary injunction and granting Welch's motion to dismiss the complaint for failure to state a claim. Sims-Campbell timely appealed to this Court.

Analysis

Sims-Campbell contends that the trial court improperly granted Welch's motion to dismiss her claims. "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).

I. Plaintiff's Constitutional and Statutory Claims

Sims-Campbell first argues that Welch terminated her employment in violation of the United States and North Carolina Constitutions and applicable state law. We disagree.

In North Carolina, employment relationships ordinarily are at-will. *See Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991). As a result, "both employer and employee are generally free to terminate their association at any time and without any reason." *Id.* But the First Amendment (and the analogous provision in our State Constitution) imposes an exception on our State's at-will employment rules: ordinarily, the government cannot terminate public employees for engaging in political speech and activity. *See Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997).

Nevertheless, courts have recognized that there is a special subset of government jobs where "political party affiliation can be an appropriate requirement for effective job performance." *Jenkins*, 119 F.3d at 1162; *see also Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). In *Jenkins*, a case from Buncombe County, the U.S. Court of Appeals for the Fourth Circuit held that "political affiliation and loyalty to the sheriff are appropriate job requirements" for deputy sheriffs. 119 F.3d at 1163. The court noted that the General Assembly made deputy sheriffs at-will employees who "serve at the pleasure of the appointing officer" and that they "hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." *Id.* at 1163-64 (internal quotation marks omitted). Their position thus resembles that of "a policymaker, a communicator, or a privy to confidential information." *Id.* at 1164 (internal quotation marks omitted). In light of these important public duties, the court held that "sheriffs may dismiss deputies either because of party affiliation or campaign activity" without violating the First Amendment. *Id.* at 1164-65.

This Court later applied *Jenkins* to deputy clerks of superior court. *Carter v. Marion*, 183 N.C. App. 449, 453-54, 645 S.E.2d 129, 131 (2007). In *Carter*, three Surry County deputy clerks sued the newly elected clerk of court, alleging that the clerk terminated their appointments because they had not supported her in the election. *Id.* at 451, 645 S.E.2d at 129-30. Citing *Jenkins*, we held that it did not violate the United States or North Carolina Constitutions, or public policy of this State, for a clerk of court to terminate his deputies for political reasons. *Id.* at 453-54, 645 S.E.2d at 131-32. We explained that deputy clerks are authorized to carry out acts that "the clerk may be authorized and empowered to do," that "the clerk is responsible for the acts of his deputies," and that "deputy clerks serve at the pleasure of the elected clerk and are appointed by the clerk." *Id.* at 454, 645 S.E.2d at 132. We therefore concluded "that political affiliation is an appropriate employment requirement" for deputy clerks of court. *Id.* at 455, 645 S.E.2d at 132.

Jenkins and *Carter* control the outcome of this case. As Sims-Campbell concedes in her complaint, her job as assistant register of deeds was to "act[] as the Register of Deeds in the absence of the Register of Deeds." As with deputy sheriffs and clerks of court, assistant registers of deeds implement policies of the elected registers of deeds, exercise discretion, and act as agents for registers of deeds, who are bound by, and may be held civilly liable for, the acts of their assistants. *See* N.C. Gen. Stat. § 161-6 (2013). And, as with appointees of sheriffs

and clerks of court, the General Assembly expressly provided that assistant registers of deeds serve "at the pleasure" of their elected superiors. N.C. Gen. Stat. § 153A-103(2) (2013). Accordingly, we hold that a register of deeds may terminate the appointment of an assistant register of deeds for political reasons without violating the federal or state constitution or state public policy.

Sims-Campbell also argues that, even if her firing was not unconstitutional or in violation of public policy, it violated Section 153A-99 of the General Statutes, which provides that "county employees . . . are not restricted from political activities," including "while off duty, . . . attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America." N.C. Gen. Stat. § 153A-99(a) (2013). The express purpose of this statute is "to ensure that county employees are not subjected to political or partisan coercion while performing their job duties." *Id.*

This argument fails because an assistant register of deeds is not a county employee. Section 153A-99 provides that "'[c]ounty employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds." *Id.* § 153A-99(b)(1). Employees of the register of deeds are not "persons employed by a county or any department or program thereof." Section 153A-103 of our General Statutes provides that the elected register of deeds retains the "exclusive right to hire, discharge, and supervise the employees in his office." *Id.* § 153A-103(a)(1). Aside from fixing the number of salaried employees in the office of register of deeds, a county thus lacks *any* authority to supervise or control the details of the work performed by employees in that office. An employer-employee relationship simply cannot exist between a county and employees of the register of deeds where the county has no authority to hire, fire, supervise, or control those employees. *Cf. Hoffman v. Moore Reg'l Hosp., Inc.*, 114 N.C. App. 248, 250-51, 441 S.E.2d 567, 569 (1994) (holding that, as a matter of law, no employer-employee relationship existed because the alleged employer did not have the right to supervise and control the details of the work performed by the alleged employee).

We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff's deputies—whose appointments and powers are governed by the same statutes as those for assistant registers of deeds—are not county employees, but rather

employees of the sheriff. *See, e.g.*, *Hubbard v. Cnty. of Cumberland*, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589-90 (2001); *Clark v. Burke Cnty.*, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994); *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449-50, 368 S.E.2d 892, 894 (1988); *Styers v. Forsyth Cnty.*, 212 N.C. 558, 560, 194 S.E. 305, 306 (1937). Indeed, in *Peele*, this Court noted that N.C. Gen. Stat. § 153A-103, which applies equally to sheriffs and registers of deeds, unambiguously provides that the elected official "has the exclusive right to hire, discharge, and supervise the employees in his office." *Peele*, 90 N.C. App. at 449-50, 368 S.E.2d at 894; N.C. Gen. Stat. § 153A-103(a)(1). In light of the statute's plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds, appointed by and working at the pleasure of the elected register of deeds, is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell responds by pointing to two readily distinguishable sources. First, she cites a 1998 advisory opinion of the North Carolina Attorney General which addressed whether § 153A-99 applied to the political activities of elected officials. *See* Opinion of Attorney General to Mr. William R. Gilkeson, Staff Attorney, N.C. General Assembly, 1998 N.C.A.G. 1 (Jan. 14, 1998), *available* at http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/342.aspx. "While opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority." *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998) (internal quotation marks omitted). Here, we are not persuaded by this opinion of the Attorney General, which addressed a different issue, failed to recognize the controlling case law from our Court cited above, and relied instead on a federal district court decision that has since been overturned by the Fourth Circuit. *See Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *rev'd*, 145 F.3d 1323 (4th Cir. 1998).

Sims-Campbell also relies on this Court's opinion in *Venable v. Vernon*, 162 N.C. App. 702, 592 S.E.2d 256 (2004) to support her argument that she was a county employee. But in *Venable*, we explicitly declined to determine whether the plaintiff, a former sheriff's deputy, was "a county employee as defined by N.C. Gen. Stat. § 153A-99." *Id.* at 706, 592 S.E.2d at 258. The *Venable* decision is thus of no value to the issue presented here.

In sum, we hold that an assistant register of deeds, like a deputy sheriff, is not a "county employee" within the meaning of § 153A-99 of the General Statutes. As a result, Sims-Campbell's claims under that statutory provision must fail.

II. Plaintiff's Claim for Intentional Infliction of Emotional Distress

Sims-Campbell next argues that the trial court erred in dismissing her claim for intentional infliction of emotional distress. She contends that Welch's conduct "was intolerable and outrageous to society's expectations" because he "terminated [Sims-Campbell] after more than two decades of service at the Register of Deeds Office because she chose to be open and honest in discussing her intention to run in the upcoming election." We reject this argument and hold that Sims-Campbell's complaint does not state a claim for intentional infliction of emotional distress.

In order to survive a motion to dismiss, a claim for intentional infliction of emotional distress must charge that the defendant engaged in "extreme and outrageous conduct" which was intended to cause and did in fact cause the plaintiff to suffer severe emotional distress. *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 325, 528 S.E.2d 368, 371 (2000). This Court consistently has held that the mere firing of an employee can never be "extreme and outrageous" conduct sufficient to state a claim for intentional infliction of emotional distress. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872-73 (2005); *Lorbacher v. Hous. Auth. of City of Raleig*h, 127 N.C. App. 663, 675-77, 493 S.E.2d 74, 81-82 (1997); *see also Laing v. Fed. Exp. Corp.*, 2011 WL 6072028 at *9 (W.D.N.C. 2011); *Smith v. Computer Task Grp., Inc.*, 568 F. Supp. 2d 603, 621 (M.D.N.C. 2008). Here, Welch's only allegedly wrongful conduct was his decision to summarily fire Sims-Campbell when she decided to run against him in the upcoming election. That alleged conduct does not satisfy the "extreme and outrageous" standard as a matter of law. Accordingly, we affirm the trial court's order dismissing Sims-Campbell's claim for intentional infliction of emotional distress.

Conclusion

For the reasons stated above, we hold that the trial court properly dismissed Plaintiff's complaint for failure to state a claim on which relief can be granted. Because we affirm the trial court's order on this basis, we need not address Plaintiff's appeal from the denial of her motion for a preliminary injunction or Defendant's alternative arguments concerning sovereign and governmental immunity, which Plaintiff maintains were not properly preserved for appeal.

AFFIRMED.

Judges STEELMAN and INMAN concur.

STATE OF NORTH CAROLINA
v.
ZEBEDEE BROWN

No. COA14-67

Filed 3 March 2015

1. Constitutional Law—right to counsel—forfeiture of right

The trial court did not err by failing to appoint counsel for pro se defendant. Defendant forfeited his right to the assistance of counsel because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel.

2. Aiding and Abetting—acting in concert—robbery with dangerous weapon—no plain error review

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charges. Although defendant argued that the acting in concert instruction was "defective," defendant acknowledged that he did not object to the instruction, and he denied that he was seeking plain error review of the instruction. Thus, the Court of Appeals did not address whether the trial court committed plain error with respect to the instruction on acting in concert.

Appeal by defendant from judgments entered 28 June 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Iain M. Stauffer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant Zebedee Brown was convicted of multiple counts of robbery with a dangerous weapon ("RWDW") arising out of a string of robberies that took place in 2011. On appeal, defendant primarily argues that the trial court erred in allowing defendant to proceed pro se. However, because defendant engaged in repeated conduct designed

to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, we hold – cons1istent with the opinions in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282 (2011), and *State v. Mee*, ___ N.C. App. ___, 756 S.E.2d 103 (2014) — that defendant forfeited his right to the assistance of counsel. Consequently, the trial court did not err in failing to appoint counsel for defendant.

Facts

The State's evidence tended to show the following facts. On 12 September 2011, three individuals, including defendant and Tamarquis Merritt, entered an internet sweepstakes business at J&W Business Center in Greensboro, North Carolina and robbed it. The individuals' faces were covered, and one of them pointed a gun at the employee and demanded money. The individuals took about $900.00 in cash and ran out of the store.

On 17 September 2011, another internet sweepstakes business on Cone Boulevard in Greensboro was robbed by two individuals wearing masks. One of the robbers had dreadlocks and pointed a gun at an employee of the business and demanded money. The robbers took between $4,000.00 and $5,000.00.

On 27 September 2011, Mr. Merritt, defendant, and another individual robbed Lucky Nine Sweepstakes in Greensboro. Two of the robbers were wearing hoodies and masks, and one of the masked robbers had dreadlocks. That robber pointed a gun at a Lucky Nine employee and demanded money. The robbers took about $1,000.00 from Lucky Nine.

On 3 October 2011, Mr. Merritt, defendant, and two other men went to the Click It Internet Sweepstakes in Greensboro at night. Mr. Merritt knocked on the front door and, after an employee, Paul Beal, unlocked it, defendant and two other men rushed in from behind Mr. Merritt into the business. Defendant and the other men wore masks and hoodies, and each one carried a gun. While inside Click It, one armed robber directed Mr. Beal to go behind the counter, and the robbers took between $7,000.00 and $9,000.00 in cash. Another one of the armed men pointed the gun at another employee, Larry Beal, forcing him to hand over the money in his pockets, as well as his cell phone. Two of the men also took money and cell phones from two customers, Mitchell Baker and Barry Gregory, before the robbers left.

On 15 October 2011, Mr. Merritt, defendant, and two other men went to Wendover Internet Services around 2:00 a.m. Mr. Merritt knocked on the door, and, after an employee, Lori Tuttle, unlocked and opened the

door, defendant and the other two men rushed in behind Mr. Merritt. Defendant and the other two men were wearing masks and each carried a gun. Everyone in the store was forced to lie down on the floor. Before leaving, one of the armed robbers took $1,200.00 from the business and a handgun belonging to Ms. Tuttle, while another took a purse belonging to a customer, Jolenda Morgan. At the time of the robberies, Mr. Merritt did not have dreadlocks.

Defendant was arrested and charged with nine counts of RWDW, among other charges. Prior to trial, on 5 March 2013, defendant had a hearing before Judge Richard W. Stone in the Guilford County Superior Court concerning his right to counsel for the charges of RWDW. Judge Stone concluded that defendant waived his right to court-appointed counsel in connection with the RWDW charges. On 11 March 2013, defendant and Anne Littlejohn, defendant's counsel for other charges, appeared before Judge Ronald E. Spivey in Guilford County Superior Court concerning Ms. Littlejohn's motion to withdraw as defendant's counsel. Judge Spivey ordered a forensic evaluation of defendant before he would rule on Ms. Littlejohn's motion. Following the evaluation, defendant was found competent to proceed pro se. After a hearing on 8 April 2013, Ms. Littlejohn's motion to withdraw was allowed, and defendant declined all counsel.

On 25 June 2013, defendant appeared without counsel before Judge David L. Hall in Guilford County Superior Court for jury selection. At that hearing, defendant requested standby counsel, but Judge Hall denied that request and ruled that defendant had forfeited his right to proceed with any counsel.

Defendant was tried for nine counts of RWDW. At the close of the State's evidence, defendant made a motion to dismiss that the trial court denied. Defendant then put on two witnesses, and the State presented a rebuttal witness. At the close of all the evidence, defendant renewed his motion to dismiss, which the trial court again denied. The jury returned guilty verdicts for six robbery charges -- for robbing Paul and Larry Beal, Mr. Baker, Mr. Gregory, Ms. Tuttle, and Ms. Morgan -- and "not guilty" verdicts for the other three charges.

On 28 June 2013, Judge Hall sentenced defendant to four consecutive terms of 90 to 120 months imprisonment and two additional terms of 90 to 120 months imprisonment to be served concurrently with the last consecutive term of imprisonment. Defendant gave oral and written notice of appeal. On or about 28 August 2013, the trial court entered

corrected judgments setting the maximum term of imprisonment as 117 months for each sentence.

I

[1] Defendant argues that he is entitled to a new trial because the trial court erroneously allowed him to proceed pro se in violation of his Sixth Amendment rights. Defendant first contends that the trial court erred in finding that he waived his right to counsel. "The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). "Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). Consequently, mere "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.*

On 5 March 2013, defendant had the following exchange with Judge Stone regarding whether defendant wished to have court-appointed counsel:

> THE COURT: Well, . . . let me interrupt you, Mr. Brown. Can you tell me whether or not you want a lawyer appointed to represent you?
>
> THE DEFENDANT: No. I am my proper self. I do not need no representation.
>
> THE COURT: You do not want a lawyer to represent you on these other charges.
>
> THE DEFENDANT: That's correct.
>
> THE COURT: Okay. You're charged with assault on a female that's punishable by up to 150 days in prison, assault by strangulation that's punishable by up to --
>
> Is the date of the offense before December 1?
>
> THE DEFENDANT: I object --
>
> THE COURT: If so --
>
> THE DEFENDANT: -- no proceeding of any kind shall be --

THE COURT: Just a moment. Just a moment.

. . . .

THE COURT: Okay. So . . . you're facing a maximum sentence of 39 months on assault by strangulation. Robbery with a dangerous weapon is a Class D felony. You're facing a maximum sentence of 204 months on that charge. In the -- you have another charge -- you have two -- three more charges of robbery with a dangerous weapon. Each of those is punishable by up to 204 months. You are also charged with a Class H felony of larceny, which is punishable by up to 39 months; and a conspiracy to commit robbery with a dangerous weapon, a Class E felony punishable by up to 88 months. And all those charges could run consecutive to one another.

You're entitled to have a lawyer represent you. If you can't afford a lawyer, I'll appoint a lawyer. Obviously, you've got a lawyer appointed on the other charges, Mr. -- Mr. Brown. I suggest you have a lawyer. I believe you need a lawyer.

THE DEFENDANT: I object, Your Honor.

THE COURT: But if you don't want a lawyer, I can't make you take one. Are you going to waive your right to a lawyer?

THE DEFENDANT: I object, Your Honor. I am waiving no rights.

THE COURT: You are waiving no rights? Do you want a lawyer or not?

THE DEFENDANT: I -- I shall -- by -- I am sequestering (sic) Islamic council and a blue-ribbon jury.

THE COURT: Okay. Well, I understand what you're requesting, but --

THE DEFENDANT: A jury of my own peers.

THE COURT: -- do you want a lawyer appointed or not?

THE DEFENDANT: I do not. I am in proper persona sui juris in my own proper person competent enough to handle my own affairs, Your Honor.

THE COURT: Well, do you want a lawyer appointed to help you with that or not?

THE DEFENDANT: I object, Your Honor. I am a proper persona sui juris in my own proper person --

THE COURT: Just answer yes or no; do you want a lawyer appointed? You -- you can say no. It doesn't -- it's not going to hurt my feelings. Sir, do you want a lawyer appointed or not?

THE DEFENDANT: I'm in proper persona sui juris competent enough to handle my own affairs, Your Honor.

THE COURT: Does that mean you want a lawyer or does that mean you don't want a lawyer?

THE DEFENDANT: It means I'm in proper persona sui juris competent enough -- over the age of 21 years old competent enough to handle my own affairs. For the record, let the record show —-

THE COURT: Mr. Brown, I'm not -- I understand all that, but you're facing what in effect is the remainder of your natural life in prison, so . . .

THE DEFENDANT: Okay. Your Honor, no proceeding of -- for the record, let the record show that --

THE COURT: No. Well, I'm -- I'm not asking you that.

THE DEFENDANT: -- no proceeding of any kinds (sic) shall be implemented without first presenting documentary proof of nationality and delegation of order of authority --

THE COURT: Okay.

THE DEFENDANT: -- for any establishment of jurisdiction --

THE COURT: It sounds to me like your client doesn't want --

THE DEFENDANT: -- for a natural-born title not to -- National based on the artifacts.

. . . .

THE COURT: Okay. It sounds like Mr. Brown does not want a lawyer appointed and wants to -- to represent himself on those matters.

THE DEFENDANT: I -- I object. I am not representing myself. I am myself, Your Honor. I am in proper persona sui juris in special appearance in my own proper person competent enough to handle my own affairs.

THE COURT: Well, I have no idea what that -- most of what that means, Mr. Brown. I'm just --

THE DEFENDANT: That means that I'm not a Negro --

THE COURT: I'm not asking you what it means. I'm just telling you I don't understand what you're saying, so you've got to -- you've got your own vocabulary going on in your brain; nothing I can do about that.

THE DEFENDANT: I object, Your Honor. This is --

THE COURT: I'm not a -- I'm not a scientist, so I'm going to find that you do not want a lawyer to represent you and that you've waived counsel.

Anything else at this time?

. . . .

THE DEFENDANT: I object. I have no counsel. I have not seen the Islamic council. I have not seen a blue-ribbon jury of my own peers.

THE COURT: Okay.

THE DEFENDANT: And no -- no proceeding -- no proceeding of any kind should be implemented without first presenting documentary proof of nationality and delegation of order of authority before any establishment of jurisdiction for a natural-born title National based on the artifacts. I am a Moorish American.

At a hearing on 12 March 2013 in Guilford County Superior Court, Judge Spivey heard a motion to withdraw from Ms. Littlejohn who was representing defendant on charges other than the RWDW charges. At that hearing, Ms. Littlejohn stated that defendant wished her to withdraw and, although no forensic psychological evaluation had been done on defendant, Ms. Littlejohn believed defendant could proceed

on his own. Shortly thereafter, when the district attorney and Judge Spivey were discussing the court calendar, defendant interjected: "Um, anybody who feels that they still represent me, I hereby announce them fired."

After Judge Spivey responded that he would file documents with the Clerk of Court that defendant had brought with him to the hearing and that defendant had attempted to file previously, defendant stated, "I do by here refute the fraud. I am not a commercial entity or artificial person. I am a live, living soul over -- natural born sovereign by descended nature, my ancestors being Moroccans, the true birds of this land (unintelligible word) title, and I do hereby announce that I am a mortal (phonetic) American natural born sovereign." The court then responded that after a forensic psychiatric evaluation, the court would take up Ms. Littlejohn's motion to withdraw.

At a hearing on 8 April 2013, following an evaluation that indicated that defendant was competent to proceed to trial, Judge Spivey heard Ms. Littlejohn on her motion to withdraw. Ms. Littlejohn informed the trial court that defendant "cannot acknowledge authority of the courts . . . [which] extend[s] to appointed counsel as well[,]" as part of his beliefs. Judge Spivey stated: "The representation is he wishes to proceed representing himself and decline all counsel from the court; is that correct?" Defendant then responded, "I would tell Your Honor, I am myself . . . in persona, so therefore I do not represent myself. I am myself." Judge Spivey ultimately granted Ms. Littlejohn's motion to withdraw, finding that defendant had previously been allowed to waive counsel in other proceedings and finding that he was competent to waive counsel in this case.

During jury selection on 25 June 2013 before Judge Hall, defendant declared: "I do not recognize anything that this court is doing. No . . . proceedings of any kind may be implemented without first presenting delegation of authority," and "I do not recognize anything that this court is doing. The DA has not presented delegation of authority order." Defendant stated that he did not have "Islamic counsel" and that he did not "have the capacity [to represent myself] because I do not understand, I do not recognize anything that's going on." Defendant objected or interjected on similar grounds, refusing to acknowledge the trial court's authority to proceed, at least 17 other times throughout the 25 June 2013 hearing.

During the hearing, Judge Hall ruled that defendant had forfeited his right to counsel. At the end of the hearing, defendant made a request

for standby counsel that Judge Hall took under advisement but ultimately denied.

In *Leyshon*, 211 N.C. App. at 514, 710 S.E.2d at 286, this Court addressed a defendant's claims that he was appointed counsel against his wishes and that he did not waive his right to have assistance of counsel. At trial in that case,

> [t]he transcript shows that Defendant refused to answer whether he waived or asserted his right to counsel, and he made contradictory statements about his right to counsel. During the hearing, Defendant clearly stated, "I'm not waiving my right to assistance of counsel," "I want to retain my right to assistance of counsel[,]" and "I'm reserving my rights." Yet, in the same hearing, Defendant also said "I don't need an attorney[,]" "I refuse his counsel[,]" and "I'll have no counsel" at trial. Furthermore, although Defendant argues in his brief that "[t]he Court determined at the initial proceeding of July 19, 2007 that Defendant could proceed without a lawyer," Defendant refused to sign the waiver of counsel form filed on 19 July 2007, and the trial court noted on the waiver form that Defendant "refused in open court to sign."

Id. at 517, 710 S.E.2d at 287. Based on those statements, this Court held that defendant did not unequivocally waive his right to counsel, and the trial court did not err in appointing counsel for the defendant. *Id.*

Here, when asked whether he wanted a lawyer to represent him, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements refusing to answer whether he waived his right to counsel were similarly equivocal to the defendant's statements in *Leyshon*, and we, therefore, hold that defendant did not waive his right to counsel.

The State, nonetheless, argues that defendant forfeited his right to counsel as did the defendant in *Leyshon*. Despite the lack of a waiver of counsel in *Leyshon*, this Court held:

> Defendant . . . obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court twice advised Defendant of his right to assistance

> of counsel and repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." Even after the court explained the basis of its jurisdiction, Defendant would not state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. Defendant adamantly asserted, "I'm not waiving my right to assistance of counsel," but he also verbally refused the assistance of the attorney appointed by the trial court. At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. Instead, Defendant maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." Based on the evidence in the record, we conclude Defendant willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings.

Id. at 518-19, 710 S.E.2d at 288-89 (footnote omitted).

Here, in addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements to the effect that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about three and a half months he never did obtain counsel. We conclude that defendant's behavior, similar to the defendant's behavior in *Leyshon*, amounted to willful obstruction and delay of trial proceedings and, therefore, defendant forfeited his right to counsel. *See also Mee*, ___ N.C. App. at ___, 756 S.E.2d at 113-14 (upholding forfeiture where "defendant appeared before at least four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was briefly represented by an assistant public defender, refused to indicate his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and

claimed not to understand anything that was said on a subject other than jurisdiction. When the case was called for trial, defendant refused to participate in the trial.").[1]

II

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the RWDW charges because the evidence did not show that defendant personally took the personal property of another. Defendant acknowledges that "a defendant can be convicted of armed robbery under acting in concert," but contends that "the court must properly instruct the jury on acting in concert in order for the conviction to be upheld based on that theory." Defendant then asserts: "When the trial [court] fails to properly instruct the jury on acting in concert, the defendant's convictions can only be upheld if the evidence shows that the defendant 'personally committed each element' of the offense[,]" quoting *State v. Roberts*, 176 N.C. App. 159, 163-64, 625 S.E.2d 846, 850 (2006). This is a misleading citation of *Roberts*.

In *Roberts*, this Court held simply:

> The jury was instructed it could find defendant guilty of first degree sexual offense only if he employed or displayed a dangerous or deadly weapon. *Without an instruction on acting in concert* or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense.

Id. at 164, 625 S.E.2d at 850 (emphasis added). *Roberts* is limited solely to the situation in which the trial court has given no instruction whatsoever on acting in concert or aiding and abetting. *See also State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (noting that "in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense").

---

1. While defendant relies upon *State v. Wray*, 206 N.C. App. 354, 698 S.E.2d 137 (2010), that appeal presented an issue not raised in this case: whether the defendant was competent to represent himself under *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008). *See Wray*, 206 N.C. App. at 371, 698 S.E.2d at 148 (after concluding that the record raised questions about defendant's competence to represent himself, holding: "We are well aware that the trial court may not have had the benefit of the U.S. Supreme Court's decision of *Indiana v. Edwards*. On the facts of this record, we conclude that the trial court erred by granting defense counsel's motion to withdraw and in ruling that Defendant had forfeited his right to counsel.").

Defendant cites no authority -- and we know of none -- supporting his position: that even when a jury is instructed on acting in concert, that theory cannot be considered with respect to the sufficiency of the evidence to defeat a motion to dismiss if the trial court made any error in the acting-in-concert instruction. *See State v. Taft*, ___ N.C. App. ___, 738 S.E.2d 454, 2013 WL 602999, at *5, 2013 N.C. App. LEXIS 160, at *13, (unpublished) ("After reviewing the arguments and applicable case law, we find a distinction between the cases cited by defendants in which the trial court failed or refused to give an acting in concert instruction and there was otherwise insufficient evidence to support the convictions, and the case presently before this Court, where the trial court mistakenly issued the wrong instruction but there is otherwise sufficient evidence to support the convictions . . . ."), *appeal dismissed and disc. review denie*d, ___ N.C. ___, 743 S.E.2d 200 (2013).

Here, after instructing the jury on the elements of RWDW and indicating that the elements would be the same for each of the nine counts, the trial court then instructed the jury:

> Ladies and gentlemen, for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose *to commit robbery with a dangerous weapon*, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon, or as a natural or probable consequence thereof.

(Emphasis added.) The trial court, therefore, specifically instructed the jury regarding the doctrine of acting in concert in connection with the charges of RWDW. Therefore, *Roberts* is inapplicable.

While defendant spends a significant portion of his brief setting out his contentions as to why this acting-in-concert instruction was "defective," defendant acknowledges that he did not object to the instruction, and he denies that he is seeking plain error review of the instruction. Instead, he asserts in his reply brief: "The issue in this case is not that the trial court failed to give a proper acting in concert instruction to the jury." Consequently, we do not address whether the trial court committed plain error with respect to the instruction on acting in concert. *See*, *e.g.*, *State v. Hill*, ___ N.C. App. ___, ___, 741 S.E.2d 911, 916 ("Since defendant does not argue that the trial court's purported error should

be reviewed for plain error, we conclude he has waived appellate review of this issue on appeal."), *disc. review denied*, ___ N.C. ___, 747 S.E.2d 577 (2013).

No error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
RANDY CARTER DAVIS

No. COA14-547

Filed 3 March 2015

1. Evidence—expert witnesses—child sexual abuse—foundation of opinion

In a prosecution arising from the sexual abuse of a child where neither of defendant's experts offered an expert opinion that there exists a "profile" of the victims of child sexual abuse, or whether the victim in this case had characteristics that were consistent with such a profile, the Court of Appeals did not reach defendant's arguments regarding the proper foundation for such evidence, the degree to which experts disagree about the existence of "symptoms" of sexual abuse, or the foundation required for consideration of "unnamed studies of sexual abuse" upon which defendant contends the witnesses relied.

2. Evidence—child sexual abuse—expert witnesses—credibility of victim

The expert witnesses in a prosecution arising from the sexual abuse of a child did not vouch for the victim's credibility. In context, the expert was testifying to a distinction between hallucinations and paranoid delusions, not testifying about the victim's credibility regarding her claim to have been sexually abused. Similarly, another expert testified about the victim's account of sexual abuse by defendant but was not asked for an opinion on the credibility of sexual abuse victims in general or on this victim's credibility. Defendant did not cite any authority for the proposition that a witness who testifies to what another witness reports is "vouching" for that person's

credibility unless each disclosure by the witness includes a qualifier such as "alleged."

3. Criminal Law—sexual offenses against child—instructions—expert witness testimony

An instruction in a child sexual abuse prosecution that the jury could consider the testimony of expert witnesses who had treated the victim to the extent that it corroborated or supported her testimony was not improper.

4. Evidence—sexual abuse—testimony of other victims—prejudice not shown

There was no prejudicial error in a prosecution for the sexual abuse of a child where the trial court admitted the testimony of two witnesses who also claimed abuse, as well as that of the minister of the church attended by defendant and two of the girls. Although defendant argued that the testimony described conduct that was not similar to the charged offenses and that the time interval between the interactions was too great, he failed to show the requisite prejudice and did not preserve his arguments for appeal. It was not necessary to reach a definitive conclusion on his arguments.

5. Sexual Offenses—sexual abuse of children—instructions—use of "victims"

In a prosecution arising from the sexual abuse of a child, the trial court did not err by referring to the complaining witness and a step-sister by the word "victim" during the instructions to the jury. The Court of Appeals case relied upon by defendant was reversed by the North Carolina Supreme Court. It was noted that the best practice would be for the trial judge to modify the Pattern Jury Instruction to read "alleged victim" upon defendant's request.

Appeal by defendant from judgments entered 30 September 2013 by Judge Jeffery Hunt in Cleveland County Superior Court. Heard in the Court of Appeals 20 November 2014.

Attorney General Roy Cooper by Special Deputy Attorney General Robert M. Curran for the State.

Mark Montgomery for defendant-appellant.

STEELMAN, Judge.

Where the testimony of expert witnesses was restricted to their own observations and experiences, their testimony did not constitute expert opinions that the State was required to disclose prior to trial. The trial court did not err or abuse its discretion by allowing the witnesses to testify. Even assuming, *arguendo*, that the trial court erred by allowing witnesses to testify pursuant to Rule 404(b), defendant has failed to show prejudice. The trial court did not err by using the word "victim" to refer to the prosecuting witness during its instructions to the jury.

I. Factual and Procedural Background

On 12 March 2012 Randy Carter Davis (defendant) was indicted for one count of first degree statutory rape of a child under 13, one count of sexual offense of a minor by a person in a parental role, and one count of first degree statutory sexual offense against a child under 13, with respect to G.S.; and for one count of indecent liberties and one count of sexual offense of a minor by a person in a parental role with respect to L.W. The charges against defendant came on for trial at the 23 September 2013 session of criminal superior court for Cleveland County.

A. State's Evidence

G.S. was born in 1976 and was thirty-seven years old at the time of trial. Her mother and defendant began living together when she was three or four years old, and married in 1981. She lived with defendant, her mother and her younger siblings until she was nine years old, cj528when her mother and defendant separated. After defendant and her mother separated, G.S. had occasional weekend visits at defendant's residence until she was 13 years old.

From the time G.S. was three and a half to four years old until she was thirteen, defendant engaged G.S. in sexual activity "every chance he got." Defendant committed more than 100 sexual offenses against her, including masturbation, oral sex and vaginal intercourse. Defendant's conduct ended when G.S. was thirteen and she stopped visiting defendant's residence. G.S. knew L.W., defendant's other step-daughter, but had no contact with L.W. after she was thirteen.

Defendant told G.S. not to reveal these sexual activities, but when G.S. was 16, she told her boyfriend, T.S., that defendant had sexually abused and raped her. She married T.S. when she was 17 and at the time of trial they were still married and had two children. T.S.'s testimony corroborated that of G.S. After 2006, G.S. and her husband attended the same church as defendant and, on one occasion in church, defendant gave G.S. a card stating that he was sorry. In 2011, G.S. told her

pastor "a little bit of what happened" between her and defendant. She later reported defendant's sexual assaults to the Cleveland County Sheriff's Department.

In her teens and twenties, G.S. experienced nightmares and trouble sleeping, and in 2006 she was briefly hospitalized with suicidal thoughts. In the hospital she was treated by Dr. Vikram Shukla, who testified as an expert in child and adolescent psychology. Dr. Shukla treated G.S. with anti-depressant and anti-psychotic medication for alcohol abuse, depression, and psychotic depression. She responded well to treatment, and was no longer psychotic when she was discharged. While G.S. was in the hospital, she told Dr. Shukla that she was sexually abused by her stepfather from age three and a half or four to age thirteen.

Sandra Chrysler testified as an expert in mental health counseling. She began counseling therapy with G.S. in March 2013. During counseling, G.S. described to her the sexual abuse by defendant.

L.W. was born in 1976 and was 6 months older than G.S. When she was eleven years old, her mother married defendant, and she lived with her mother and defendant until she was sixteen or seventeen. For several years, starting when L.W. was thirteen or fourteen years old and after G.S. had stopped visiting defendant's residence, defendant frequently talked to L.W. about sexual matters and attempted to engage her in sexual activity. Defendant told L.W. that he wanted to be her first sexual partner and asked her to perform oral sex on him. On a number of occasions defendant entered L.W.'s room at night and either masturbated by her bed or tried to physically force her to have sex. L.W. successfully rebuffed these attempts by kicking defendant. L.W. never reported these incidents until she was contacted by a detective in 2011. Once, when L.W. and G.S. were young, G.S. asked her "if anything had ever happened," but L.W. did not want to talk about it, and she was not aware of the sexual contact between defendant and G.S.

A.J., who was twenty-two years old at the time of trial, testified pursuant to Rule 404(b) of the North Carolina Rules of Evidence. When she was 12 or 13 she became acquainted with defendant. Their relationship was that of a "grandparent and grandchild." She knew L.W. from occasional family get-togethers, but did not know G.S. For several years, beginning when A.J. was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. Defendant also told A.J. that when L.W. was younger he discussed sex with her and took sexual pictures of L.W., and offered to do the same for A.J.

S.W., who was eighteen years old at the time of trial, also testified pursuant to Rule 404(b). When she was fourteen, defendant assisted with youth activities at her church. He frequently discussed sexual matters with S.W., asked to be her first sexual partner, and sent an explicit photo to her cell phone. Tracy Marlowe was married to S.W.'s aunt, and knew defendant through church. When S.W. was a teenager she confided to him that she had received suggestive phone messages from defendant.

Greg Neely was the pastor of the church attended by defendant, who was involved in youth activities in the church. In 2011 Pastor Neely met with defendant to discuss his concerns about defendant's conduct with teenage female members of the church, and asked defendant to "back away" from involvement with the young people of the church. Pastor Neely testified that due to "an accumulated amount" of incidents involving defendant and "a gathering of things that brought us to the point to take action," the church later sent defendant a letter informing him that he was banned from the church premises. Defendant did not respond to the letter. S.W. told Pastor Neely about unwanted conversations and text messages from defendant. Pastor Neely also met with G.S., who told him about defendant's abuse, and he encouraged her to go to law enforcement.

Deputy Tracy Curry of the Cleveland County Sheriff's Department interviewed G.S. and L.W. in October 2011, and interviewed A.J. and S.W. in 2012. His account of these interviews corroborated the testimony of the witnesses.

B. Defendant's Evidence

Delores Davis had been married to defendant for over 25 years at the time of trial. Her daughter, L. W., was eleven years old when she and defendant were married. Ms. Davis never saw anything inappropriate about L.W.'s relationship with defendant. G.S. had visited their home and Ms. Davis recalled her as happy and normal. She never saw or heard anything suspicious regarding A.J and defendant. Ms. Davis testified that her husband was never alone with the female witnesses, other than to drive L.W. to school.

Following the presentation of the State's evidence, the charge of sexual offense against L.W. by a person in a parental role was reduced to a charge of attempted sexual offense against L.W. On 30 September 2013 the jury returned verdicts finding defendant guilty of all charges. Pursuant to the Fair Sentencing Act, which governed sentencing for felonies committed between 1 July 1981 and 1 October 1994, the trial court imposed active prison sentences of life in prison for first degree

statutory sexual offense against G.S., life in prison for first degree statutory rape of G.S., and three years for attempted sexual offense against L.W., with these sentences to be served consecutively; and three years for indecent liberties against L.W., and four and a half years for sexual offense against G.S. by a person in a parental role, with the last two sentences to be served concurrently with the first set of offenses.

Defendant appeals.

II. Admission of Expert Testimony

[1] In his first argument, defendant contends that the trial court erred in admitting portions of the expert testimony of Dr. Shukla and Ms. Chrysler. Defendant asserts that these witnesses offered "opinion testimony" that was erroneously admitted without a proper foundation and in violation of discovery statutes, and that the testimony "amounted to expert vouching" for the veracity of the prosecuting witness. We disagree.

A. Standard of Review

Rule 702(a) of the North Carolina Rules of Evidence provides that: "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013).[1] In addition, N.C. Gen. Stat. § 15A-903(a)[2] provides that, upon motion from the defendant, the trial court must order

> (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted

1. The current version of Rule 702 became effective 1 October 2011, and applies "to actions commenced on or after that date." The date of indictment marks the commencement of a criminal proceeding. *State v. Gamez*, __ N.C. App. __, __, 745 S.E.2d 876, 878-79, *disc. rev. denied*, 367 N.C. 256, 749 S.E.2d 848 (2013) ("[W]e hold that a criminal action arises on the date that the bill of indictment was filed."). Although defendant was tried for offenses committed prior to 1992, he was indicted in March of 2012; thus, the current version of Rule 702 is applicable to his trial.

2. The current version of N.C. Gen. Stat. § 15A-903 became effective 1 December 2011 and applies "to cases pending on that date and to cases filed on or after that date." It is applicable to defendant's trial, as defendant was indicted after 1 December 2011.

> by the expert. The State shall also furnish to the defendant the expert's *curriculum vitae*, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court. . . .

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citing *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986)). Thus, " '[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.' " *State v. Ryan*, __ N.C. App. __, __, 734 S.E.2d 598, 604 (2012) (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) (internal quotation omitted), *disc. rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion. An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Ward*, 364 N.C. 133, 139-40, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal citations omitted), and quoting *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (internal citation omitted).

B. Analysis

At trial, Dr. Shukla testified as an expert in child and adolescent psychology, and Ms. Chrysler testified as an expert in mental health counseling. On appeal, defendant does not challenge the expert credentials of either witness or the admissibility of their testimony regarding their treatment of G.S., including the personal and medical history that she provided. Rather, defendant argues that both witnesses offered their expert opinions on the "symptoms" of sexual abuse, that their expert opinions lacked an adequate evidentiary foundation, and that their opinions were not disclosed to defendant prior to trial as required by N.C. Gen. Stat. § 15A-903(a)(2). Our review of the record and trial transcript does not support defendant's characterization of the testimony of these witnesses.

At trial, defendant argued that the State had not provided the defendant with Dr. Shukla's expert opinion prior to trial, and that Dr. Shukla

should not be permitted to offer an expert opinion on the characteristics of sexual abuse or the reasons for delayed reporting of abuse. The trial court ruled that Dr. Shukla could testify to his own observations in these areas, but could not offer an expert opinion on these issues. The trial court thus sustained defendant's objections to questions concerning Dr. Shukla's opinion on matters such as the characteristics of child sexual abuse victims. Defendant concedes on appeal that at trial the prosecutor couched her questions to Dr. Shukla in terms of his own observations.

Dr. Shukla testified that in treating more than 1000 patients who reported sexual abuse, he had observed a wide range of responses to sexual abuse. He testified that the responses of individuals to traumatic experiences such as sexual abuse or wartime atrocities varied greatly depending on the individual's genetic makeup and his or her personal experiences. He did not testify that there was any single set of "symptoms" of past sexual abuse, or a common "profile" of victims of sexual abuse. Dr. Shukla was not asked whether G.S. displayed "symptoms" or characteristics that, in his opinion, were consistent with a history of sexual abuse, and he did not volunteer testimony to this effect. We conclude that Dr. Shukla did not testify that there is a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903. As a result, the trial court did not err or abuse its discretion by admitting Dr. Shukla's testimony.

At trial, defendant objected to Ms. Chrysler's testimony upon the same grounds as Dr. Shukla's. The trial court limited Ms. Chrysler's testimony, ruling that she could only testify about the characteristics of sexual abuse victims and delayed reporting of sexual abuse based on her own experience as a mental health counselor, but could not offer expert testimony "as to profiles" of sexual abuse victims. Ms. Chrysler testified in general terms that, in her observation and experience, victims of childhood sexual abuse might have difficulty trusting others, might experience anxiety, depression, or feelings of guilt or shame about the abuse, and that sexual abuse could be a "trigger" for various mental illnesses, including bipolar disorder, agoraphobia, and depression. In her observation and experience, victims of sexual abuse often delayed reporting the abuse. In addition to testifying about her general observations regarding victims of sexual abuse, Ms. Chrysler testified extensively about her treatment of G.S. However, she was not asked, and did not volunteer, testimony that G.S. exhibited characteristics that fit a "profile" of sexual abuse victims, or that her "symptoms" were consistent with a history

of sexual abuse. We conclude that, because Ms. Chrysler's general testimony about sexual abuse victims was limited to her own observation and experience, it did not constitute an expert opinion that had to be disclosed in advance of trial, and that the trial court did not err or abuse its discretion by admitting Ms. Chrysler's testimony.

Because we hold that neither Dr. Shukla nor Ms. Chrysler offered an expert opinion that there exists a "profile" of the victims of child sexual abuse, or whether G.S. had characteristics that were consistent with such a profile, we do not reach defendant's arguments regarding the proper foundation for such evidence, the degree to which experts disagree about the existence of "symptoms" of sexual abuse, or the foundation required for consideration of "unnamed studies of sexual abuse" upon which defendant contends that the witnesses relied in reaching their expert opinions.

[2] We also reject defendant's argument that Dr. Shukla and Ms. Chrysler "vouched" for G.S.'s credibility. Regarding the specific testimony of Dr. Shukla, defendant contends that Dr. Shukla testified that he was "able to distinguish a true from a false belief," thus suggesting that Dr. Shukla testified to the veracity of G.S.'s reports of abuse. However, the testimony to which defendant refers occurred during his cross-examination of Dr. Shukla regarding G.S.'s sense that she had a shadow over one shoulder:

> Q. I believe you testified that she had a persistent fear, an imaginary perception that something was on her, physically on her, right? Isn't that what you said?
>
> A. . . . My understanding, objectively, professionally, is she had a paranoid sense of presence on her.
>
> Q. Something behind her left shoulder?
>
> A. That is correct.
>
> . . .
>
> Q. But that couldn't be true, right?
>
> A. By definition, I have already testified that paranoid delusion is a fixed false belief, and she had a paranoid form of psychotic sign during her depressed state over a long period of time. But paranoid delusion is not the same as hallucination.

> Q. So she had a paranoid delusion, which is what you described to the jury as a fixed yet false belief.
>
> A. Yes, that is correct.
>
> Q. And you can't, as a psychiatrist, distinguish between hallucinations and paranoid delusions, true beliefs, false beliefs. You can't make that distinction, can you?
>
> A. In fact, yes, I can.

As the context makes clear, Dr. Shukla was testifying to a distinction between hallucinations and paranoid delusions, and not testifying about G.S.'s credibility regarding her claim to have been sexually abused.

Defendant also argues that in their testimony about the treatment of G.S., both Dr. Shukla and Ms. Chrysler vouched for G.S.'s credibility. We disagree. Dr. Shukla testified that G.S. told the health care providers in the hospital that she had been sexually abused, and that the treatment provided in the hospital improved G.S.'s ability to discuss her past. Dr. Shukla was not asked for an opinion regarding G.S.'s credibility. Similarly, Ms. Chrysler testified about G.S.'s account of sexual abuse by defendant. However, she was not asked for an opinion regarding either the credibility of sexual abuse victims in general or on G.S.'s credibility.

Defendant acknowledges that neither witness ever testified that he or she believed G.S. or that her behavior was consistent with credibility. Defendant's argument that Dr. Shukla and Ms. Chrysler vouched for G.S.'s credibility appears to be based primarily on the fact that they testified about the problems G.S. reported without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." For example, Dr. Shukla testified without objection that G.S. reported the following mental health issues:

> The problems she reported were inability to cope with her past, inability to cope with dysfunctional childhood, and inability to cope with approximately ten years of sexual molestation she went through with one person, and she was having difficulty coping with the nightmares that she was experiencing, and flashbacks she was experiencing as a product of the sexual molestation.

Similarly, Ms. Chrysler testified to G.S.'s account of sexual abuse by defendant over a period of many years. Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be "vouching" for that person's

credibility unless each disclosure by the witness includes a qualifier such as "alleged." We decline to impose such a requirement.

Defendant also contends that both Dr. Shukla and Ms. Chrysler testified that "patients they had treated over the years were in fact sexual abuse victims," and that G.S. "displayed [the] characteristics" of a typical victim of child sexual abuse. Defendant does not cite to a specific transcript reference for this assertion, and our review of the transcript indicates that neither expert testified that his or her patients "were in fact sexual abuse victims" or that G.S. matched a profile that was characteristic of sexual abuse victims.

[3] Defendant also challenges the trial court's instruction to the jury that it could consider the testimony of Dr. Shukla and Ms. Chrysler to the extent that it corroborated or supported G.S.'s testimony. We conclude that the instruction was not improper.

For the reasons discussed above, we hold that the trial court did not err by admitting the testimony of the expert witnesses. This argument is without merit.

III. Admission of 404(b) Evidence

In defendant's second argument, he argues that the trial court erred by admitting the testimony of S.W. and A.J. pursuant to North Carolina Rule of Evidence 404(b). Defendant asserts that this testimony was evidence only of his propensity to commit the acts for which he was on trial, and thus was inadmissible. We conclude that even assuming, *arguendo*, that this testimony was erroneously admitted, defendant has failed to show prejudice.

A. Standard of Review

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides that "[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." "Rule 404(b) is 'a clear general rule of inclusion.' . . . [Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990), and *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995)). In addition, "if the trial court concludes the evidence is relevant to something other than the defendant's propensity to commit the

crime, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Noble*, __ N.C. App. __, __, 741 S.E.2d 473, 480, *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013).

"[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *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." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "In addition, 'this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.' " *Id.* at 131, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (internal citation omitted).

B. Analysis

[4] As discussed above, the trial court admitted the testimony of two witnesses pursuant to Rule 404(b). A.J. testified that for several years, beginning when she was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. S.W. testified that when she was fourteen, defendant frequently discussed sexual matters with her, asked to be her first sexual partner, and sent an explicit photo to her phone. In its ruling allowing the testimony of S.W. and A.J., the trial court found that:

> [1.] The Court finds the testimony of the witnesses [G.S. and L.W.] the alleged victims, covers a time period throughout the 1980's beginning in 1981. Further, that testimony of witness [A.J.] occurred in the year 2000[.] . . . Testimony of [S.W.] occurred over a period from 2009 through 2011, into 2011[.]
>
> [2.] [S]triking similarities exist in testimony of [the four witnesses], . . . [and] threads of commonality run through each of these witnesses' testimony;
>
> [3.] . . . [I]n each instance the alleged victims were young females from age eleven through sixteen[.] . . . [G.S.'s] victimization may have occurred, may have started at

> an earlier age. Nevertheless, successful intercourse, in her case, was alleged to have started at approximately age twelve.
>
> [4.] In each instance the victims were alone with the Defendant, either in a room or a vehicle. In each instance the Defendant used his position of authority, or perceived authority, to commit his acts upon the victims, witnesses, in [G.S. and L.W.] the position of stepfather, in [A.J.] the perceived position of grandfather, and in [S.W.] the position of youth director.
>
> [4.] In each instance the Defendant's acts and his discussions involved his sexual arousal or gratification, or his fascination with sex and his victims' sexuality.
>
> [5.] In each instance, the Defendant seemed obsessed with being the first to engage in vaginal intercourse with his victims, and in [G.S.] the victim at age twelve, and [L.W.] the attempts with the victim at age thirteen, and [A.J.] offers to engage in sex and teach about sex at ages thirteen and fourteen for the victim, that period, and in [S.W.] at age fourteen the Defendant allegedly told her he wanted to be the — he wanted to take her virginity.
>
> [6.] Next, as to the testimony of [all four witnesses], in each instance the Defendant exploited his position of authority and trust to conduct a quote, "how-to," unquote, instruction involving sex to these young girls, either through actual physical violations or through discourse, or by both.
>
> [7.] Next, the Defendant used the subterfuge of the quote, "trusted instructor," unquote, role to engage in preparation of his victims in each instance, for his subsequent criminal sexual behavior with each victim and witness.

Defendant does not challenge the evidentiary support for the trial court's findings of fact. As a general rule, "[f]indings of fact which are not challenged 'are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions.' " *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 743 (2008) (quoting *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (internal citations omitted). Moreover, our

review shows that the trial court's findings were supported by competent evidence. Based on its findings, the trial court concluded:

> 1) That the evidence of [G.S., L.W., S.W., and A.J.] is strikingly similar;
>
> 2) That the – rather than being too remote in time from one another as to run afoul of Rule 403 analysis, in this case the temporal proximity analysis actually reveals a commonality connecting the Defendant's criminal sexual conduct stretching over a period of approximately thirty years, involving at least four young girls from the ages of eleven through sixteen;
>
> 3) That the Court in its discretion concludes that the probative value outweighs the possibility of prejudice to the Defendant, pursuant to Rule 403 and 404(b);
>
> 4) Finally, that this Court concludes that the evidence questioned is admissible under 404(b) and 403 to show the Defendant's possible state of mind as to identity, plan, design, preparation, intent, opportunity and motive if the jury so finds.

On appeal, defendant argues that the testimony of A.J. and S.W. described conduct that was not similar to the charged offenses, and that the number of years between the offenses with which he was charged and his interactions with A.J. and S.W. rendered their testimony inadmissible. We conclude that it is unnecessary for us to reach a definitive conclusion on defendant's arguments, given that defendant has failed to show the requisite prejudice.

N.C. Gen. Stat. § 15A-1443 provides that:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . .
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a

> reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Defendant argues on appeal that "admission of this testimony denied not only [defendant's] statutory rights, but his constitutional rights to a fair trial." This conclusory statement is unsupported by argument or citation to authority, or even any discussion of the specific nature of the "constitutional rights" at issue. N.C. Rule of Appellate Procedure 28(b)(6) states 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." *See Hackos v. Goodman*, __ N.C. App. __, __, 745 S.E.2d 336, 341 (2013) ("Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff's argument.") (citing *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008)).

Because defendant does not articulate an argument in support of his contention that his "constitutional rights" were violated by admission of the challenged testimony, he has failed to preserve for review the issue of whether admission of the challenged testimony violated his constitutional rights. As a result, we do not reach the questions either of the existence of a constitutional violation or whether the alleged constitutional violation was harmless beyond a reasonable doubt. Instead, we apply the standard set forth in N.C. Gen. Stat. § 15A-1443(a), which requires defendant to demonstrate "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."

Defendant argues that under "the ordinary standard for prejudice, a new trial [is] required." This argument is supported by a single citation, with no discussion or analysis of the application of the standard, or of the language of the quote, to the specific facts of this case. Assuming, *arguendo*, that this issue is preserved for review, we conclude that defendant has failed to show that, in the absence of the testimony of A.J. and S.W., his trial would have had a different result.

In his appellate brief, defendant emphasizes the difference in degree between the charged offenses and the 404(b) testimony:

> "Mr. Davis was charged with repeatedly and forcibly rap[ing] G.S. and attempting to forcibly rape L.W. A.J. testified only that Mr. Davis would make sexual references to her; he never tried to have sex with her. S.W. testified only

> that Mr. Davis complimented her on her breasts, texted her about sex and asked to take her virginity. He never touched her except to hug her."

We agree that the behavior described by A.J. and S.W. was far less egregious than the offenses with which defendant was charged. For that reason, it seems unlikely that admission of this evidence changed the outcome of the trial.

Moreover, defendant fails to offer any appellate argument challenging the admission of testimony by Greg Neely, the pastor at the church attended by defendant, G.S., S.W., and A.J. As discussed above, Pastor Neely testified that (1) both G.S. and S.W. confided in him that they had experienced unwanted sexual interactions with defendant; (2) Pastor Neely discussed with defendant his concerns about defendant's behavior with the young women of the church, and; (3) ultimately Pastor Neely found it necessary to ban defendant from the church premises. In addition, Pastor Neely read to the jury the letter sent by the church to defendant, informing him that he was barred from the church. " '[W]hen, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *State v. Davis*, 353 N.C. 1, 22, 539 S.E.2d 243, 258 (2000) (quoting *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989)). In addition, Pastor Neely's testimony was at least as prejudicial as that of the 404(b) witnesses. Defendant does not argue on appeal that this evidence should have been excluded.[3] We also observe that the testimony of G.S. and L.W. was largely unimpeached and was corroborated by that of other witnesses. We conclude, given the strength of the State's evidence and the unchallenged admission of Pastor Neely's testimony, that defendant has failed to establish that he was prejudiced by the testimony of A.J. and S.W.

IV. Court's Use of the Word "Victim" in Jury Instructions

[5] In his third argument, defendant contends that the trial court committed reversible error by referring to G.S. and L.W. by the word "victim" during its instructions to the jury. Defendant argues that "[t]his case is controlled by *State v. Walston*[, __ N.C. App. __, 747 S.E.2d 720 (2013)], in which this Court held that it was prejudicial error for the trial court

3. Defendant notes that the "prosecution presented two additional witness[es] to corroborate S.W.," presumably referring to Lindsay Landers and Tracy Marlowe, who testified that S.W. had told them about receiving suggestive phone messages from defendant. Although Pastor Neely's testimony also included corroboration of S.W., it was not received subject to a limitation restricting its consideration to corroboration.

to refer to the complaining witness as the "victim" in its jury instructions. We agree that *Walston* is controlling, but observe that *Walston* was recently reversed by our Supreme Court. In *State v. Walston*, __ N.C. __, __ S.E.2d __ (2015) (2014 N.C. LEXIS 953), our Supreme Court held that:

> [W]e hold in this case that the trial court did not err in using the word "victim" in the pattern jury instructions to describe the complaining witnesses. We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

Walston, __ N.C. at __, __ S.E.2d at __. Based on *Walston*, we hold that the trial court did not commit reversible error by using the term "victim" to describe the complaining witnesses.

V. Conclusion

For the reasons discussed above, we conclude that the defendant had a fair trial, free of reversible error.

NO ERROR.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
GRANT RUFFIN HAYES

No. COA14-766

Filed 3 March 2015

1. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—Confrontation Clause—state of mind—not hearsay

In defendant's trial for first-degree murder, the trial court did not violate the Confrontation Clause by admitting a forensic psychologist's report and testimony concerning her evaluation of defendant during a custody dispute with the victim. The evidence was admitted for the purpose of showing defendant's state of mind, not for the truth of the matter asserted.

2. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—relevancy—state of mind

In defendant's trial for first-degree murder, the trial court did not err by admitting a forensic psychologist's report and testimony concerning her evaluation of defendant during a custody dispute with the victim. Because the report arguably was unfavorable to defendant and was found in his car with handwritten markings throughout, the report was relevant for showing his state of mind toward the victim. In addition, the trial court gave the jury a limiting instruction on this evidence.

3. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—error assumed arguendo—no prejudice

In defendant's trial for first-degree murder, even assuming that the trial court erred by admitting a forensic psychologist's report and testimony, defendant failed to show that in the absence of the alleged error there was a reasonable possibility that the jury would have reached a different verdict. There was abundant other evidence of defendant's guilt.

4. Homicide—evidence—testimony that cause of death was homicide—not commentary on a legal conclusion

In defendant's trial for first-degree murder, the trial court did not err or commit plain error by allowing the State's expert witness

pathologists to testify that the cause of the victim's death was homicide. The pathologists were testifying within their functions as medical examiners and not commenting on a legal conclusion. Even assuming admission of the testimony was error, it was not probable that the jury would have reached a different verdict absent the alleged error. Defendant's own position at trial was that the victim was killed at the hands of another person; the trial court gave a limiting instruction regarding expert testimony; and there was abundant evidence pointing to defendant's guilt.

5. Homicide—evidence—hearsay

In defendant's trial for first-degree murder, a witness did not give inadmissible hearsay testimony by indicating that he had knowledge of certain facts about a witness.

6. Homicide—evidence—hearsay—no plain error

In an appeal from defendant's trial for first-degree murder, even assuming that testimony by a detective about a witness's statements amounted to inadmissible hearsay, a violation of the Confrontation Clause, and an improper bolstering opinion, defendant failed to show plain error. The jury considered other evidence that was essentially the same as the allegedly erroneously admitted evidence and was given a limiting instruction.

7. Appeal and Error—preservation of issues—no request for plain error review

In an appeal from defendant's trial for first-degree murder, the Court of Appeals declined to consider whether evidence was properly authenticated because authentication was not the basis of defendant's objection at trial, and defendant failed to request plain error review.

8. Homicide—evidence—song lyrics—similarity to facts surrounding murder—identity, motive, and intent

In defendant's trial for first-degree murder, the trial court did not err by admitting into evidence song lyrics allegedly authored by defendant. The lyrics shared similarities with the facts surrounding the murder and therefore were relevant to establishing identity, motive, and intent. The probative value of the lyrics substantially outweighed their prejudicial effect to defendant.

9. Homicide—jury request—exercise of discretion by trial court

In defendant's trial for first-degree murder, the trial court's erroneous preemptive instruction regarding review of exhibits and

testimony did not amount to a violation of N.C.G.S. § 15A-1233. When the jury asked whether the transcripts of the trial were available for review, the trial court exercised its discretion in making its ruling.

Appeal by defendant from judgment entered 16 September 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

On 16 September 2013, a jury found defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a fair trial, free from prejudicial error.

I. Facts

Laura Jean Ackerson (the victim) and Grant Ruffin Hayes (defendant) met in March 2007. Thereafter, the two engaged in a domestic relationship, but never married. Two children were born of the relationship, and once defendant and the victim separated, a custody dispute over the children ensued. In late 2009, defendant met Amanda Hayes (Amanda) and they began dating. Defendant and Amanda married in April 2010 and moved into an apartment in Raleigh. The victim lived in Kinston.

On 29 June 2010, the Lenoir County District Court entered a consent order giving temporary physical custody of the children to defendant during the week and to the victim on weekends. As part of their temporary arrangement, the parties agreed to a psychological evaluation by Dr. Ginger Calloway, a forensic psychologist. After evaluating the parties over a period of time, Dr. Calloway issued a report recommending that defendant and the victim share legal and physical custody of the children. Over defendant's objection, Dr. Calloway testified about the contents of her report at trial.

On 12 July 2011, defendant e-mailed the victim to suggest that she see the children for a mid-week visit. The victim drove to Raleigh on 13 July, texting defendant at 4:12 p.m., "I'm leaving the Wilson area now.

I'll call when I get past the traffic. Where will you be in [an] hour or so?" The victim also called defendant, with the last outgoing call occurring at 4:59 p.m. near Crabtree Valley mall "going outbound toward [defendant's] apartment[.]" Chevon Mathes, the victim's friend and business partner, knew that the victim was going to Raleigh and expected a business related call from her at approximately 9:00 p.m., which she never received.

In the early hours of 14 July, defendant bought goggles, trash bags, a reciprocating saw, blades, plastic sheeting, tarp, gloves, bleach, tape, and a lint roller at Wal-Mart and Target in Raleigh. Amanda called her daughter, Sha, later that morning, and Sha took the children to Monkey Joe's, a play center, in Raleigh for most of the day. On 16 July, defendant bought coolers and ice. He also rented a U-Haul trailer and indicated that his destination was Texas. Amanda called Sha and told her that she was going to Texas to see her sister, Karen Berry. Defendant, Amanda, and the children drove to Texas in the U-Haul and arrived at Ms. Berry's house in the late hours of 17 July or early in the morning of 18 July.

On 19 July, defendant bought gloves and bottles of acid from Home Depot. Surveillance cameras captured Amanda dumping some of the bottles in an area near Ms. Berry's residence. Ms. Berry's residence was also located near a creek that was often used for fishing. Ms. Berry testified that defendant and Amanda took her boat into the creek on the night of 19 July. When investigators later searched the creek, they found the victim's decomposed and dismembered body parts. The State's expert witness pathologists testified at trial that the victim's cause of death was "homicide by und[et]ermined means" or "undetermined homicidal violence."

Defendant returned the U-Haul trailer on 20 July and drove with Amanda and the children back to Raleigh. Mathes became concerned about the victim's disappearance and notified law enforcement. After launching an investigation, law enforcement officers searched defendant's apartment on 20 July. In addition to a bleach stain, missing furniture, and cleaning products, they also found lyrics to a song entitled, "Man Killer." The lyrics concerned the first-person killing of a woman by making her bleed and by strangulation. Over defendant's objection at trial, the trial court admitted the song lyrics into evidence.

The State also offered the witness testimony of Pablo Trinidad at trial. Trinidad testified that in July 2011, he was being held in the Wake County Detention Center on federal charges while defendant was being held in the same location for the murder charge. Trinidad stated that

he met defendant because they were housed in the same area. One day, inmates saw defendant's case being discussed on television and wanted to harm him, but Trinidad diffused the situation. Trinidad testified that at some point after this incident, defendant told him that he called the victim and "lured" her to his apartment under the "false pretenses" of settling the custody dispute, "subdued" her with Amanda's help, strangled her, and drove out of state to dispose of the body.

II. Analysis

a.) Dr. Calloway's Report and Testimony

Defendant first argues that the trial court erred by admitting Dr. Calloway's report into evidence and by allowing her to testify about the report. Defendant specifically avers that information about defendant and the victim that was presented in Dr. Calloway's testimony and report was inadmissible under both the North Carolina Rules of Evidence 402, 404, and 802 and the Confrontation Clause of the United States Constitution because it allegedly discussed: 1.) defendant's history of illicit drug use, 2.) defendant having suffered from possible mental illness, 3.) defendant's character for untruthfulness, 4.) Dr. Calloway's opinion that defendant wanted to "obliterate" the victim, 5.) defendant's prior conviction for DWI, and 6.) sympathy for the victim and her good character.

i. Confrontation Clause

[1] We first address defendant's argument that Dr. Calloway's report and testimony violated the Confrontation Clause of the United States Constitution because they contained third party statements from non-testifying witnesses who were not subject to cross-examination. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766, 767 (2010). "The Confrontation Clause bars testimonial statements of witnesses if they are not subject to cross-examination at trial unless (1) the witness is unavailable and (2) there has been a prior opportunity for cross-examination." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005). However, "where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue." *Id.*

After reviewing the record, it is clear that the trial court admitted Dr. Calloway's report and testimony to the extent that it was relevant upon the issue of defendant's state of mind, not for the truth of the matter asserted (see the trial court's limiting instruction below). Accordingly, the third party statements found in Dr. Calloway's report and testimony were not inadmissible on Confrontation Clause grounds. *See id.*

ii. Relevancy and Prejudicial Effect

[2] Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Moreover, "[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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, "where evidence is relevant for some purpose other than proving character, it is not inadmissible because it incidentally reflects upon character." *State v. Anderson*, __ N.C. App. __, __, 730 S.E.2d 262, 267 (2012) (citations and quotation marks omitted). This Court reviews *de novo* the legal conclusion that the evidence is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident within the permissible coverage of Rule 404(b). *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 461 (2013) (citation and quotation marks omitted).

Upon our review of issues arising from Rules 401 and 403, this Court has noted:

> [a]lthough the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

Before Dr. Calloway testified, the trial court provided the jury with a limiting instruction regarding her testimony as to the report:

> Let me -- I need to give the jury some limiting instructions with regard to this testimony. Okay?
>
> Ladies and gentlemen, Ginger Calloway is not here as an expert witness. She is here as a fact witness. And as such, she is permitted to testify about her report, which I believe is State's Exhibit 406. The report itself is in evidence. The report and her testimony about it may be relevant in this trial but only to the extent it may have been read by the victim or read by the defendant or read by both and that it may have had some bearing on either of them or both of them that caused them to form impressions about the upcoming August 15 custody dispute. Therefore, this information should be considered only to the extent that you find it is relevant and it bears upon the state of mind of Grant Hayes or Laura Ackerson or of both of them on or about July 13 of 2011. Otherwise, you may not consider this information for any other purpose. It is not received into evidence to prove the truth or the accuracy of the matters contained in the report but only to the extent that that report, in reviewing it, affected the mind of the victim, the alleged victim, or the defendant. And therefore I caution you and ask you to limit your evaluation of this evidence solely for that purpose.

During jury instructions, the trial court re-emphasized that the jury could only consider Dr. Calloway's report and testimony related to that report for a limited purpose:

> Ladies and gentlemen, State's Exhibit 406, a child custody evaluation report, and testimony from the author of that report was received into evidence for a limited purpose. You may consider that evidence only to the extent that you find it relevant on the issue of Laura Ackerson's state of mind and intentions regarding custody of her children on July 13, 2011, and the state of mind of the defendant on July 13, 2011, as it relates to child custody and to any motive or intent involving the crime charged in this case. You may consider this evidence only for that limited purpose and for no other purpose.

The report and testimony primarily focused on "what [were] [in] the best interests of the children with regard to parental access or custody." In answering this question, Dr. Calloway obtained background information about the relationship between defendant and the victim, met with both of them to "ask them for their concerns generally, and tr[ied] to get some sense of their interaction with each other[,]" and conducted psychological assessments in the form of home visits, behavioral observations, and interaction with the children. The report, which spans over fifty pages, also contains Dr. Calloway's written observations of: defendant's drug use, his possible mental illness, his untruthfulness toward her during the evaluation process, her opinion that defendant desired to "obliterate" the victim's relationship with the children, his prior conviction for DWI, and according to defendant, her sympathy for the victim.

Based on her findings, Dr. Calloway recommended, in relevant part, that both parents share legal and physical custody, both children enter preschool programs that will "compensate for any parental deficiencies exhibited by both parents[,]" defendant obtain a parent coach to help him "provide a greater sense of reassurance and comfort to his children[,]" defendant "be referred to a psychiatrist for evaluation regarding the question of a mood disorder or other possible explanations for the illogical, disturbed thinking he exhibits", random drug screens for both parents, and the court retain oversight over the family.

Thus, the "bad character" evidence purportedly discussed in the report and testimony, whether in fact true or not, was considered by Dr. Calloway in reaching her child custody recommendation. Because Dr. Calloway's report was arguably unfavorable to defendant and the report was found in defendant's car with handwritten markings throughout the document, Dr. Calloway's report and ensuing testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that the report as a whole created some basis for defendant's ill-will, intent, or motive towards the victim.

Although the report incidentally reflected on defendant's character, the probative value of Dr. Calloway's report and testimony substantially outweighed the potential prejudicial effect to defendant. The reflections of defendant's character, which comprised a small portion of the report, were not admitted for the truth of the matters asserted. Rather, they were offered to demonstrate how the resulting recommendations were relevant to defendant's state of mind. Thus, the admission of Dr. Calloway's report and testimony was not error.

iii. Prejudicial Error

[3] Even if we agreed with defendant that the trial court erred by admitting Dr. Calloway's report and testimony, defendant must also show that he was prejudiced by these errors. *See State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) ("To establish reversible error, a defendant must show a reasonable possibility that had the error not been committed a different result would have been reached at the trial."). If "abundant evidence" exists "to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Young*, 302 N.C. 385, 389, 275 S.E.2d 429, 432 (1981) (citation and quotation marks omitted).

Defendant has failed to carry his burden of showing that had Dr. Calloway's report and corresponding testimony not been admitted at trial, a reasonable possibility exists that the jury would have reached a different result. The State presented other abundant evidence of defendant's guilt.

Many witnesses testified to the tumultuous relationship between defendant and the victim, especially with regard to their child custody dispute. While the victim and defendant were in a relationship, defendant mentally and physically abused the victim, and defendant openly expressed his frustration with the high expenses associated with the custody issue and his belief that the victim was "gold digging" and "putting [him] through hell."

On Tuesday, 12 July, defendant e-mailed the victim and offered to let her see the children the next day. On occasion, the victim met defendant at Monkey Joe's, and less frequently, she went to defendant's apartment. Defendant's friend, Lauren Harris, was a manager at Monkey Joe's and allowed the children to play there free of charge. Harris testified that on 13 July, defendant did not bring the children to Monkey Joe's.

Based on phone records and cellular data, defendant and the victim communicated throughout the day on 13 July. The final outgoing call made by the victim on her cell phone was to defendant while she was driving in a direction towards his apartment. Investigators ultimately discovered the victim's car in a nearby apartment complex, which was the location of defendant's prior residence.

At approximately 2:30 a.m. on 14 July, defendant bought an abundance of cleaning materials and tools. Between 10:00-10:30 a.m. that morning, Sha, defendant's step-daughter, took the children to Monkey Joe's after receiving a call from Amanda. Sha remained with the children at Monkey Joe's until nearly 4:00 p.m. At 5:31 p.m., another surveillance video showed defendant at Target purchasing several containers of bleach, paper towels, two sets of gloves, electrical tape, and a lint roller. Amanda then asked Sha to bring her vacuum to their apartment, which she did by 6:00 p.m. Defendant also posted an ad on Craigslist to sell various items in his apartment.

When law enforcement officers later searched defendant's apartment, they noticed a bleach stain on the carpet near the entrance and missing furniture. A load of trash collected from defendant's apartment dumpster also yielded a vacuum cleaner, toilet scrub brushes, bleach containers, respirator mask packaging, gloves, and a bleach-stained towel. DNA on a latex glove contained the victim's DNA profile.

On 18 July 2011, Detective James Gwartney, who was investigating the victim's disappearance, contacted defendant for possible leads. Despite being at Ms. Berry's house in Texas, defendant told Detective Gwartney that he was in Raleigh and provided inconsistent information about his interaction with the victim on 13 July.

Ms. Berry testified that defendant and Amanda took her boat out into the nearby creek on the night of 19 July and were gone for a "couple of hours." Ultimately, divers found a torso, portions of a leg, and a head in the creek, which were later determined to have been the victim's body parts. Ms. Berry also testified that Amanda told her that she was "covering for [defendant]." Just before defendant and his family left the Berry residence, Amanda's niece, who lived at Ms. Berry's house in Texas, observed defendant and overheard him stating, "I don't need an alibi, I was with my family[.]"

At trial, the State's expert witness pathologists could not determine the exact cause of death due to the decomposed remains, but concluded that the victim's death was caused by "homicide by undetermined means." They testified that strangling or stab wounds to the neck area could have caused the victim's death. The State also offered Trinidad's testimony that defendant admitted to committing the crime.

In light of the State's evidence discussed above, even if the trial court erred by admitting Dr. Calloway's report and testimony, any such error was non-prejudicial.

b.) Pathologists' Testimony

[4] Defendant also argues that the trial court erred by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" Specifically, defendant argues that the pathologists' testimony was inadmissible because there were insufficient factual bases for their opinions and the State established no foundation to show that "homicide" was a medical term-of-art. We disagree.

Defendant concedes that we should review this issue for plain error because his attorneys did not object to the admission of the pathologists' testimony at trial. We "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted).

N.C. Gen. Stat. § 8C-1, Rule 704 (2013) states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our Supreme Court has interpreted Rule 704 and drawn "a distinction between testimony about legal standards or conclusions and factual premises." *State v. Parker*, 354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001).

While an expert may provide opinion testimony "regarding underlying factual premises[,]" he or she cannot "testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *Id.* (citation and quotation marks omitted).

The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck,

stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony. *See id.* at 290, 553 S.E.2d at 900.

Assuming *arguendo* that the admission of the pathologists' testimony regarding the victim's cause of death was error, it is highly unlikely that absent the error, the jury probably would have reached a different result. At trial, defendant did not appear to challenge that the victim had been killed. In fact, defendant's theory at trial was that Amanda killed the victim. During opening statements, defendant's attorney stated: "The evidence will show that the death of [the victim] happened in a spontaneous, unpredictable way at the hands of Amanda Hayes. [Defendant] helped clean up the evidence and dispose of the body. That's a serious thing, that's a terrible thing, but it's not murder." During closing arguments, defendant's attorney told the jury:

> The reliable evidence in this case points to Amanda Hayes. . . . She said she hurt [the victim]. . . . Amanda created the body so Amanda was in charge of getting rid of it. . . . Remember she called Sha on the way there and said, 'I need my big sister.' She needed her big sister because she had killed somebody. . . . Amanda Hayes' confession is a reasonable doubt. . . . She didn't say we. She said I, 'I hurt [the victim],' and that's reasonable doubt. . . . It was Amanda's plan because Amanda was responsible for killing Laura.

Moreover, the trial court provided a limiting instruction to the jury about their consideration of expert testimony:

> In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of accuracy and weight and credibility I previously mentioned, evidence of the witness's training, qualifications and experience, or lack thereof; the reasons, if any, given for the opinion; whether the opinion is supported by the facts that you find to exist from the evidence; whether the opinion is reasonable; and whether the opinion is consistent with other believable evidence in the case. You should consider the opinion of an expert witness, but you are not bound by it. In other words, you're not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Thus, defendant's own uncontested position at trial that Amanda killed the victim, the trial court's limiting instruction, and the other aforementioned evidence pointing to defendant's guilt would preclude us from holding that the pathologists' opinion testimony was plain error.

c.) Detective Faulk's Testimony

Defendant next argues that Detective Jerry Faulk's admitted testimony that Trinidad's previous statements to federal agents were consistent with Trinidad's statements to him on 6 August 2012 constituted prejudicial error and plain error. We disagree.

i. Impermissible Hearsay

[5] Defendant's first sub-argument is that a portion of Detective Faulk's testimony constituted impermissible hearsay. We disagree. We review this issue *de novo*. *See State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*.).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2013).

The testimony at issue is the following:

> PROSECUTOR: You had been questioned about the various dates of those articles that were available, apparently, on the internet on those dates. With regard to Pablo Trinidad, you indicated that you interviewed him in June of 2012; is that right?
>
> DETECTIVE FAULK: I believe when they showed me my report, it's actually August.
>
> PROSECTUOR: August 2012?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And prior to that, you were aware that he had been interviewed by other law enforcement agents in a federal debriefing, weren't you?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And at that time that he had given information related to this homicide case and Grant Hayes and information that he had at that time?

DEFENSE COUNSEL: I'm going to object to the multiple layers of hearsay here.

THE COURT: Overruled. Go ahead.

DETECTIVE FAULK: Correct.

PROSECUTOR: And were you aware that the interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?

DETECTIVE FAULK: Correct.

Defendant's argument fails because the prosecutor merely asked Detective Faulk whether he was aware that: 1.) Trinidad had been interviewed by federal agents and 2.) Trinidad had provided information related to this case. Detective Faulk indicated that he had knowledge of such facts, but he did not testify about what Trinidad actually told federal agents. Thus, Detective Faulk's statements above were not hearsay.

ii. Other Hearsay Issues, Confrontation Clause, and Improper Bolstering

[6] Defendant also argues that Detective Faulk impermissibly testified about Trinidad's statements to federal agents because Detective Faulk learned about the contents of Trinidad's statements by way of hearsay. Defendant avers that the admission of this testimony violated the Confrontation Clause of the United States Constitution. He also argues that the characterization of Trinidad's statements to federal agents as "consistent" with his statements to Detective Faulk was an improper opinion serving to bolster Trinidad's credibility. We review these issues for plain error, as asserted by defendant in his brief, because defendant's trial counsel failed to timely object to Detective Faulk's testimony concerning Trinidad's statements to the federal agents.

The relevant portion of Detective Faulk's testimony is the following:

PROSECUTOR: And were you aware that the interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?

DETECTIVE FAULK: Correct.

PROSECUTOR: And did you -- did you have that information available to you before you went to speak with Mr. Trinidad?

DETECTIVE FAULK: Yes.

> PROSECUTOR: And what type of information were you aware that Mr. Trinidad had provided to the federal authorities related to this homicide in January of 2012?
>
> DETECTIVE FAULK: Specifics, I don't recall, but it was consistent with the information that he gave me during my interview.
>
> PROSECUTOR: And during your interview, what information did he provide to you?
>
> DETECTIVE FAULK: It was consistent with his testimony here in court. He said that he had spoken with Grant while locked up with him for a period of a week or two. He said that Grant spoke with him about this case and provided him some details regarding this case, said that Grant told him that -- that he had contacted the victim in this case, Laura Ackerson, and wanted to -- told -- asked to meet with her regarding the children, and he used the term 'lured her to his apartment,' where he and his wife, Amanda Hayes, then killed her, cut up her body, and took her to Texas to dispose of the body.
>
> PROSECUTOR: In -- so basically, that information that he gave you when you spoke with him in August of 2012 was consistent with information that he had provided to the federal authorities back in January of 2012?
>
> DETECTIVE FAULK: Correct.

Even if we presume *arguendo* that Detective Faulk's testimony about the contents of Trinidad's statements to federal agents amounted to impermissible hearsay, violated the Confrontation Clause, and constituted an improper bolstering opinion, defendant has failed to establish plain error.

After reviewing the record, we do not believe that Detective Faulk's testimony by itself tilted the scales and caused the jury to reach its verdict. Notwithstanding the contested portions of Detective Faulk's testimony, Trinidad testified at trial that he met defendant in the Wake County Detention Center in July 2011 and had the opportunity to befriend him. With regard to the homicide, Trinidad testified that defendant told him:

> [the victim] was an unfit mother, that they've been going on a – they've been having a custody battle for some years

> now, going back and forth, and that she was soliciting herself on the internet, she was doing drugs, that she continuously asked for money, and he was just tired of it going back and forth with that. So he said that he placed a call to her and lured her to his apartment, and that's when him and his wife subdued her and strangled her.
>
> Later on after that -- they had dismembered the body, and afterwards they took her on a road trip in -- out of state, out of town, and got rid of the body.

Detective Faulk testified that the information provided by Trinidad to him during their previous interview was consistent with Trinidad's trial testimony. Moreover, the information elicited at trial regarding Trinidad's alleged statements to federal agents was essentially identical to Trinidad's trial testimony and his previous statements to Detective Faulk. Thus, even if Trinidad's alleged statements to federal agents were absent from the jury's purview, the jury nonetheless considered essentially the same evidence.

The jury also heard evidence related to Trinidad's credibility. Trinidad testified with the hope of "hav[ing] some consideration given at some point down the road" for his 21-year sentence for conspiracy to traffic in cocaine and possession of a firearm. Defendant's attorney cross-examined Trinidad at length and in detail with regard to what defendant allegedly told him and focused on the potential unreliability of his testimony based on his incentive to provide evidence for the State. Defendant's attorney also had the opportunity to ask Trinidad questions about his statements to federal agents. Additionally, the trial court provided the jury with a limiting instruction relating to Trinidad's testimony as an interested witness. Based on the foregoing evidence, we reject defendant's argument that the admission of Detective Faulk's testimony regarding Trinidad's statements to federal agents constituted plain error.

d.) Admission of Song Lyrics

Next, defendant argues that the trial court erred by admitting into evidence song lyrics allegedly authored by defendant. We disagree.

i. Authentication

[7] In his first sub-argument, defendant contends that the State presented no sufficient evidence of "authorship" such that "the jury could conclude that [defendant] wrote the lyrics[.]" However, we cannot consider this argument on appeal because authentication was not the basis

of the objection to the entry of the song lyrics at trial (see colloquy below) and defendant does not request this Court to review this issue for plain error.

ii. Relevancy and Prejudicial Effect

[8] Defendant avers, in his second sub-argument, that the song lyrics were not relevant. Even if they were relevant, defendant argues that the probative value of the lyrics was substantially outweighed by its prejudicial effect.

At trial, defendant's attorney objected to the State's introduction of the song lyrics on the following grounds:

> DEFENDANT'S ATTORNEY: We would object, or we did at the bench, on the basis of relevancy, and to the extent there was any relevancy, on 403, the unfair prejudice of that song or that piece of paper that was found in his home would outweigh any probative value. And we also object under due process clause, right to a fair trial.
>
> THE COURT: The Court does find that the probative value outweighs any prejudicial effect and has overruled your objection. The words in the song and also the -- the way in which they're used the jury may find relevant, and therefore the objection is overruled.

The State offered a copy of song lyrics that were found by law enforcement officers during the course of their investigation in "the room that was used as an office studio" in defendant's apartment. Testimony at trial showed that defendant was an aspiring musician and song writer. Detective Faulk testified as to the contents of the song lyrics by reading directly from the lyrics themselves:

> The title is 'Man Killer.' The first line, M and then some information in brackets. Then it goes, 'Give in to me. I want it all. I want your scream and I want your crawl. I'll make you bleed. Fall to the floor. Don't try to plead. That turns me on. I'll take the keys to your car and some more.'
>
> The next portion, 'As the dogs come, try to walk them over. Start your line there, right around her shoulder. As her mom and dad come, walk them away. Tell 'em she died fast. They'll know she wasn't in pain.' The next portion, 'I'm not the one to make you scream. I'm just the one to make you bleed. Don't raise your arms. You can't stop me.

> I'll put my hands on your throat and squeeze.' Then the last line is chorus, 'Hallelujah.'

Pertinent evidence related to the murder charge showed that the victim's car had been potentially moved from defendant's apartment to a nearby apartment complex, the victim had been stabbed, and that defendant told Trinidad he had strangled the victim.

In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant. Accordingly, we do not find error in the admission of the lyrics.

We also note that even if the trial court erred by admitting the song lyrics into evidence, any such error was not prejudicial due to the other abundant evidence of defendant's guilt previously discussed in this opinion.

e.) Jury Instructions

[9] Finally, defendant argues the trial court erred by manifesting a belief that it lacked discretion to allow the jury to review exhibits in the deliberation room and review a portion of a witness's testimony. Defendant avers that the trial court's erroneous preemptive instruction effectively denied the jury an opportunity to make such a request. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1233 (2013):

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other

> evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

N.C. Gen. Stat. § 15A-1233. "To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Garcia*, 216 N.C. App. 176, 178, 715 S.E.2d 915, 917 (2011) (citation and quotation marks omitted).

Even if we assume that defendant preserved this issue for appellate review despite his counsel's failure to object to the trial court's instructions, his argument nonetheless fails.

The trial court, in relevant part, stated the following to the jury during jury instructions: "If you request to see an exhibit, for instance, under the rules of the court, exhibits cannot go back to the jury room. And therefore, I'll have to bring you back out in the courtroom, and we will let you see the exhibit in whatever manner that's appropriate."

Later on during the instructional phase, a juror then asked, "[a]re the transcripts then not available to us?" The trial court responded to the juror's inquiry prospectively:

> We've actually had three court reporters in this case. The testimony of no witness has been transcribed. It's not likely they'd be. When [court reporter #1] takes this down in shorthand, basically, there is no transcript. She or [court reporter #2] or [court reporter #3], any of the three court reporters that we had here, would have to type up the transcript, the testimony, if you ask me to allow you to review testimony. And the rules of the court require that if you make that request, you're required to review the entire testimony of the witness. You can't just say I want to hear the cross-examination of a witness or part of the testimony. It requires that you -- if you consider it, you have to consider all of the testimony of a particular witness if you're interested in that. And, normally, I simply would have the testimony read back to you, and therefore it would take -- you can't just flip through the transcript. It would take — for planning purposes, it would take as

> long as it took a witness to testify, at least, for the court reporter to read back to you the testimony. And she would read question, answer, question, answer, question, answer. So from just -- *I do have the discretion to allow testimony to be reviewed by the jury. I also have the discretion to deny that request. And I'll consider any request that you make on a -- under the circumstances as you present it to me*, but I tell you now that there is no written transcript of any testimony in the case. Hopefully, collectively, you will all remember the important aspects of any witness's testimony, but *if you reach a point where you simply decide we can't make a decision until we hear this again, then let me know, and we'll make an effort to accommodate any reasonable request that you make.*

(emphasis added). We first note that although the trial court erroneously stated that the court rules require that the jury review all, not just parts, of a witness's testimony, and that exhibits cannot go back to the jury room for review, it did not make these comments in response to specific jury requests to review evidence. Thus, the provisions of N.C. Gen. Stat. § 15A-1233 do not apply. Accordingly, defendant's argument that the trial court violated the statute by manifesting a belief that it lacked discretion to allow the jury to review a portion of a witness's testimony and take evidence back to the jury room fails.

In support of his argument that the trial court violated N.C. Gen. Stat. § 15A-1233 by providing a preemptive instruction that denied the jury an opportunity to make any evidentiary requests, defendant relies on *State v. Johnson*. 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004). In *Johnson*, we held that, even in the absence of an actual jury request, the trial court erred by making "pretrial comments [that] could have foreclosed the jury from making a request for . . . testimony or evidence." *Id.* The *Johnson* court found "a failure to exercise discretion" where the trial court instructed, "[t]here is no transcript to bring back there. . . . [W]e don't have anything that can bring it back there to you. . . . Surely one of you can remember the evidence on everything that come [sic] in." *Id.* at 19, 595 S.E.2d at 187.

Unlike in *Johnson*, the trial court's own words in the present case indicated his knowing ability to exercise discretion when ruling on the jury's request to review evidence. Moreover, the trial court here did not preemptively foreclose the jury from making a future request to review evidence. To the contrary, the trial court instructed the jury that although no transcript of the case existed at that moment, it would consider each

request on a case by case basis and attempt to "accommodate any reasonable request" if necessary. Accordingly, the trial court did not violate the provisions of N.C. Gen. Stat. § 15A-1233. Thus, defendant's argument fails.

III. Conclusion

We hold that the trial court did not err by admitting into evidence: Dr. Calloway's report and testimony, the pathologists' testimony that the victim's cause of death was "homicide[,]" and the song lyrics. Moreover, the trial court's jury instructions complied with the provisions of N.C. Gen. Stat. § 15A-1233. Finally, any purported error arising from the admission of Detective Faulk's testimony about Trinidad's statements to federal agents did not amount to plain error.

No prejudicial error.

Judges DAVIS and TYSON concur.

STATE OF NORTH CAROLINA
v.
DERRICK LEE McDONALD

No. COA14-893

\Filed 3 March 2015

Evidence—motion to suppress—drugs—police checkpoint—purpose—reasonableness

The trial court erred in a possession with intent to sell or deliver cocaine and possession of marijuana case by denying defendant's motion to suppress evidence seized from a car at a police checkpoint. Contrary to defendant's assertion, an attempt to increase police presence in an affected area while conducting a checkpoint for a recognized lawful purpose is not akin to operating a checkpoint for the general detection of crime. However, the trial court erred in failing to adequately determine the reasonableness of the checkpoint. The case was remanded so that the trial court could make appropriate findings.

Appeal by defendant by writ of certiorari from order entered 14 July 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 December 2014.

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

Staples Hughes, *Appellate Defender*, *by Jon H. Hunt*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Derrick Lee McDonald ("Defendant") appeals by writ of certiorari from his convictions of possession with intent to sell or deliver cocaine and possession of marijuana. On appeal, he contends that the trial court erred by denying his motion to suppress. After careful review, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

Factual Background

On 11 March 2010, Detective Brett Riggs ("Detective Riggs") with the Charlotte-Mecklenburg Police Department ("CMPD") prepared a written operational plan for a checkpoint ("the Checkpoint") at the intersection of Ashley Road and Joy Street in Charlotte, North Carolina. The Checkpoint was conducted that night from 12:34 a.m. to 1:52 a.m. Every vehicle driving through the Checkpoint was stopped, and the officers asked the driver of each vehicle for his or her driver's license.

During the course of the Checkpoint's implementation, a vehicle in which Defendant was riding in the front passenger seat was stopped. The only other occupant of the vehicle was the driver.[1] When several of the officers approached the vehicle, they detected a strong odor of marijuana emanating therefrom. Defendant opened the front passenger door and exited the vehicle. As he did so, a bag containing 41.4 grams of marijuana, two baggies containing 2.7 grams of powder cocaine, a digital scale, cell phones, and a set of keys all fell out of the vehicle. Defendant was placed under arrest.

On 6 July 2010, Defendant was indicted for (1) possession of a Schedule VI controlled substance; (2) possession with intent to sell or deliver a controlled substance; and (3) possession of drug paraphernalia. On 26 October 2010, Defendant filed in Mecklenburg County Superior Court a motion to suppress all evidence obtained as a result of the traffic stop based on his assertion that the Checkpoint was unconstitutional.

1. The record does not contain the driver's name.

A hearing on Defendant's motion to suppress was heard on 13 July 2011 by Judge Hugh B. Lewis. At the hearing, Detective Riggs testified, in pertinent part, as follows:

> Q. What was the purpose of the license checkpoint?
>
> A. As a driver safety checkpoint, checking for valid driver's license, registration, proper registration on the vehicles coming through the checkpoint.
>
> Q. And was there a proper plan for this checkpoint?
>
> A. Yes, sir. I typed up an operational plan essentially stating that every car that approached the checkpoint would be stopped, the driver would be asked to produce their driver's license.
>
> I had a provision in the ops plan that stated that if a hazard — or if it became a hazard to conduct the check due to weather, circumstances, that it would be cancelled. Additionally if traffic became backed up we would allow all cars to move through until the traffic lightened and then we'd begin checking every car.

During the hearing, the State introduced into evidence the written plan for the Checkpoint prepared by Detective Riggs. The written plan stated that the purpose of the Checkpoint was "[t]o increase police presence in the targeted area while checking for Operators License and Vehicle Registration violations." The plan also detailed the pattern to which the officers would adhere in conducting the Checkpoint:

> Predetermined Pattern: All vehicles coming through the check point shall be stopped unless the Officer in charge determines that a hazard has developed or that an unreasonable delay to motorist [sic] is occurring. At that point all vehicles will be allowed to pass through until the hazard or delay is cleared.

On 14 July 2011, the trial court entered a written order denying Defendant's motion to suppress. Defendant subsequently entered a plea of guilty. The trial transcript did not reflect that Defendant intended to appeal the denial of his motion prior to entering his guilty plea, and no notice of his intention to appeal the motion was contained in the transcript of plea. Defendant was sentenced to 6-8 months imprisonment. The sentence was suspended, and Defendant was placed on 24 months supervised probation.

Defendant then attempted to appeal the order denying his motion to suppress. The State filed a motion to dismiss the appeal on the ground that Defendant had failed to properly preserve his right to appeal the order. In an unpublished opinion filed on 17 July 2012, we dismissed Defendant's appeal without prejudice to his right to seek an evidentiary hearing in superior court for a determination of whether his guilty plea did, in fact, reserve his right to appeal the denial of his motion to suppress. *State v. McDonald*, 221 N.C. App. 670, 729 S.E.2d 128 (2012) (unpublished).

Defendant subsequently filed a motion for appropriate relief, which was heard by the trial court on 1 February 2013. On that same date, the trial court ordered that Defendant's plea transcript be amended to reflect Defendant's intent to appeal the denial of his motion to suppress. Defendant filed a petition for writ of certiorari on 23 December 2013, which this Court granted by order entered 7 January 2014.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, Defendant asserts that the trial court failed to determine (1) the Checkpoint's primary programmatic purpose; and (2) the reasonableness of the Checkpoint.

> When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. However, conclusions of law regarding admissibility are reviewed de novo.

State v. Jarrett, 203 N.C. App. 675, 677, 692 S.E.2d 420, 423 (citation and internal quotation marks omitted), *disc. review denied*, 364 N.C. 438, 702 S.E.2d 501 (2010). In the present case, the trial court made the following pertinent findings of fact:

> 1. On July 13, 2011, the defense made a motion to suppress the checkpoint and any evidence produced thereafter on the basis that the checkpoint was unconstitutional.
>
> 2. The State called Detective B. Riggs, the arresting officer, as a witness.

3. Det. Riggs testified that he was the officer in charge and that he had developed the operation plan for the checkpoint that took place near the intersection of Ashley Rd. and Joy St. on the evening of March 11, 2010.

4. Det. Riggs also testified that the purpose of the checkpoint was to check for operator's license and vehicle registration and insurance violations.

5. It was Det. Riggs's testimony that every vehicle was to be stopped and checked for proper license, registration, and insurance, unless the weather became a hazard or traffic was unreasonably delayed; in those cases Det. Riggs said that either the checkpoint would be shut down or they would allow all vehicles to pass through until the hazard or delay was no longer present, at which point they would resume checking each vehicle.

6. Det. Riggs testified that every vehicle was stopped.

7. The State entered the physical document of the operation plan into evidence as State's Pre-trial Exhibit #1, which is attached to the order.

8. The language in the operation plan (State's Pre-trial Exhibit #1) laid out the purpose and pattern of the checkpoint.

a. The purpose of the checkpoint was, "To increase police presence in the targeted area while checking for Operator's License and Vehicle Registration violations."

b. The predetermined pattern was, "All vehicles coming through the checkpoint shall be stopped unless the Officer in charge determines that a hazard has developed or that an unreasonable delay to motorists is occurring. At that point all vehicles will be allowed to pass through until the hazard or delay is cleared."

The trial court then made the following pertinent conclusions of law:

1. Under N.C.G.S. § 20-16.3A(a)(2a) [sic], a pattern is required, but does not need to be in writing; however, here we have both Det. Riggs's testimony and the written operation plan that express the pattern that was exercised at the checkpoint.

> 2. Additionally, N.C.G.S. § 20-16.3A(a)(2) requires that law-enforcement designate what they will check for and how the vehicles will be stopped; Det. Riggs's testimony and the written operation plan indicated that all vehicles would be stopped and that they would be checking for Operator's License and Vehicle Registration violations.
>
> 3. In *State v. Barnes*, the North Carolina Court of Appeals found that where the findings showed that a checking station was conducted in substantial compliance with required guidelines a motion to suppress was not proper. *State v. Barnes*, 123 N.C. App. 144, 472 S.E.2d 784 (1996).
>
> 4. Based on Det. Riggs's testimony and the written operation plan, the checkpoint conducted by Det. Riggs was in compliance with the applicable statute and did not violate the defendant's constitutional rights.

In denying Defendant's motion to suppress, the trial court relied upon our decision in *State v. Barnes*, 123 N.C. App. 144, 472 S.E.2d 784 (1996). In *Barnes*, the defendant was stopped at a checkpoint and arrested for driving while impaired. The officers conducting the checkpoint stopped all vehicles that approached the checkpoint, the stated purpose of which was "to detect driver's license and registration violations as well as other motor vehicle violations including driving while impaired." *Id.* at 146, 472 S.E.2d at 785. The defendant moved to suppress all evidence stemming from the checkpoint on the ground that it had been conducted in an unconstitutional manner, and the trial court granted the defendant's motion. On appeal, this Court reversed, holding that

> [u]pon careful review of the evidence, we find that the court's findings do not support its conclusion that the checking station was not conducted in accordance with required guidelines. Instead, the findings show that there was substantial compliance with N.C. Gen. Stat. § 20–16.3A and [State Highway Patrol] Directive 63. Accordingly, we find no fourth amendment violation and we reverse the trial court's order granting defendant's motion to suppress.

Id. at 147, 472 S.E.2d at 785.

Since *Barnes* was decided, however, this Court has modified the framework it employs in analyzing Fourth Amendment challenges to checkpoints based on intervening decisions on this subject from the United States Supreme Court. We explained this framework in *State v. Veazey*, 191 N.C. App. 181, 662 S.E.2d 683 (2008).

In *Veazey*, a state trooper set up a driver's license checkpoint. When the defendant was stopped at the checkpoint, the trooper detected a strong odor of alcohol on him and ultimately arrested him for driving while impaired. At trial, the defendant moved to suppress evidence stemming from the checkpoint on the ground that the checkpoint violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the defendant's motion to suppress. *Id.* at 182-83, 662 S.E.2d at 684-85.

On appeal, we remanded the case to the trial court for new findings and conclusions, applying the United States Supreme Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L.Ed.2d 333 (2000), and *Illinois v. Lidster*, 540 U.S. 419, 157 L.Ed.2d 843 (2004) — both of which were decided after *Barnes*. We held that in reviewing a constitutional challenge to a checkpoint, courts are required to apply a two-part test in order to determine its reasonableness. *Veazey*, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87.

We noted that, as an initial matter, *Edmond* requires the identification of the primary programmatic purpose of the checkpoint.

> First, the court must determine the primary programmatic purpose of the checkpoint. In *Edmond*, the United States Supreme Court distinguished between checkpoints with a primary purpose related to roadway safety and checkpoints with a primary purpose related to general crime control. According to the Court, checkpoints primarily aimed at addressing immediate highway safety threats can justify the intrusions on drivers' Fourth Amendment privacy interests occasioned by suspicionless stops. However, the *Edmond* Court also held that police must have individualized suspicion to detain a vehicle for general crime control purposes, and therefore a checkpoint with a primary purpose of general crime control contravenes the Fourth Amendment.
>
> The Supreme Court in *Edmond* also noted that a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers. Otherwise, according to the Court, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason,

> courts must examine the available evidence to determine the primary purpose of the checkpoint program.

Id. at 185, 662 S.E.2d at 686 (internal citations, quotation marks, and brackets omitted).

Next, we addressed the second prong of the test for determining a checkpoint's constitutionality based on *Lidster*:

> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, "[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Lidster*, 540 U.S. at 426, 157 L.Ed.2d at 852. To determine whether a checkpoint was reasonable under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. *See*, *e.g.*, *Martinez–Fuerte*, 428 U.S. at 555, 49 L.Ed.2d at 1126. In *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979), the United States Supreme Court held that when conducting this balancing inquiry, a court must weigh "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." *Id.* at 51, 61 L.Ed.2d at 362. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional. *See*, *e.g.*, *Lidster*, 540 U.S. at 427–28, 157 L.Ed.2d at 852–53.

Veazey, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87.

Therefore, it is clear that the analysis employed by this Court in *Barnes* has been superseded by decisions from the United States Supreme Court and that the analytical framework articulated in *Veazey* must instead be used in reviewing challenges to the constitutionality of a checkpoint. Accordingly, we must now determine whether the trial court properly utilized this framework in the present case.

I. Primary Programmatic Purpose

Defendant first argues that the trial court failed to determine the Checkpoint's primary programmatic purpose. Specifically, he argues that the trial court found two purposes — one that was lawful and another

that was unlawful — without determining which of these two purposes was the primary one. We disagree.

In determining a checkpoint's legality, "the trial court must initially examine the available evidence to determine the purpose of the checkpoint program." *State v. Gabriel*, 192 N.C. App. 517, 521, 665 S.E.2d 581, 585 (2008) (citation and internal quotation marks omitted). The rationale behind inquiring into a checkpoint's primary programmatic purpose is that "[t]his type of searching inquiry is required to ensure an illegal multipurpose checkpoint is not made legal by the simple device of assigning the primary purpose to one objective instead of the other." *Id.* at 522, 665 S.E.2d at 585 (citation and internal quotation marks omitted).

> [W]here there is no evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose. In such cases, the trial court may not simply accept the State's invocation of a proper purpose, but instead must carry out a close review of the scheme at issue.

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687-88 (internal citations, quotation marks, and brackets omitted); *see also Gabriel*, 192 N.C. App. at 521, 665 S.E.2d at 585 ("[W]hen a trooper's testimony varies concerning the primary purpose of the checkpoint, the trial court is required to make findings regarding the actual primary purpose of the checkpoint and to reach a conclusion regarding whether this purpose was lawful." (citation, internal quotation marks, and ellipses omitted)).

In the present case, the trial court found that "[t]he purpose of the checkpoint was, 'To increase police presence in the targeted area while checking for Operator's License and Vehicle Registration violations.' " It is well established that checkpoints may lawfully be conducted for the purpose of "verify[ing] drivers' licenses and vehicle registrations[.]" *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339, *appeal dismissed and disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005).

The trial court's finding that the Checkpoint's purpose was to check for driver's license and vehicle registration violations was supported by the testimony of Detective Riggs and the written plan for the Checkpoint. Defendant contends, however, that the trial court found the Checkpoint

also served the dual purpose of increasing police presence in the area. He attempts to equate this latter purpose with a general crime control purpose, which our courts have held cannot serve as the basis for a checkpoint. *See Veazey*, 191 N.C. App. at 185, 662 S.E.2d at 686 ("[P]olice must have individualized suspicion to detain a vehicle for general crime control purposes, and therefore a checkpoint with a primary purpose of general crime control contravenes the Fourth Amendment.").

We reject Defendant's argument on this issue as we do not believe an attempt to increase police presence in an affected area *while conducting a checkpoint for a recognized lawful purpose* is akin to operating a checkpoint for the general detection of crime. The trial court's reference to increasing police presence was linked to the permissible purpose of checking for driver's license and vehicle registration violations. Defendant does not point to any evidence in the record suggesting that the Checkpoint was actually being operated for the purpose of general crime control or that the stated desire to check for driver's license and vehicle registration violations was a mere subterfuge. Moreover, as the State notes in its brief, *any* checkpoint inherently results in the increased presence of law enforcement officers in the subject area. Accordingly, Defendant's argument on this issue is overruled.

II. Reasonableness

Defendant's final argument is that the trial court erred in failing to adequately determine the reasonableness of the Checkpoint. We agree.

As discussed above, a trial court's inquiry does not end with the finding that a checkpoint has a lawful primary programmatic purpose.

> After finding a legitimate programmatic purpose, the trial court must determine whether the roadblock was reasonable and, thus, constitutional. To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest. In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*. Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure; [2] the degree to which the seizure advances the public interest; and [3] the severity of the interference with individual liberty.

State v. Townsend, __ N.C. App. __, __, 762 S.E.2d 898, 907-08 (2014) (internal citations, quotation marks, and brackets omitted); *see also*

Jarrett, 203 N.C. App. at 679, 692 S.E.2d at 424-25 ("Although the trial court concluded that the checkpoint had a lawful primary purpose, its inquiry does not end with that finding. Instead, the trial court must still determine whether the checkpoint itself was reasonable. . . . In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*. . . ." (internal citations and quotation marks omitted)).

We have held that "[t]he first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342 (internal citation omitted).

With regard to "the second *Brown* prong — the degree to which the seizure advanced public interests — the trial court [is] required to determine whether the police appropriately tailored their checkpoint stops to fit their primary purpose." *State v. Nolan*, 211 N.C. App. 109, 121, 712 S.E.2d 279, 287 (citation, internal quotation marks, and brackets omitted), *cert. denied*, 365 N.C. 337, 731 S.E.2d 834 (2011).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690.

Finally, in applying the third *Brown* factor, "courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Id.* at 192, 662 S.E.2d at 690-91.

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police

> took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not lynchpins, but instead are circumstances to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.

Id. at 193, 662 S.E.2d at 691 (internal citations, quotation marks, and brackets omitted).

In conclusion of law 4 in its order, the trial court made the following determination:

> 4. Based on Det. Riggs's testimony and the written operation plan, the checkpoint conducted by Det. Riggs was in compliance with the applicable statute and did not violate the defendant's constitutional rights.

We do not believe this bare conclusion is sufficient given the failure of the trial court to adequately assess the Checkpoint's reasonableness under the constitutional framework set out in *Veazey* and applied in other recent cases from our Court. While it appears that evidence was received at the suppression hearing as to many of the factors that are relevant under the *Brown* test, the trial court's order lacks express findings on a number of these issues.

With regard to the first prong of the *Brown* test, the trial court made no findings concerning the gravity of the public concerns served by the Checkpoint. While — as discussed above — checking for driver's license and vehicle registration violations is a permissible purpose for the operation of a checkpoint, the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged. *See Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342 ("[E]ven if a checkpoint is for one of the permissible purposes, that does not mean the stop is automatically, or even

presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." (citation, internal quotation marks, and brackets omitted)).

As to the second *Brown* prong, there were no findings made by the trial court regarding a number of the factors relevant to the issue of whether the Checkpoint was appropriately tailored to meet its primary purpose. For example, the trial court's order failed to address (1) why the intersection of Ashley Road and Joy Street was chosen for the Checkpoint; (2) whether the Checkpoint had a predetermined starting or ending time; and (3) whether there was any reason why that particular time span was selected. *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690.

Finally, with regard to the third *Brown* prong, the trial court made no findings addressing whether the location of the Checkpoint was selected by Detective Riggs or by his supervisor or the manner in which the officers conducting the Checkpoint were subject to supervision. In addition, no findings were made as to whether (1) the officers took steps to put drivers on notice of an approaching checkpoint; (2) drivers could see visible signs of the officers' authority; and (3) the officers conducting the checkpoint were provided with any oral or written guidelines. *Id.* at 193, 662 S.E.2d at 691.

We do not mean to imply that the factors discussed above are exclusive or that trial courts must mechanically engage in a rote application of them in every order ruling upon a motion to suppress in the checkpoint context. Rather, our holding today simply reiterates our rulings in *Veazey* and its progeny that in order to pass constitutional muster, such orders must contain findings and conclusions sufficient to demonstrate that the trial court has meaningfully applied the three prongs of the test articulated in *Brown*.

As such, we must vacate the trial court's order and remand so that the trial court can make appropriate findings as to the reasonableness of the Checkpoint under the Fourth Amendment. *See Rose*, 170 N.C. App. at 298-99, 612 S.E.2d at 345 ("Based on our review of the trial court's order, it appears that the trial court concluded that the checkpoint was reasonable based solely on the purpose of the checkpoint and the fact that the officers stopped every car. In doing so, the court addressed the first prong of the . . . analysis and part of the third prong. The court made no findings regarding the tailoring of the checkpoint to the purpose (the second prong) and failed to consider all of the circumstances relating

to the discretion afforded the officers in conducting the checkpoint (the third prong). Accordingly, we remand for further findings as to each of the . . . factors and a weighing of those factors to determine whether the checkpoint was reasonable."); *Veazey*, 191 N.C. App. at 194-95, 662 S.E.2d at 692 ("[T]hese findings alone cannot support a conclusion that the checkpoint was reasonable because the trial court did not make adequate findings on the first two *Brown* prongs. . . . The trial court . . . was required to explain why it concluded that, on balance, the public interest in the checkpoint outweighed the intrusion on Defendant's protected liberty interests. The trial court's written order, however, contains no such explanation. Therefore, if the trial court determines on remand that the State's primary purpose for the checkpoint was lawful, it must also issue new findings and conclusions regarding the reasonableness of the checkpoint.").[2]

Conclusion

For the reasons stated above, we vacate the trial court's order denying Defendant's motion to suppress and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

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2. We further note that a number of the trial court's "findings" in its order are not actual findings but rather are merely recitations of testimony. *See State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 892-93 (2013) ("[A trial court's] mere recitation of testimony . . . is not sufficient to constitute a valid finding of fact. . . . Findings of fact must be more than a mere summarization or recitation of the evidence . . . [O]ur review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts, *not* the testimony recited by the trial court in its order." (internal citations, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). We therefore instruct the trial court on remand to make findings of fact based upon its evaluation of the evidence and not to merely recite the testimony of Detective Riggs and the contents of the written plan for the Checkpoint.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MARCH 2015)

ARTIS v. IMP. SERVS., LLC No. 14-1006	Pitt (14CVS84)	Dismissed
CNTY. OF HARNETT v. ROGERS No. 14-912	Harnett (12CVS890)	Dismissed
CORNING v. CORNING No. 14-764	Craven (08CVD1538)	Affirmed
HALFORD v. HALFORD No. 14-1039	Henderson (11CVD145)	Affirmed
IN RE C.L-H. No. 14-948	Henderson (13JB33)	Affirmed
MacMILLAN v. MacMILLAN No. 14-831	Forsyth (13CVD7597)	Dismissed
McKEOWN v. CASTAGNO No. 14-81	New Hanover (10CVD952)	Reversed and remanded in part; vacated in part
MILLER v. HOLLOMAN No. 14-485	Hertford (12CVS180)	Affirmed
PILOS-NARRON v. NARRON No. 14-649	Buncombe (13CVD2529)	Reversed and Remanded
STATE v. BOYD No. 14-845	Halifax (11CRS51960)	No Error
STATE v. BRASWELL No. 14-1010	Avery (07CRS50676) (09CRS50190) (12CRS639)	No Error
STATE v. BULLOCK No. 14-1035	Durham (10CRS56171) (11CRS3849)	No Error
STATE v. CURRIE No. 14-1073	Mecklenburg (12CRS1000)	No Error
STATE v. DAVIS No. 14-843	Warren (10CRS50828-30)	Affirmed

STATE v. DAVIS No. 14-1013	Craven (11CRS50791) (12CRS1014)	No Error
STATE v. DOWNEY No. 14-816	Johnston (11CRS4383) (11CRS54463)	Vacated and Remanded
STATE v. GAITHER No. 14-616	Nash (12CRS54101) (12CRS54102)	Affirmed
STATE v. GORHAM No. 14-842	Pitt (13CRS55724)	Affirmed
STATE v. LANCASTER No. 14-1018	Wilson (12CRS53945)	No Error
STATE v. MULDER No. 14-903	Lee (11CRS50050) (11CRS50051) (11CRS50055) (11CRS78)	No Error
STATE v. SETZER No. 14-722	Caldwell (12CRS219) (13CRS1329)	No Error
STATE v. SHEETS No. 14-1102	Wilkes (10CRS1089) (10CRS52859)	No Error
STATE v. STERLING No. 14-725	Mecklenburg (11CRS255751-52)	No Error
STATE v. WILLIS No. 14-674	Wake (12CRS216257) (12CRS8325)	No Error
STATE v. WILMOTH No. 14-1037	Forsyth (12CRS61644)	No Error
STOUTAMIRE v. BAILEY No. 14-322	Mecklenburg (12CVS942)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Interlocutory orders—sufficiency of service of process—Defendant's appeal from the trial court's interlocutory order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction was dismissed. Although defendant's motion was couched in terms of lack of jurisdiction under Rule 12(b)(2), it actually raised a question of sufficiency of service or process. Motions challenging only the sufficiency of service and process and not challenging the existence of sufficient minimum contacts with the State are not immediately appealable under N.C.G.S. § 1-277(b). **Crite v. Bussey, 19.**

Issue not raised below—choice of statute of limitations—The applicable statute of limitations for a reformation claim arising from a foreclosure was the three-year statute of limitations for fraud or mistake, which both parties relied on at trial, rather than the ten-year statute of limitations for sealed instruments which plaintiff raised for the first time on appeal. The Court of Appeals declined to exercise its discretion to suspend the Appellate Rules. **Wells Fargo Bank, N.A. v. Coleman, 239.**

Issue preservation—In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, defendant guarantor preserved his argument that he was not liable for the deficiency under N.C.G.S. § 45-21.36. **Branch Banking & Tr. Co. v. Smith, 293.**

Mootness—effect of statutory amendment—A statutory amendment did not render plaintiffs' appeal of an interlocutory order moot. The amendment did not provide plaintiffs the relief they sought—the disclosure of daily hearing notices from the Division of Employment Security prior to the statutory amendment and attorney fees. **Wilson v. N.C. Dep't of Commerce, 456.**

Notice of appeal—termination of parental rights—order ceasing reunification order—not designated—In a child neglect and dependency proceeding, the Court of Appeals denied DSS's motion to dismiss the appeal and respondent's petition for a writ of certiorari where DSS contended that respondent had not designated the order ceasing reunification in her notice of appeal. Respondent's parental rights were terminated in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was identified as an issue in the record on appeal. **In re H.D., 318.**

Preservation of issues—issue not raised at trial—The trial court did not err when it made no findings of fact about mitigation of damages in a breach of contract case. Failure to mitigate damages is an affirmative defense, and defendant's failure to raise it at trial waived it for appellate review. **Clark v. Bichsel, 13.**

Preservation of issues—no request for plain error review—In an appeal from defendant's trial for first-degree murder, the Court of Appeals declined to consider whether evidence was properly authenticated because authentication was not the basis of defendant's objection at trial, and defendant failed to request plain error review. **State v. Hayes, 539.**

Preservation of issues—termination of parental rights—no notice of appeal from permanency planning review—appeal from termination order—A father properly preserved his right to challenge permanency planning review orders where he did not give timely notice of appeal from those orders, but appealed from the termination order and cited the review orders as issues he wished to address. **In re A.E.C., 36.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Dependency—mother's visitation—at father's discretion—The trial court improperly delegated its judicial authority in a dependent child proceeding by granting the father discretion in determining the terms of the mother's visitation. The trial court effectively turned the father into the mother's case worker and also gave the father the authority to determine whether the mother complied with the trial court's directives. **In re J.D.R., 63.**

Dependent—alternative care arrangement—no finding—The trial court erred by adjudicating a child as dependent. A dependent juvenile is defined, in pertinent part, as one in need of assistance or placement because the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement. In the present case, the Department of Social Services failed to present any evidence on child care at the hearing and the trial court made no finding of fact that the mother lacked an alternative child care arrangement. **In re J.D.R., 63.**

Felony child abuse inflicting serious bodily injury—jury instruction—especially heinous, atrocious, or cruel aggravating factor—no plain error—In a trial for felony child abuse inflicting serious bodily injury, the trial court erred by failing to provide an adequate instruction on the "especially heinous, atrocious, or cruel" aggravating factor. However, the error did not amount to plain error in light of evidence supporting the existence of excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious injury. **State v. Houser, 410.**

Felony child abuse inflicting serious bodily injury—charge conference—no material prejudice—In a trial for felony child abuse inflicting serious bodily injury, the trial court's failure to comply fully with N.C.G.S. § 15A-1231(b) in conducting the charge conference did not materially prejudice defendant's case. Defense counsel had the opportunity to correct the inadequate aggravating factor instruction after the jury had been charged, and there was overwhelming evidence in support of the aggravating factor. **State v. Houser, 410.**

Jurisdiction terminated—custody award to father—findings sufficient—The trial court complied with N.C.G.S. § 7B-911 when it awarded custody to a father and terminated its jurisdiction. Although the mother argued the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50, and therefore the trial court's order awarding custody to the father did not comply with N.C.G.S. § 7B-911(a), the court's findings were relevant to the child's interest and welfare and were sufficient under N.C.G.S. § 7B-911(a). **In re J.D.R., 63.**

Jurisdiction terminated—custody transferred to Chapter 50 case—findings—no need for further State intervention—The trial court erred by terminating its jurisdiction over a child pursuant to Chapter 7B by transferring the issue of the child's custody to a Chapter 50 case. The trial court's order did not contain the required ultimate finding that there was no need for continued State intervention on the child's behalf, and no findings from which it could be inferred that the issue had been considered. **In re J.D.R., 63.**

Neglected juvenile determination—supported by evidence—The trial court's determination that a child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), was supported by the evidence where the trial court found that mother had previous problems with drugs and that she had previously injured the child

EMOTIONAL DISTRESS—Continued

involving estranged parents and an injury to the mother witnessed by the children. The forecasted evidence was sufficient to raise genuine issues of material fact as to each essential element. The trial court also erred by dismissing the minor children's claim for punitive damages related to the IIED claim. **Needham v. Price, 94.**

ESTATES

Non-claim statute—reformation of deed of trust not barred—A claim for reforming a deed of trusting arising from a foreclosure was not barred by the non-claim statute, N.C.G.S. § 28A-19-3(a) (2013). The non-claim statute does not preclude actions that seek to effectuate and enforce a deed of trust. **Wells Fargo Bank, N.A. v. Coleman, 239.**

EVIDENCE

Admission of store surveillance video—erroneous—prejudicial—Defendant was prejudiced by the erroneous admission of a video recording as substantive evidence in a case involving the larceny of clothing from a department store. The video recording was the only evidence offered to establish the value of the property stolen. This testimony was the only evidence before the jury of the value of the stolen goods. **State v. Snead, 439.**

Child sexual abuse—expert witnesses—credibility of victim—The expert witnesses in a prosecution arising from the sexual abuse of a child did not vouch for the victim's credibility. In context, the expert was testifying to a distinction between hallucinations and paranoid delusions, not testifying about the victim's credibility regarding her claim to have been sexually abused. Similarly, another expert testified about the victim's account of sexual abuse by defendant but was not asked for an opinion on the credibility of sexual abuse victims in general or on this victim's credibility. Defendant did not cite any authority for the proposition that a witness who testifies to what another witness reports is "vouching" for that person's credibility unless each disclosure by the witness includes a qualifier such as "alleged." **State v. Davis, 522.**

Contract claim—income before and after breach—In an action by a student alleging breach of contract by a technical college, the trial court did not abuse its discretion by admitting evidence of plaintiff's income before and after his enrollment in the college. This evidence was relevant to determination of his consequential damages. **Supplee v. Miller-Motte Bus. Coll., Inc., 208.**

Defendant's account inconsistent—not commentary on truthfulness—In a trial for felony child abuse inflicting serious bodily injury, the trial court did not err or commit plain error by admitting an investigating officer's testimony that the existence of a blonde hair in the sheetrock of a bathroom was inconsistent with defendant's account of why there was a hole in the sheetrock. The officer's testimony was not commentary on the truthfulness of defendant's statements. Rather, the testimony explained why the officers returned to defendant's home to collect the hair from the sheetrock**. State v. Houser, 410.**

Discipline of attorney—trust account mismanagement—prior audits—In an a proceeding for the discipline of an attorney, the probative value of evidence of prior audits indicating deficiencies in defendant's management of his trust account was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. **N.C. State Bar v. Adams, 489.**

HOMICIDE—Continued

TERMINATION OF PARENTAL RIGHTS—Continued

law and could in its discretion consider additional evidence and arguments from the parties. A party cannot seek relief from a non-existent order; DSS's motion for relief was treated according to its substance as a motion to reopen the evidence, instead of a Rule 60 motion. **In re A.B., 157.**

Statutory right to counsel—ineffective assistance of counsel—Respondent received ineffective assistance of counsel in a termination of parental rights proceeding and was entitled to a new hearing. Trial counsel did not attempt to communicate with respondent before the hearing and did not present any evidence or make a cogent argument during the hearing. **In re B.L.H., 52.**

Subject matter jurisdiction—The trial court did not err by exercising subject matter jurisdiction over a termination of parental rights proceeding. Although a Virginia court entered the initial custody order, under N.C.G.S. § 50A-203 the trial court had subject matter jurisdiction to terminate the father's parental rights because North Carolina was the child's home state and neither the child nor the parents resided in Virginia at the time the motion was filed. **In re B.L.H., 52.**

Trial court order—insufficient findings and conclusions—The trial court erred by terminating the parental rights of respondent father. The trial court's order failed to indicate the grounds under which it terminated respondent's parental rights, and it failed to make findings and conclusions that would support any of the statutory grounds under N.C.G.S. § 7B-1111. The Court of Appeals reversed and remanded for further proceedings on the matter. **In re O.J.R., 329.**

TRESPASS

Party asserting claim—not in possession of property at time unauthorized entry first occurred—On rehearing, the Court of Appeals determined that it was not bound by the portion of *Woodring v. Swieter*, 180 N.C. App. 362 (2006), suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry first occurred. **Graham v. Deutsche Bank Nat'l Tr. Co., 301.**

Summary judgment—removal of encroaching structure—The trial court did not err in a trespass case by granting summary judgment in favor of plaintiff and BB&T, and issuing a mandatory injunction requiring defendant to remove the encroaching portions of the pertinent structures. A defendant's wrongful maintenance of an encroaching structure is itself a trespass each day it so remains and constitutes a distinct wrong. The forecast of evidence showed that all of the elements of a trespass claim were satisfied. **Graham v. Deutsche Bank Nat'l Tr. Co., 301.**

UNFAIR TRADE PRACTICES

Car sale—two financing contracts—summary judgment—The trial court erred by granting summary judgment as to defendant Vester Ford on a claim for unfair and deceptive trade practices arising from the sale of a car and two financing contracts relating to that sale. There were issues of fact concerning the existence of the original contract, whether defendant committed an unfair or deceptive trade practice in threatening to repossess the car if plaintiff did not sign the second contract, whether plaintiff reasonably relied on the assertions of defendant's employee that the terms of the second contract were the same as the first, and whether plaintiff would have

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

Under N.C.G.S. § 97-18(e), "appeal" includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court. The Commission properly determined here that the time for appeal expired fifteen days after the mandate issued and the time to file for a petition for discretionary review ended. **Silva v. Lowes Home Improvement, 175.**

Sufficiency of findings—exposure to asbestos—The Industrial Commission did not err in a workers' compensation case by finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. Findings of fact #3, #7, and #14 supported it. **Patton v. Sears Roebuck & Co., 370.**